EMPLOYMENT TRIBUNALS

AT AN OPEN ATTENDED PRELIMINARY HEARING

Claimant: Mr C McDonald

Respondent: University of Derby

Heard at: Nottingham

On: 20, 21 & 22 April 2022

Before: Employment Judge Victoria Butler (sitting alone)

Representation
Claimant: In person
Respondent: Ms G Cawthray, Solicitor

RESERVED JUDGMENT

The Employment Judge gives judgment as follows:

1. The application to amend is refused in its entirety.

2. Accordingly, the claims of whistleblowing detriment, automatically unfair dismissal and victimisation are struck out because they have no reasonable prospect of success.

3. The claims of arrears of pay and '*other payments'* are struck out because they have no reasonable prospect of success.

4. The claim of direct race discrimination is struck out because it is vexatious.

5. The claim of equal pay is struck out because it has no reasonable prospect of success[1].

6. The claim of unfair dismissal can proceed under ss 94 & 98 Employment Rights Act 1996.

[1] Oral judgment was given at the hearing and written reasons will follow under separate cover

REASONS

Introduction

1. The background to this claim is important in explaining why I have reached my conclusions. It is summarised where possible, but I have quoted from the case management summaries for ease of understanding the chronology and why the various claims are struck out.

2. In furtherance of that understanding, I have set out my decision making as I progressed through the matters I was required to determine. There are elements of repetition which is unavoidable given the nature of the various applications.

Background

3. The Claimant was employed by the Respondent from 23 April 1990, latterly as a Senior Academic Counsellor, until his summary dismissal on 23 July 2021. He has raised circa twenty-seven grievances between 1997 and 2021.

4. Prior to these claims, the Claimant issued two claims in the Employment Tribunal, under case numbers 2601879/2008 and 2604179/2009.

The 2008 claim

5. There were three primary allegations of race discrimination advanced by the Claimant in the 2008 proceedings, namely:

    - That he was denied an interview for the post of Head of Combined Subject Programme during the period July to September 2004 (“allegation 1”);

    - That the Respondent failed to appoint him as Head of Combined Subject Programme in November 2004 (“allegation 2”); and

    - That the Respondent failed to give him an interview for the post of Head of Joint Honours Scheme during the period February to April 2007 (“allegation 3”).

6. The Respondent made an application for a pre-hearing review to determine if the Claimant’s claim was presented outside the time limit for presenting it. The decision of the Regional Employment Judge (“REJ”) was that:

    > “*The Respondent’s application succeeds. The claims were presented after the statutory time limit had expired and are accordingly dismissed*”.

7. The REJ provided written reasons for their decision, explaining why the last act

relied on by the Claimant was out of time.

The 2009 claim

8. The Claimant issued a further claim of race discrimination in 2009 citing allegations 1-3 from the 2008 litigation, along with the following further allegations:

    - That he suffered less favourable treatment on the ground of his colour when he was allegedly told that he was at risk of redundancy in February 2009 (“allegation 4”); and
    - That the Respondent failed to shortlist him for the Head of Computing position in November 2008 (“allegation 5”).

9. The claim was subject to a pre-hearing review to determine whether the Claimant was estopped from relying on allegations 1 -3, whether allegation 4 had no reasonable prospect of success and whether allegation five was presented outside the statutory time limit.

10. Employment Judge Milgate gave judgment that:

    - The Claimant was estopped from relying on allegations 1-3;
    - Allegation 4 had no reasonable prospect of success and was struck out; and
    - Allegation 5 was presented out of time and it was not just and equitable to extend the time limit.

11. Judge Milgate noted in her judgment that ‘*for the avoidance of doubt the Claimant confirmed to the Tribunal that his claim form contained no further claims*”.

The 2020 claim

12. The Claimant issued his first claim on 14 August 2020 (prior to his dismissal) which he subsequently clarified was for direct race discrimination only.

13. The Claimant makes allegations dating back to 1991, including a repeat of allegations 1 – 3 relied upon in the 2008 and 2009 litigation.

The 4 November 2020 closed preliminary hearing

14. The case was subject to a closed preliminary hearing (“PH”) by telephone before me on 4 November 2020 during which the Claimant was ordered to provide further and better particulars of his claim and a lengthy schedule (“the Schedule”) containing fifty-one allegations of discrimination was produced. In

my case management summary, I noted the following:

> ***"Further particulars***
>
> *1. At the outset of the litigation, the Respondent asked the Claimant to schedule his claims in order to clarify what allegations were relied on as acts of discrimination versus what was background information. The Claimant has made a valiant attempt at doing so, but some vital information is missing.*
>
> *2. We discussed the best way of dealing with this to allow the Respondent and the Tribunal to understand the case advanced. The Claimant has agreed to update the existing schedule, being absolutely clear what the factual elements of each allegation are.*
>
> *3. In relation to each allegation of direct discrimination he will confirm who the comparator(/s) is. In relation to allegations of indirect discrimination he will confirm (1) what the provision, criterion or practice ("PCP") is that put people with whom he shares the same protected characteristic at a particular disadvantage when compared with others who do not share it; (2) what the disadvantage is; and (3) that the Claimant himself was subject to that disadvantage.*
>
> *4. The Claimant will also set out what his claim is in respect of unauthorised deductions of wages and quantify how much is claimed and why.*
>
> *5. He will add an additional column to the existing schedule and cross-refer each allegation to the original claim form identifying in which paragraph/s that allegation is contained. He will also highlight new allegations not raised in the claim form.*
>
> *6. Thereafter, the Respondent will add its own column containing a reply."*

15. The Claimant was ordered to provide the updated schedule by **1 December 2020**.

16. I also listed the case for an open PH on 5 and 6 May 2021 to determine the following issues:

> *"15.1 Whether the Claimant is estopped from relying on events that were subject to previous litigation;*
>
> *15.2 Whether any allegations relied on by the Claimant are out of time and, if so, whether it is just and equitable to extend time;*
>
> *15.3 To hear the Claimant's application to amend (if necessary); and*

15.4 To make further case management orders and list the case for a final hearing."

The 30 April 2021 PH

17. Prior to the May 2021 hearing, an urgent PH was listed on 30 April 2021, at the Respondent's request, to attempt to clarify the claims set out in the schedule as they remained unclear. The PH was conducted by Employment Judge Rachel Broughton and, given the time it took to clarify the first five allegations, there was insufficient time to clarify the remainder. However, the Claimant agreed that allegations 1-3 in the 2009 litigation appear at complaint numbers 14, 15 and 18 of the Schedule and were repeat allegations. Allegations 4 and 5 do not appear in this claim.

The 4 & 5 May 2021 PH

18. I gave the following judgments at the open PH, followed by written reasons thereafter:

> *"Estoppel:*
>
> > *"The Claimant is estopped from relying on allegations 1 – 20 as set out in the schedule of allegations against the Respondent. Those allegations are, therefore, dismissed*".
>
> *The application to amend:*
>
> *"1. The following amendments are allowed:*
>
> > *Allegation 29 in the schedule of allegations*
> > *Allegation 42(b) in the schedule of allegations*
>
> *2. The following amendments are refused:*
>
> > *Allegation 21 in schedule of allegations*
> > *Allegation 24 in the schedule of allegations*
> > *Allegation 48 (b) in the schedule of allegations"*

19. At the May 2021 PH, we also discussed further case management because the majority of the allegations advanced were unclear. I listed the case for a two-day closed PH on 17 & 18 September 2021 and recorded in this case management summary:

> *"The Claimant has helpfully confirmed that all allegations relied on are allegations of <u>direct discrimination only</u> – there is no claim of indirect discrimination.*
>
> *Unfortunately, the allegations remain insufficiently clear to allow the Respondent and the Tribunal to fully understand the case he advances.*

The Claimant has had several bites at the cherry in explaining his case with assistance from both the Tribunal and the Respondent regarding what information he is required to provide.

We spent significant time today clarifying the allegations subject to the application to amend to ensure that they were properly understood. However, there was insufficient time to complete this exercise in respect of the remainder.

On discussion, we agreed that a sensible course of action would be to allow the Claimant a further opportunity to furnish the specifics of the acts complained of. To be clear, he must set out what happened, when, who was involved and who the comparator is.

As a precaution, I have listed this case for a two-day closed preliminary hearing to clarify the allegations if needs be.

However, I hope that this will be unnecessary and, if the allegations are clear when the Claimant has complied with the order below, day one of the preliminary hearing will be converted to a three-hour case management discussion by CVP to discuss further case management more generally, including making orders in readiness for the final hearing.

20. The Claimant was ordered to provide clear particulars of each and every allegation of direct race discrimination by **26 May 2021**.

21. I also listed the case for a 39-day hearing within a 55-day trial window and timetabled the same.

22. The Claimant said that he was intending to issue further claims and he would be appealing my decision on estoppel, but I declined to stay the proceedings concluding:

> *"On balance, I decided a stay is not appropriate given that matters would be on hold for an indeterminable length of time. Ultimately, a line will have to be drawn in the sand on which matters form part of this case.*
>
> *Accordingly, I have listed the case for a final hearing. If the Claimant does appeal my decision on estoppel to the EAT, he should apply for it to be expedited so the final hearing can proceed as listed."*

After the May 2021 PH

23. On 11 August 2021, the Respondent wrote to the Tribunal confirming that the PH in September 2021 was required because the Claimant had still failed to provide the necessary clarity for it to understand the allegations against it.

24. The Claimant also wrote to the Tribunal requesting an '*appeal*' of my decisions. His correspondence was not addressed to the EAT, nor was it submitted on the EAT pro-forma. As such, I treated it as a reconsideration request and refused it. At this hearing (April 2022), the Claimant said that he had not requested a reconsideration of my decisions and was frustrated that I had treated it as such.

Claims 2 & 3

25. Claim 2 (2601835/2021) was issued on 31 August 2021 claiming unfair dismissal, whistleblowing detriment and arrears of pay. Claim 3 (2602193/2021) was issued on 8 September 2021 claiming victimisation.

The 17 & 18 September 2021 PH

26. We spent the duration of the hearing attempting to clarify the allegations in claim 1 and managed to complete forty-seven of the fifty-one allegations. I recorded the following in my case management summary and sent appropriate schedules for ease with clear headings explaining what further information the Claimant was required to provide:

> *"The Claimant has recently issued two new claims against the Respondent for unfair dismissal, whistleblowing and victimisation (case numbers 2601835/2021 & 2602193/2021).*
>
> *The claims are not clearly described and I confirmed that the Respondent is <u>not</u> required to enter a defence for either until such time that they can be sensibly responded to.*
>
> *In furtherance of this, I enclose two schedules for the Claimant to complete in accordance with the order below. Having spent this hearing working through his existing allegations, I anticipate he will be better placed to articulate those in the new claims".*

27. The Claimant was ordered to provide clear particulars of each and every allegation of claims 2 & 3 by **1 November 2021**.

28. I listed the hearing for a further PH on 10 November 2021 to finalise the remaining four allegations and also to consider whether any of the allegations should be struck out or subject to a deposit order.

29. Unfortunately, that hearing was postponed due to my ill-health and was re-listed on 12 January 2022. The Claimant now suggests that I deliberately postponed the hearing because he had notified the Tribunal that he was going to appeal my estoppel judgment. This is an odd suggestion given that I had previously recorded the Claimant's intention to appeal my decision in my case management summary following the May 2021 PH.

Provision of further information – claims 2 & 3

30. Following the PH in September 2021, the Claimant provided the following to the Respondent:

    i. 7 October 2021: a 4-page document appearing to be further and better particulars/answers to the Respondent's questions which it says is unclear;

    ii. 14 October 2021: a schedule of 'post-dismissal' claims (34 pages) but the Respondent says it is not clear what the document relates to and the information contained within it was not clear;

    iii. 20 October 2021: a schedule of post-dismissal claims and what appears to be an amended schedule of the direct race discrimination claim (claim 1) – 58 and 131 pages respectively;

    iv. 25 October 2021: a PID schedule (19 pages) which contains significant typed text and a victimisation schedule;

    v. 2 November 2021: the Claimant's comments on the summary of allegations as discussed on 16 & 17 September 2021 and a document called 'new evidence'; and

    vi. 2 November 2021: an amended document called 'new evidence'.

Claims 4 & 5

31. Claim 4 (2602480/2021) was issued on 12 October 2021 alleging unfair dismissal, race discrimination, arrears of pay and 'other pay'. Claim 5 (2600029/2021) was issued on 6 January 2022 for equal pay.

12 January 2022 PH

32. This was the continuation of the September 2021 PH which was postponed in November 2021. It was intended that the first part would be closed to finalise the schedule of direct race discrimination allegations (claim 1) and the second part was intended to be open to determine whether any allegations should be struck out or be subject to a deposit order. However, it took the whole morning to seek to understand the final four allegations and given the additional claims and their lack of clarity, we agreed to use the afternoon for case management purposes instead.

33. In respect of claims 2, 3 and 4, I recorded in my case management summary:

> *"Most of the above* (paragraph 30) *were in my possession, but it was simply impossible to sensibly understand the basis of claims 2, 3 & 4 and I agree with the Respondent that the claims are still not in a format that can be properly responded to.*

In addition, claim number 5 has not yet been served on the Respondent and the Claimant has confirmed that he intends to issue more claims following numerous further grievances that he has raised……

………

As above, the Claimant has yet to clearly articulate the outstanding claims - it is not for the Respondent to try and work out what they are from various spreadsheets.

I have made it very clear to the Claimant that he has <u>one last opportunity</u> to clarify the allegations in respect of each claim. He was of the view was that the Tribunal should go through each claim with him in the same way as claim 1 to clarify the allegations. I explained that it was not proportionate or in accordance with the overriding objective to do this and would take at least a further week of the Tribunal's and the Respondent's time to carry out such an exercise.

The Claimant has been given numerous bites of the cherry to date, in addition to receiving an unusual amount of assistance from both the Respondent and Tribunal in clarifying his claim. It has taken two and a half days to clarify claim 1 and he knows what is expected of him.

If the Claimant fails to explain his case clearly, concisely and in a manner that allows the Respondent and the Tribunal to understand the claims he is at risk of the claim/s being struck out in accordance with either Rule 37(1)(a), (b), (c) or (e) of the Employment Tribunal Rules 2013 ("the Rules").

To assist one further time in this exercise, I attach further schedules so that the Claimant can put the allegations relied on in each claim in the same document and cross-refer it to an existing ET1 (or acknowledge that it is a new allegation). This is not an opportunity to introduce further allegations – it is simply an exercise in clarifying the existing claims and allegations contained within them.

In respect of claim 4 (2602480/2021), the Claimant should complete the relevant schedule and can disregard any that are not relevant.

The Claimant will also set out clearly and concisely in an additional document the basis of his unfair dismissal claim under sections 94 and 98 Employment Rights Act 1996 ("ERA"). He must say why he believes his dismissal was procedurally and/or substantively unfair.

34. The Claimant was ordered to provide this information by **1 February 2022.** He was also ordered to set out in writing the basis of his application to amend by the same date.

35. In respect of claim 5, I recorded the following:

> *The Claimant has submitted a new claim alleging equal pay. Within the details of his complaint, he refers to both male and female comparators and relies on allegations dating back to the early part of his employment.*
>
> *I explained to him that the equal pay provisions are in place to ensure equality of pay between men and woman and his claim as drafted appears to be a race discrimination claim. The Claimant refused to accept this despite my attempting to explain it to him on several occasions. Accordingly, the legal basis of the claim will most likely be subject to a strike out application at the upcoming preliminary hearing (details below).*
>
> *If the claim is permitted to proceed, it is further likely that the Respondent will raise the estoppel point again.*
>
> *The Respondent must respond to the claim in accordance with the deadline generated by the Tribunal, even if it simply to the extent that it wishes to make any of the applications referred to above. If the claim survives, the Respondent will be granted leave to respond to it in full.*
>
> *If I am wrong in my initial view about the claim and there is a legal basis on which it can be pursued, the Respondent should respond to it in the usual way.*

36. During the hearing, I expressed my concern that the Claimant's claims were still unclear. The Claimant was of the view again that the final hearing should be vacated given that there were further claims to come. I recorded in my case management summary:

> *"The final hearing remains listed in September 2022 but if the claim is not properly articulated and understood there is a risk that the existing trial window will have to be vacated - which is in neither party's interests.*
>
> *The Claimant expressed the view that the trial window should be vacated regardless given that there are further claims to come. I disagreed. This case cannot be delayed indefinitely and given that the allegations relied on date back many years as it is, further delay will bring into play the question of whether a fair trial is possible for the Respondent.*
>
> *If further claims materialise, they may have to be subject to a further hearing but at least the existing allegations can be dealt with this year."*

37. I listed the case for <u>this</u> hearing to determine the following:

    i. The Claimant's application to amend claim 1 and if necessary,

claims 2, 3 & 4;

ii. To consider if any allegation within any of the claims should be subject to a deposit order because it has little reasonable prospect of success or struck out because it has no reasonable prospect of success (Rules 39 and 37 of the Rules)

iii. To consider whether claim 5 should be subject to a deposit order because it has little reasonable prospect of success or struck out because it has no reasonable prospect of success;

iv. To consider if the Claimant should be estopped from relying on any allegations in any of the claims (if appropriate);

v. General case management to prepare for the final hearing; and

vi. The format of the final hearing.

Provision of further information

38. In response to my order to provide information by 2 February 2022, the Claimant provided the Respondent with the following:

i. 1 February 2022: - a 'post-dismissal' schedule (127 pages);

ii. 11 February 2022: - a victimisation schedule (19 pages);

iii. 18 February 2022: - PID schedule and revised victimisation schedule (127 and 33 pages);

iv. 19 March 2022: application to amend (95 pages); a revised post-dismissal schedule containing reference to claim 6; the Equal Pay Statutory Code of Practice; and, his summary of two cases;

v. 15 April 2022: a witness statement (1179 paragraphs); and

vi. 18 April 2022: his explanation of why his dismissal was unfair.

Claim 6

39. The Claimant submitted claim 6 (2600809/2022) on 16 March 2022. Although he ticked section 8 to say that he was claiming unfair dismissal, race discrimination, notice pay and other payments – the accompanying details of complaint did not set out with any clarity the legal basis on which the narrative was pursued.

<u>This hearing</u>

40. The Respondent was ordered to prepare a bundle of essential documents. The core pleadings bundle alone ran to 1886 pages which is remarkable given that this was simply the pleadings documentation to date, and we are, in reality, no further forward.

41. The Respondent produced a skeleton argument in accordance with my order which was provided to the Claimant in advance of the hearing.

42. On 19 April 2022, I undertook as much pre-reading as time would allow. I read the Claimant's witness statement first in anticipation that it would give me a full understanding of the claims in their entirety. Unfortunately, it did not.

Appeal

43. On day one of the hearing, the Claimant said that he had appealed my decision on estoppel from May 2021, such appeal having been submitted electronically to the EAT on 19 & 20 January 2022. The Claimant had not received any contact from the EAT, nor an automated response after submission with a reference number. On checking with the EAT, no claim was ever received.

44. The Claimant subsequently provided documents to me which indicated that he had attempted to file documents electronically with the EAT but was unable to (although it is not clear where he actually sent them in the end). Regardless, he made no follow-up enquiries with the EAT to confirm receipt or chase progress.

Format of this hearing

45. After discussion about the most efficient way to deal with the matters subject to this hearing, we agreed to deal with them in this order: i) the application to strike out claim 5 (equal pay); ii) the Claimant's application to amend his claims; iii) the application to strike out the claims in their entirety (which we referred to as the 'global' strike out application); and iv) the application to strike out/deposit order in respect of individual allegations.

46. The rationale for this format was the strike out application in respect of claim 5 could be dealt with in isolation and Ms Cawthray submitted that consideration of the application to amend was also relevant to the global strike out application. Subject to the outcome of those applications, we would deal with the individual allegations thereafter.

Strike out of the equal pay claim

47. Claim 5 is pursued under the equal pay provisions of the Equality Act 2010 ("EQA") – the Claimant was clear that this was his intention and relied on the 'Equal Pay Statutory Code of Practice' ("the Code") in support. However, his claim is that he did not receive equal pay on the grounds of race and refers to comparators of a different race who are predominantly male. He could have presented the claim as a race discrimination claim but chose not to.

48. In his submissions, the Claimant accepted that the law requires a comparator of the opposite sex. However, he cherry-picked paragraphs from the Code in isolation and was adamant that it applied to all protected characteristics, rather than just sex. I gave judgment that the claim should be struck out because it has no reasonable prospect of success given that there was no basis in law on which it can be pursued. This is subject to a separate judgment and written reasons will follow.

49. In the Claimant's submissions on the global strike-out application (by way of written comments on the Respondent's skeleton argument) he said:

> *"But here (sic) the main reason you are wrong: Pay Claims for race you say should be raised as direct race discrimination claims and therefore must be raised in 3 months, whereas pay claims must be raised within 6 months. Although you know I am being denied access to a pay claim on the grounds of race, you don't see that THE Pay Claim Code of Practice applies to all protected characteristics. The Equal Pay code of practice in (sic) racist, your interpretation is"* (paragraph 121).

50. In his oral submissions he went on to say:

> *"I'm incensed that I can't bring an equal pay claim because I'm black ……..I'm saying whether you realise it or not you are racist in denying me the right to a claim".*

51. The Claimant also calls the Respondent's representative racist because she submits that his claim for equal pay, in light of his refusal to accept my explanation for the operation of an equal pay claim, is both scandalous and vexatious (paragraph 107 of the Respondent's skeleton argument with the Claimant's comments).

52. I simply record this for transparency. The Claimant's conduct in this regard, whilst disrespectful, has not played a part in my deliberations.

<u>THE APPLICATION TO AMEND</u>

53. The application to amend was extensive and covered claims 1, 2, 3, 4 and 6. In total I examined two hundred and sixty-nine allegations across all claims, in addition to the claims themselves. Given the number of allegations subject to the application involved, Ms Cawthray spent a considerable amount of time after the close of the first day categorising them. She explained which allegations fell within each category on day two and the Claimant confirmed he agreed with her analysis.

54. The parties made general submissions to cover all the schedules and categories therein, which concluded at the end of the second day.

55. I hoped to be in a position to given judgment by 11am the following morning. Ultimately, it proved impossible given the sheer amount of information requiring consideration. I reserved my decision to allow time for proper determination and so we could use the remaining time to cover the global strike out and the strike out/deposit application in respect of individual applications.

The Claimant's submissions

56. The Claimant produced a document purporting to be an application to amend (paragraph 38 above) but it is simply a statement setting out the factual element of some, but nowhere near all, of the allegations now subject to this application. He fails to address the matters set out in the Presidential Guidance on amending a claim or response which is surprising given his knowledge of what is required and having argued the same at the open preliminary hearing on 4 & 5 May 2021. However, I allowed him to make oral submissions instead.

57. The Claimant agreed that his submissions can be broadly summarised as follows - that he provided the relevant detail of his complaints in various grievances to the Respondent but waited until they were complete before submitting that detail to the Employment Tribunal. He felt it was reasonable to wait.

58. In respect of claim 1, he says that the grievances were completed eventually.

59. In respect of the grievances that were not concluded by the Respondent and are relevant to the other claims, the Claimant confirmed that at some point he arrived at a decision to submit the detail to the ET1, albeit did not say when and what prompted him to do so.

60. The Claimant refers to an '*explosion of information'* that came to light on 1 October 2021 which prompted further grievances and claims. This, he says, was the discovery that good <u>honours</u> rates produced in a grievance investigation report on 29 January 2021 were the same rates used in the good <u>joint honours</u> rates produced in a grievance investigation report in <u>June 2021</u>.

61. The Claimant refers to the '*explosion*' happening on 1 October 2021, rather than June 2021 because that's when he noticed the change whilst '*reviewing the documents following the appeal Outcome report after the 1st October 2021 ….*' (para 528 of his witness statement).

62. In terms of the nature of the amendments, the Claimant accepts that many are new and, if on examination other allegations are not set out within existing claims as he believes, it follows that they are new too.

63. In relation to the allegations that the Respondent says are estopped, the Claimant submits that the 2009 estoppel decision and my 2021 decision are errors in law and, therefore, he should not be estopped from relying on matters pre-dating the 2009 claim.

The Respondent's submissions

64. As above, Ms Cawthray set out her submissions in her skeleton argument and she supplemented them briefly at the hearing. I summarise the Respondent's submissions as follows:

65. The Claimant has not provided any coherent submissions supporting his application to amend;

66. His submissions focus mainly on the grievances, but he knows the difference between a grievance and Tribunal proceedings;

67. He has had been afforded very clear instructions and guidance from the Tribunal to date;

68. The allegations largely remain unclear and/or are an attempt to bring in new and further claims against the Respondent; an attempt to change the explanations for events and treatment; and, an attempt to '*hedge his bets'* having now understood the difficulties of a direct race discrimination claim.

69. The prejudice to the Respondent in allowing the amendments would be substantial – including the fact that a number of named individuals no longer work for the Respondent.

70. This is a very brief summary and I have had full regard to the comments set out in the skeleton argument in its entirety.

The law

71. The starting point in an application to amend is always the original pleading set out in the ET1. In ***Chandok v Tirkey 2015 ICR 527***, the EAT said:

> "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with the time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*"

72. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration

of the issues; and to save expense.

73. In ***Cocking v Sandhurst Stationers Ltd [1974] ICR 650*** the President held that regard should be had to all the circumstances of the case and in particular the Tribunal should *"consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused*".

74. In ***Selkent Bus Company (trading as Stagecoach) v Moore [1996] IRLR*** the EAT held that relevant circumstances include:

> *"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 has 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 e.g., 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."*

75. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in ***Cocking*** and ***Selkent.***

76. In respect of re-labelling, the Guidance provides: *"While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further an employer is entitled to know the claim is has to meet".*

77. Under 'Time Limits' the Guidance provides: *"The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent".*

78. A Tribunal can allow an application to amend but reserve any limitation points until the final hearing which might be necessary in cases where it is not possible to make a determination without hearing the evidence – ***Galilee v Commissioner of the Metropolis UKEAT/0207/16.***

CONCLUSIONS

79. My considerations relate to all the schedules and categories therein, so I do not repeat them under each heading. If different considerations are relevant (e.g. allegations are more recent), I expressly say so.

80. For ease of understanding at the outset, the application to amend is refused in its entirety.

Direct race discrimination - claim 1

81. I am mindful that this claim was issued on 14 August 2020 and was subject to an application to amend on 4 & 5 May 2021 last year.

82. It has also been the subject of two previous preliminary hearings simply to *understand* what the allegations within the claim are. A final schedule of allegations was clarified at the hearings on 17 & 18 September 2021 and 12 January 2022.

83. I have had regard to the previous application to amend this claim in May 2021. At that hearing, we encountered the same difficulty that has hindered these proceedings to date, namely the Claimant's inability to articulate the precise basis of each allegation within his claim. I commented in the judgment that:

> *"Regrettably, the specific allegations of discrimination remain unclear and we spent considerable time during the morning of day two of this hearing establishing what the complaints subject to the application to amend were, and why the Claimant says they amount to direct discrimination. The Respondent must know the specific facts of the allegations against it and the case it is required to answer, but there was insufficient time to deal with the remaining 26 allegations and I have made a separate order in this regard."*

84. I also recorded the following as explained by the Claimant:

> *"The Claimant explained that he has not relied on the matters that are subject to this application in his originating claim because they 'slipped his mind'. He also said that when he was drafting his claim, he took a conscious view on what to include and what not to include. He said he could have included further allegations of bullying and harassment but chose to focus on the three broad headings of promotion, pay and influence. Accordingly, he has made an active choice about which allegations to include and exclude. Given the Claimant's history of grievances and litigation, I do not accept that if the Claimant held a belief that they amounted to discrimination that they would have slipped his mind and he would have included them in this extensive claim."*

85. This commentary remains relevant in this judgment, given it is the same claim.

Direct discrimination – the schedule agreed on 17 & 18 September 2021 and 12 January 2022

86. The allegations subject to this application are as follows: 22, 23, 25, 26, 27, 28, 30, 31, 35, 41, 41(b), 42, 47, 49, 50 & 51 (the Claimant is estopped from relying on allegations 1- 20 inclusive as per my previous judgment).

The type of amendment

87. The Claimant acknowledges that they are all new factual allegations, thereby changing the basis of the existing claim.

88. Each allegation requires a new factual enquiry resulting in an extensive exercise for the Respondent, particularly given that some date back over a decade ago.

Time limits

89. Touching on time limits, the Respondent acknowledges that the Claimant

argues the allegations form part of conduct continuing over a period and, if the application is allowed, can only be dealt with at the final hearing in this case. Accordingly, I have not considered time limits in this exercise.

The timing and manner of the application

90. The allegations range in date between 2012 and July/August 2020, but importantly, they all occurred prior to the Claimant issuing claim 1 on 14 August 2020. They would have been within his knowledge at the point of issue and, given the Claimant's previous comments, he took a conscious view not to include them.

91. Whilst delay itself is not necessarily a reason to refuse the application, I am satisfied that the Claimant has not advanced a persuasive reason why the amendments came so late. He was aware that he was aggrieved about the matters on which he now relies and was able to complain about them in numerous grievances. This is not a claim where new evidence has come to light after issue of the ET1.

92. The Claimant confirmed that he understands the difference between a grievance and Tribunal proceedings. However, he seeks to blame the Respondent for his delay in presenting the allegations because, in his view, it did not deal with his grievances in a timely manner, or indeed at all after his summary dismissal.

93. I attach little weight to this argument given the Claimant is fully aware of the importance of time limits having had his 2008 claim dismissed for being presented out of time and one allegation in the 2009 subject to the same determination. Moreover, he submitted claim 2 (unfair dismissal) promptly after his summary dismissal without waiting for the outcome of his appeal and despite subsequently submitting that time for submitting an unfair dismissal claim starts to run from the date of the appeal outcome (and not the dismissal). This undermines his explanation of waiting for internal outcomes as his reason for the delay.

94. The Claimant also appears to rely on the Respondent's grievance procedure as the basis on which to conduct this litigation. In his comments on the Respondent's skeleton argument, he quotes from the procedure, more particularly that a written grievance should:

> *"contain a brief description of the reasons for the complaint, including any relevant facts, dates and names of individuals involved. There will be opportunity to explain the grievance further during the process, therefore unduly lengthy written complaints should be avoided at this stage".*

95. He takes the view that he is only required to provide the barest detail in his originating claims and the rest can follow in due course. This is simply not the case – ***Chandok v Tirkey.***

96. However, the main difficulty presented in this litigation to date is the Claimant's inability to provide a concise description of his claim, including relevant facts, to get out of the starting block in the first place. This is evidenced by the time it took to understand the allegations in previous preliminary hearings. It is not the norm, nor should it be, for the Tribunal to spend days attempting to elicit the information from the Claimant to understand the claim advanced.

97. The Respondent points out that the Claimant is an educated professional and has also been a trade union representative and, therefore, assisted colleagues with employment related matters. He knows what is required of him.

98. It seems to me that the Claimant is merely trying to justify his failure not to include allegations that have occurred to him after the event – particularly given his previous concession that he made an active choice about which complaints to include.

Prejudice

Cogency of the evidence

99. I have considered the prejudice to the Respondent in allowing the amendments. The allegations date back to 2012 and the Respondent is faced with tracing the relevant evidence and individuals from a decade ago – several of whom (where they have been identified) have already left. By way of example, allegation 22 is that the Claimant did not receive pay rises in 2012 and 2015. The two individuals he alleges made the decision not to award a rise have both left the Respondent and he relies on a comparator he says received a pay rise in approximately 2008/2009.

100. Not only are the alleged decision makers no longer employed, but in this example the cogency of the evidence of those who may be able to assist by giving secondary evidence is severely diminished. The same can also be said of later allegations, particularly where relevant individuals have left. The Respondent will be forced to rely on witnesses giving their opinion on any documentary evidence if it exists.

Clarity of the allegations

101. I am also very concerned that most allegations remain unclear. By way of example, allegation 51 is:

> *"The Respondent did not respond to my grievance dated 6 June 2020 despite saying it would look into it. It did not respond because of my race".*

102. The Claimant has failed to identify who he believes made the decision not to respond or who said they '*would look into it*', leaving the Respondent in a position where it must try and work out who the alleged discriminators are and

hope, in the absence of clear documentary evidence, that it is right.

103. This particular allegation was clarified at the PH on 12 January 2022 with assistance from me in trying to draw the information out which was a difficult task. I add that the Claimant seemed to take exception to my questioning, but it was necessary to prompt at least the bare bones of the complaint. It is troubling that the Claimant cannot articulate what his complaints are, even with assistance. He is obliged to tell the Respondent and the Tribunal what his case is at the outset – the case cannot proceed to a final hearing absent that understanding. The Respondent must know the case it has to meet.

Deposit/strike out application

104. Another relevant factor is that allegations 26, 27, 28, 30, 31, 32, 33, 41, 42(b), 47, 49, 50 and 51 are subject to consideration of a deposit/ strike out application.

105. There was insufficient time at this hearing to determine this application at the hearing. In terms of dealing with it post-hearing, it was suggested that a proportionate approach was for me to consider each allegation during <u>this</u> exercise and send a reserved judgment to the parties.

106. The Respondent has commented on each allegation within the schedules, so its position is clear. The Claimant has not actively responded to its comments but was fully aware that the deposit/strike out application would form part of this hearing. He was given opportunity to make oral submissions but both parties accepted that time did not permit submissions on each individual allegation – only a broad-brush approach was possible.

107. I advised the parties that I would consider adopting this approach but would not commit to it given that my focus so far was on the application to amend. If I felt that such an approach was not practicable a further, and likely lengthy, PH will be required.

108. On balance, given the sheer number of allegations subject to the application throughout the schedules, it was not practicable to deal with it as part of these deliberations. Accordingly, consideration of the same in any format at a later date, whether it be on the papers or at an open PH, will result in the existing trial window being vacated and further extensive use of Tribunal resource.

Vacating the trial window

109. On this point, the earliest this case can be re-listed is September 2023. The Claimant is keen for the trial window to be vacated in any event which I find surprising. However, the prejudice to the Respondent of another year's delay would be further prejudicial in terms of cost and the cogency of the evidence.

110. Additionally, the Respondent will possibly be put to the additional cost of a lengthy preliminary hearing to deal with the deposit/strike out applications if I

determine it is not appropriate to deal with them on the papers. It has already been put to the cost of preliminary hearings to simply understand the basis of the claim along with weeks of additional legal preparatory work to prepare for the same. Furthermore, and at my direction, the Respondent has yet to submit Responses to claims 2, 3, 4 and 6.

The overriding objective

111. I have also had regard to the overriding objective to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

112. The parties are not on equal footing. The Respondent is still unaware of the claim it has to meet. It was anticipated that once the direct race discrimination allegations were clarified and subject to appropriate applications, the claim would be capable of being defended. The claim is not even close to that position despite being issued in August 2020. Thereafter, claims 2, 3, 4, 5 and 6 followed. All five present the same lack of clarity, often containing lengthy narrative but little in the way of identifiable legal claims.

113. The time taken to date in dealing with the claims has been entirely disproportionate. The Claimant is versed in discrimination litigation having litigated in 2008 and 2009 but waited some further eleven years before raising allegations of discrimination dating back to 1991. It took the Tribunal two-and-a-half sitting days to simply elicit from the Claimant the basis of claim 1 and it was his view that the Tribunal should do the same with his subsequent claims. I disagree.

114. The Respondent submitted that *"the approach taken by the Claimant in submitting claims that are unclear, producing various iterations of unintelligible schedules that appear to contain significant overlap has caused considerable delay in reaching a position where the claims can be understood, delay to preparations for the final hearing and has caused the Respondent considerable unnecessary cost and prejudice*" (para 87 of its skeleton argument). This is a fair submission and accurately reflects the Claimant's conduct to date.

115. I am mindful that the Claimant is a litigant in person but, equally, he has a responsibility to advance his claim in a sensible format. He has been given an unusual amount of assistance by the Respondent and the Tribunal in doing so. However, despite being provided with explanations of the relevant law and schedules with very clear and straightforward headings to respond to, the allegations remain imprecise and vague.

116. I have sought to be flexible by allowing the Claimant numerous attempts to clarify his claims but to little avail.

117. The Respondent has yet to identify who it needs to call as witnesses so little advance preparation on its part can be done.

118. In terms of the complexity of the issues, they in themselves would not necessarily be overcomplicated if the allegations were clear. They are not.

119. In terms of expense, the Respondent has already been put to considerable time and expense to date and we are no further forward.

Conclusion

120. In considering all the factors above, I am entirely satisfied that the balance of injustice and hardship would fall heavily against the Respondent in allowing the amendments and they are, therefore, refused.

121. For completeness, allegation 48 was never clarified by the Claimant so cannot proceed.

122. At this stage in my judgment, allegations 29, 32, 33, 34, 37 (albeit detail is still missing), 38, 39, 40, 42(b), 43 (albeit relates to without prejudice discussions), 44, 45, 46 remain.

123. Allegations 32, 33, 34, 42(b) are still subject to a deposit/strike out order.

The 'post-dismissal' schedule – direct discrimination

124. This schedule has one hundred and sixty-five entries and was submitted in February and March 2022.

125. The categories for consideration are as follows: i) those that the Claimant himself identified as new; ii) those that the Claimant cross-referred to a previous ET1 but, on examination, the detail does not correspond; iii) those where the detail is cited in an ET1, but it is now advanced as a new legal claim of direct discrimination; iv) those where the Claimant cites a claim number but seems to have been mis-referenced them; and v) one allegation which is estopped.

Those allegations that the Claimant acknowledges are entirely new

126. The first tranche of allegations (save allegation 1 which relates to claim 1) up to and including 74, and 87, relate to claim 2 which was issued on 31 August 2021.

127. All allegations occurred in 2020/21 but pre-date 31 August 2021. Despite being more recent, the Claimant does give a plausible explanation why they were presented circa six months post-ET1 and the application to amend made for the first time at this hearing.

128. In this regard, he refers to the '*explosion of information'* on 1 October 2021 when he received a grievance appeal outcome regarding the good honours reporting.

129. I have three observations on this submission. Firstly, the information that he refers to was within his knowledge when he received the grievance outcome letter in June 2021 (see paragraphs 60 & 61) - which was before the issue of claim 2. It was also the subject of his grievance appeal thereafter.

130. Secondly, if the appeal outcome on 1 October 2021 was an '*explosion of information'* the Claimant was aware of it when he submitted claim 4 on 12 October 2021 but failed to include it at that stage.

131. Thirdly, within claim 6 he says that he raised the good honours issue in 2018 and that the appeal outcome was '*final confirmation'* that he was subject to '*victimisation for whistleblowing'*. He clearly already held the view that he was being disadvantaged somehow for requesting the good honours data. However, he confines this *'confirmation'* to his whistleblowing claim which does not explain the late introduction of allegations of race discrimination.

132. Many of the allegations are inadequately pleaded or do not amount to discrimination in law. For example, allegation 5 is that Mr McEwan (the Claimant's new line manager) allocated the Claimant "*a module that he intends to run just for a single year after my workload was fully populated*" which he says amounts to a breach of the Academic Workload Planning (AWP). The less favourable treatment is the requirement for extensive planning for a one-off module. However, he asserts this treatment was because of Mr McEwan's '*incompetence*'. The same can be said for allegation 6 which also relates to workload, and he says of Mr McEwan "*He does not know how to manage workloads due to incompetence*". If the reason for the Claimant's treatment is incompetence, it is not because of race.

133. The Respondent avers that the majority of the allegations should be subject to a deposit order/strike application and I agree.

134. As I explained at the outset of this section, I have applied the same considerations as set out above throughout the amendment exercise, except where expressly stated.

135. Taking those matters into account, I conclude that the balance of injustice and hardship would fall against the Respondent if I allowed the amendments. Accordingly, allegations 1, 5, 6, 7, 8, 9, 10, 12, 15, 18, 19, 20, 29, 30, 35, 37, 43, 44, 45, 46, 47, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71,72, 73 and 74 are refused.

136. Allegations 75, 76 and 77 which are dated 2013, '2019' and June 2021 respectively relate to claim 3 which was issued on 8 September 2021. Again, they pre-date the ET1 and allegation 77 is still subject to a deposit order/strike out application.

137. For the same reasons, I conclude that the balance of injustice and hardship

would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

138. Allegations 80, 83, 84, 85, 86, 87, 88, 89, 90, 91 and 93 do not reference an existing claim at all and range in date from 2011 to March 2020 – all prior to issue of claim 1.

139. All, save 85, are still subject to a deposit order/strike out application.

140. Considering all the factors in the round, I conclude that the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Allegations linked to a claim, but the detail does not match

141. This applies to allegations 11, 13, 14, 16, 22, 23, 24, 25, 31, 32, 39, 48 and 62. I have cross-referred each allegation to the relevant claim form and agree with the Respondent that the detail simply does not correlate. Accordingly, they are new factual allegations which relate to claims 2 or 3 and pre-date claim 2.

142. All are still subject to a deposit/strike out application.

143. Taking all the relevant factors into account, I conclude that the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Allegations where the claim is cited and the detail is there, but the Claimant advances the allegations as a new legal claim of direct discrimination

144. The allegations in this category are 2, 3, 4, 17, 21, 26, 27, 28, 33, 34, 36, 38, 40, 41, 42, 58, 92 and 97. They all relate to claim 2 and pre-date the issue of the ET1.

145. This is a matter of relabelling - but a significant one because claim 2 is one of victimisation, not direct race discrimination. The new legal head of claim would involve a significantly new factual enquiry and evidential burden on the part of the Respondent.

146. All allegations are still subject to a deposit/strike out application.

147. Taking all the relevant factors into account, I conclude that the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Claims which appear to be mis-referenced

148. It appears that allegations 78, 81, 82, 94, 95, 96, 98, 99, 100, 101, 102 and 103

have been mis-referenced. The Claimant has not pointed me to the correct claims, and I cannot accept an amendment if the Claimant cannot tell me what he wants to amend - is not my role to seek it out. However, I do note that the allegations seemingly relate to claims 3 and 4 and pre-date issue of the respective ET1s.

149. All allegations are still subject to a deposit/strike out application.

150. Taking all the relevant factors into account, I conclude that the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Estoppel

151. Allegation 79 relates to an alleged failure to redeploy in August – December 2004. I have already given judgment that the Claimant is estopped from relying on matters occurring before the issue of his 2009 claim. Accordingly, he is estopped from relying on allegation 79 and the application to amend is refused.

Allegations 104 onwards

152. These allegations relate to claim 6 which I deal with later in this judgment.

The protected disclosures (PID) schedule

Allegations that the Claimant has identified are new

153. The Claimant had included seven new alleged protected disclosures, although has not linked them to a specific claim. As before, I cannot accept an amendment if the Claimant cannot tell me what he wants to amend.

154. Nevertheless, allegations 7 and 8 occurred prior the issue of claim 1 and allegations 9 – 11 occurred prior to the issue of claim 2. No date is provided for allegation 12 and allegation 13 occurred on 16 November 2021, prior to the issue of claim 5.

155. Allegations 7, 8, 9, 10, 12 and 13 do not identify protected disclosures in law. By way of example, allegation 8 is that he made a '*request for historical good honours data'*.

156. Allegation 11 refers to a possible earlier disclosure, but he has failed to identify the specific basis of it. It is not the Respondent's role, or the Tribunal's, to try and work it out, especially not at this stage in the proceedings.

157. Given that the Claimant has failed to identify disclosures which are protected in law, all seven allegations are still subject to a deposit/strike out application.

158. Accordingly, taking all the relevant factors into account, the application to

amend to include allegations 7, 8, 9, 10, 11, 12 and 13 is refused.

Allegations that the Claimant has cross-referred to an existing claim, but the relevant paragraphs do not set out the basis of a protected disclosure

159. I have examined allegations 1 – 6 and cross referred them to the relevant claim which is claim 1 issued on 14 August 2020. The alleged disclosures occurred between 2007 and 2017, therefore pre-dating the ET1, but claim 1 was submitted as a direct race discrimination claim and not whistleblowing.

160. I agree with the Respondent that the Claimant has not identified the basis of any protected disclosure in law, in either the schedule or the claim form. As such, all six allegations are still subject to a deposit/strike out application.

161. Accordingly, taking all the relevant factors into account, the application to amend to include allegations 1 - 6 is refused.

162. For the avoidance of doubt, all allegations in the PID schedule are refused as amendments.

Automatically unfair dismissal

163. In consequence of the amendments in the PID schedule being refused, it follows that a claim for automatically unfair dismissal pursuant to s.103 Employment Rights Act 1996 cannot proceed.

164. For the avoidance of doubt, the application to amend to include this claim would have been refused in any event. In the column asking '*which of the protected disclosures relied upon is said to be the cause of dismissal'* he says:

> "*At the start of the suspension it was the whistleblowing re JHS Good Honours. After 6th June it included the institutional racist culture established by the VC's appointments and promotions. On the 9th June I raised, in an e-mail to Gail, whistleblowing re Assessment practice in Computing emerging before and after my suspension".*

165. I have already identified that the alleged JHS disclosure does not amount to a protected disclosure and is subject to a deposit/strike out application (allegation 8 the PID schedule and paragraph 154 above). There is no reference to an e-mail to '*Gail'* in the PID schedule amounting to a disclosure in itself, save reference to an e-mail and explanation in an appendix in which he says he provided evidence to Gail regarding suspected plagiarism by a student which cannot amount to a protected disclosure in law. Nor does the statement of institutional racism does not amount to a protected disclosure.

166. Accordingly, the Claimant has not identified a protected disclosure on which to base this claim so it would be subject to a deposit/strike out application in any event.

167. Further, the Claimant has not completed the sections *'explain the basis for the contention that the reason or principal reason for your dismissal was because you had made protected disclosure(s) relied on',* nor has he cross referenced it to an existing claim. Therefore, the terms of the proposed amendment are not clear which is good reason itself to refuse the amendment.

168. The Claimant's unfair dismissal claim was presented on 31 August 2021 and the amendment not presented until February 2022 with no compelling reason to explain the delay.

169. Considering all the relevant factors, the balance of injustice and hardship would fall against the Respondent if the amendment was allowed and I would have refused it.

170. For completeness, the Respondent is not required to submit a Response to this claim.

The detriments schedule

Allegations that the Claimant has identified as new

171. The application in respect of the detriments schedule is academic given that the whistleblowing claim cannot proceed. However, I have considered it for completeness.

172. Allegations 23, 29, 32 and 33 all pre-date the claims and are not cross-referenced to a specific claim. Furthermore, 23 and 32 have already been refused as amendments at the May 2021 PH.

173. Allegations 41 – 46 are not cross-referenced to a specific claim.

174. All allegations of detriment are still subject to a deposit/strike out application and many remain unclear.

175. Taking all the relevant factors into account, the balance of injustice and hardship would fall against the Respondent and, therefore, the application to amend is refused.

Allegations which are estopped

176. Allegations 14, 15 and 16 all occurred pre-2009. The Claimant is estopped from relying on them and the application to amend is refused.

Allegations which the Claimant cross refers to a claim, but the relevant paragraphs do not set out a detriment claim

177. I have cross-referred allegations 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 30,

31 and 39 and agree with the Respondent's analysis that a detriment is not pleaded in the existing claims. They are, therefore, new factual allegations. All the allegations, save 39, relate to claim 1 and pre-date the ET1.

178. All are still subject to a deposit/strike out application.

179. Allegation 39 relates to claim 2 but the Claimant has cross referred it to the claim in its entirety (51 paragraphs) rather than a specific paragraph/s. It is impossible to identify exactly what detriment he relies on. It is also subject to a deposit/strike out application.

180. Applying the same balancing exercise, the application to amend is refused.

Allegations that are cross referred to existing claims – the detail is there, but not pleaded as a detriment

181. Allegations 34 – 36 relate to claim 2 and pre-date the ET1. Further, whilst the facts are set out in the ET1, they are not pleaded as a detriment or linked to a protected disclosure.

182. Allegations 37, 38 and 40 relate to claim 3 and pre-date the ET1. Further, whilst the facts are set out in the ET1, they are not pleaded as a detriment or linked to a protected disclosure.

183. All six allegations of detriment are still subject to a deposit/strike out application.

184. Applying the same balancing exercise, the application to amend is refused.

Victimisation schedule

Allegations that the Claimant acknowledges are new

185. The allegations falling within this category are 11, 17, 18, 19, 20, 26, 27 and 28.

186. The Claimant has not cross-referred allegation 11 to a specific claim but appears to relate to claim 1.

187. Allegation 17 also appears to relate to claim 1, albeit the application to amend to include this allegation as direct race discrimination was refused in May 2021.

188. It is not clear which claim allegation 18 relates to, but all three pre-date the ET1. Furthermore, they do not clearly identify a detriment nor are they linked to a protected disclosure.

189. Allegations 19, 20 and part of 27 occurred prior to the issue of claim 2 and the remainder of allegation 27 prior to the issue of claim 5. Allegations 26 and 28 did not occur until November & December 2021 prior to the issue of claim but are not cross referred to an ET1 so I do not know what he wants me to amend.

190. Regardless, the Claimant has not described an identifiable detriment or a protected act and, as such, all allegations are still subject to a deposit/strike out application.

191. Taking all the relevant factors into account, the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Allegations which are estopped

192. Allegations 1 – 6 pre-date the 2009 litigation and the Claimant is estopped from relying on them. Accordingly, the application to amend is refused.

Allegations which the Claimant cross refers to an ET1, but the relevant paragraph does not correlate to the allegation

193. Allegations 7, 8, 9, 10, 12, 13, 14, 15 and 16 all pre-date the issue of claim 1. Allegations 21 and 22 pre-date claim 2. All are unclear in that they have failed to identify a protected act and the Claimant has not provided a clearly identifiable act of detriment.

194. They are all still subject to a deposit/strike out application.

195. Taking all the relevant factors into account, the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

Allegations where it is not clear whether they relate to claim 4 or 5

196. It is not clear which claim allegations 23, 24 and 25 relate to, although it is either claim 3 or 4. All three are unclear in that they have failed to identify a protected act and the Claimant has not provided clearly identifiable acts of detriment. They are all still subject to a deposit/strike out application.

197. Taking all the relevant factors into account, the balance of injustice and hardship would fall against the Respondent if I allowed the amendments and they are, therefore, refused.

198. For the avoidance of doubt, all allegations in the victimisation schedule are refused.

Claim 6 – application to amend to include allegations 104 – 165 as direct race discrimination

199. It is not initially clear on what basis the Claimant pursues this claim. He has ticked unfair dismissal, race discrimination, notice pay and arrears of pay.

200. However, at 8.2 of the ET1 he says it is the 6th in a series of claims. He clarifies each claim as follows:

1) 30 years of race discrimination

2) Unfair dismissal

3) More racism at Director of HR level & Assessing an Application for an Associate Professor Application not duly considered and allocated to a second panel

4) Victimisation

5) Equal Pay

6) Unfair dismissal and whistleblowing

201. The Claimant does not cite claim 6 as one of race discrimination nor does it read as such. The particulars of claim are headed *"Claim for Unfair Dismissal – Appeal Hearing – From November 2021 Onwards"* so clearly his intention was for this to be a continuation of his unfair dismissal claim only.

202. As a brief reminder, in the first iteration of the post-dismissal schedule on 1 February 2022, allegations 104 – 165 were clarified as new allegations of direct race discrimination (but not cross referenced to a claim) and subsequently submitted in the body of claim 6 on 16 March 2022. The Claimant produced a further version of the post-dismissal schedule the following day on 17 March 2022 cross referencing allegations 104 – 165 retrospectively to claim 6.

203. I should note here that allegation 110 relates to whistleblowing and victimisation and should not appear in the post dismissal schedule. The matters referred to therein are dealt with in other schedules.

204. If the Claimant had initially intended this claim to be one of race discrimination, he would not have included allegations 104 – 165 in the post dismissal schedule in which acknowledges that they are all new allegations of discrimination. The application to amend was made for the first time at this hearing and amounts to a matter of re-labelling but again a significant one given the change in basis of the existing claim of unfair dismissal to one of direct race discrimination.

205. The particulars of claim from paragraph 6 onwards and the post-dismissal schedule from 104 onwards are one and the same and there is simply no grounds for a race discrimination claim within the narrative in any event, save generalised statements such "*this is particularly heinous and seems to be because I'm black so they can treat me anyhow they like and significantly decrease the likelihood of Tribunal based on evidence*" and "….*and my appeal was not upheld both because I am black, and for whistleblowing, which they are desperately trying to cover up*".

206. To add to the confusion in claim 6, he also alleges his appeal was not upheld because of whistleblowing but claim 6 is not mentioned in the PID or detriment schedule.

207. Furthermore, the alleged protected disclosure relied on does not appear to be a protected disclosure at all. Rather, it is merely a request for information of the good honours data (paragraph 12 of the particulars of claim and allegations 7 and 8 of the PID schedule). This is why, had the PID amendments been allowed, they would remain subject to a deposit/strike out application because they have no basis in law.

208. It strikes me at this stage of the proceedings that there should not be this much confusion about the legal basis of a claim. The Claimant was fully aware of the requirements of him by the time this claim was issued but has failed again to produce a coherent set of pleadings.

209. That aside, I have examined allegations 104 – 165 in the post-dismissal schedule and not one sets out the legal basis of a claim for race discrimination. In fact, the vast majority to do not even reference race.

210. An example of an allegation that makes no reference to race is at 134. The details of alleged discrimination provide:

> *"Class perceptions. We concluded that the decision of the Disciplinary Panel had been reached based on what you did and said but nonetheless considered the perceptions of the students involved as critical.*
>
> ***Perceptions of what me or the confrontation: Answer: the confrontation which Bruno initiated"***

211. The narrative itself is not an allegation of discrimination – it is a commentary. His explanation as to why this is less favourable treatment/a detriment is:

> *"This is detrimental to me because I am unfairly dismissed while being held responsible for the confrontational environment initiated by the student's intentional confrontational attitude and behaviour".*

212. This simply relates to his unfair dismissal claim, not race. Placing an allegation in the schedule of direct discrimination does not make it an allegation of discrimination.

213. Sadly, the schedule is littered with examples such as these. I further note that the Claimant has used claim 6 to reintroduce twenty-four matters that occurred before the issue of <u>claim 4</u>.

214. An example where he does refer to race is allegation 114 where he says that reference to '*evidence of Alistair McEwan's racism was asked for by Appeal*

chair, I showed it, he responded 'oh'" was omitted from the appeal notes. He says that this was detrimental to him because '*evidence of racism was left out of the notes'*.

215. However, the e-mail '*evidence*' of racism itself is nothing of the sort and appears at paragraph 856 of the Claimant's witness statement. He goes on to repeat the same allegation at 116.

216. Furthermore, many allegations simply do not make sense as an allegation of discrimination at all – rather, they amount to a commentary on why the Claimant disagrees with the appeal process and outcome. A general complaint about his dismissal is insufficient for the purpose of the application to amend and, further, the Respondent needs to know the claim it is required to meet.

217. I make these observations within the context of this application because <u>all</u> the allegations are still rightly subject to a deposit/strike out application which will result in the existing trial window being vacated and further delay, as well as significant further cost to the Respondent if another PH is required.

218. I am mindful that the allegations relied on relate to the period November/December 2021. However, the Claimant does not advance a compelling reason to explain why they were not presented as a direct race discrimination claim until March 2022 and the application only made at this hearing.

219. Taking all the relevant factors into account, I conclude that the balance of injustice and hardship would fall heavily against the Respondent if I allowed the amendments and they are, therefore, refused.

What is claim 6?

220. Claim 6 seems to me to be evidence about his appeal which is relevant to his unfair dismissal claim. The appeal had not been heard prior to the issue of claim 2, and the Claimant should not be precluded from advancing relevant evidence. Had he waited until his appeal outcome before submitting his unfair dismissal claim, he may well have presented it out of time. Therefore, I order that the unfair dismissal element of claim 6 is consolidated with the unfair dismissal element of claim 2.

221. For completeness, I am not convinced that the Claimant is required to make an application to amend to rely on this evidence but if I am wrong on that, the balance of injustice and hardship would fall against him if an amendment were refused and I would, therefore, allow it.

<u>The claims remaining at this stage of my deliberations</u>

Direct race discrimination – claim 1

222. As above, the following allegations remain: 29, 32, 33, 34, 37 (albeit detail is still missing), 38, 39, 40, 42(b), 43 (albeit relates to without prejudice discussions), 44, 45 and 46.

223. Allegations 32, 33, 34, 42(b) are subject to a deposit/strike out order.

Unfair dismissal – claim 2

224. Claim 2 is claim for unfair dismissal. The Claimant was summarily dismissed for gross misconduct with effect from 23 July 2021 and presented his claim on 31 August 2021. In section 8 of the ET1, he has ticked boxes for unfair dismissal, race discrimination and arrears of pay. However, I note that in claim 6 he describes claim 2 as unfair dismissal only and the narrative reads as such. It is not clear at all what his claim for arrears of pay is.

225. In section 15, he suggests that he blew the whistle and should not have been dismissed. However, given that the protected disclosures do not survive the application to amend, the claim can only proceed as an '*ordinary*' unfair dismissal claim under ss.94 and 98 ERA.

226. The Claimant sent an e-mail to the Respondent and the Tribunal on 18 April 2022 setting out why he believes his dismissal was procedurally and/or substantively fair. He produced this document very late in the day and in breach of my order, but it is the clearest explanation of any of his claims to date.

<u>THE 'GLOBAL STRIKE OUT' APPLICATION</u>

227. I now turn to what we called the global strike out application – that being the application to strike out the claims in their entirety.

228. I explained to the Claimant at the January 2022 PH that if he "*fails to explain his case clearly, concisely and in a manner that allows the Respondent and the Tribunal to understand the claims he is at risk of the claim/s being struck out in accordance with either Rule 37(1)(a), (b), (c) or (e) of the Employment Tribunal Rules 2013 ("the Rules")."*

229. As recorded above, the Respondent provided a skeleton argument in advance of the hearing. During the course of this hearing itself, the Claimant added his comments in response which I have had regard to.

230. They are broadly the same as those for the application to amend, namely that the Respondent's failure in dealing with his grievances in a timely manner, or not at all, was the cause of the delay in presenting the claims/allegations and further particulars.

231. The Claimant relies on the Respondent's internal grievance procedure which provides that lengthy written complaints should be avoided to explain why so much new material has been added to the claims.

232. He is adamant that an important part of the Employment Tribunal process is for the internal processes to be complete first, regardless of limitation periods. He said that if the Respondent had dealt with all his grievances it would have saved an enormous amount of time.

233. Where he raises additional factors, I have attempted to summarise them as best I understand them under each heading.

234. Both parties made supplemental oral submissions which were limited due to the available time.

Rule 37(1)(a) – scandalous or vexatious

235. Rule 37(1)(a) provides that all or any part of the claim (or response) may be struck out if it is "*scandalous or vexatious or has no reasonable prospect of success*".

236. In ***Bennett v Southwark London Borough Council 2002 ICR 881***, Sedley LJ explained *"the word 'scandalous' in its present context seems to me to embrace two somewhat narrow meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process".* In other words, it means irrelevant and abusive of the other party – it is not to be given its colloquial meaning.

237. In ***Attorney General v Barker [2000] EWHC 433*** Bingham LJ described a vexatious proceeding as one which has "*little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding maybe, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*".

The Respondent's submissions

238. In summary, the Respondent submits that the Claimant considers he has been the target of institutional racism for many years. He cites dozens of individuals as discriminating against him and, despite raising twenty-seven grievances, there has been no finding of discrimination.

239. Despite the Claimant's view and having first submitted a claim to the Employment Tribunal in 2008, he continued in his role at the Respondent and remained there for thirty-one years.

240. Of particular note, the Claimant did not raise a whistleblowing detriment claim until after his summary dismissal in July 2021, despite him now stating his first alleged protected disclosure was made in 2007. He did not submit a

victimisation claim until more recently, although he raised grievances as early as 1997.

241. The Respondent's view is that the basis of the Claimant's claims lay in his dissatisfaction and disagreement with management decisions, and this is evident from the detail set out in the various schedules. There is no basis in law for many of the allegations of direct race discrimination, whistleblowing, victimisation or an unfair dismissal claim in claim 6.

242. In respect of claim 5, the Claimant has refused to accept the Tribunal's explanation for the operation of an equal pay claim yet continued to pursue claim 5 as an equal pay claim relying on comparators of a different race, not sex, when it was always open to him to pursue the claim as one of race discrimination.

243. In relation to the schedules provided by the Claimant, the Respondent has made substantial comments on his approach which can be summarised by the abovementioned quote from its submissions that:

> *"the approach taken by the Claimant in submitting claims that are unclear, producing various iterations of unintelligible schedules that appear to contain significant overlap has caused considerable delay in reaching a position where the claims can be understood, delay to preparations for the final hearing and has caused the Respondent considerable unnecessary cost and prejudice*"

The Claimant's submissions

244. In addition to paragraphs 230 - 232 above, the Claimant accuses the Respondent of racism.

<u>Rule 37(1)(a) – no reasonable prospect of success</u>

245. The Respondent referred me to the case of ***Mechkarov v Citibank NA [2016] ICR 1121*** in which the EAT summarised the approach to be followed by a Tribunal when faced with an application to strike out a discrimination claim as follows:

- Only in the clearest case should a discrimination claim be struck out.
- Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence.
- The Claimant's case must ordinarily be taken at its highest.
- If the Claimant's case is "*conclusively disproved by*" or is "*totally and inexplicably inconsistent"* with undisputed contemporaneous documents, it may be struck out.

- A Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts

246. I have also been referred to the following cases: ***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330***; ***Anyanwu and another v South Bank Students' Union and South Bank University [2001] IRLR 305***; ***Cox v Adecco and others EAT/0339/19; Croke v Leeds City Council UKEAT/0512/07; Sivanandan v Independent Police Complaints Commission and another UKEAT/0436/14; Ahir v British Airways Plc [2017] EWCA Civ 1392***; and ***Dossen v Headcount Resources Ltd and others UKEAT/0483/12.***

The Respondent's submissions

247. The Respondent submits and where there is no arguable case in law the claim has no prospect of success and should, therefore, be struck out. It further submits that many of the allegations are totally and inexplicably inconsistent with contemporary documentation and the allegations put forward are implausible.

The Claimant's submissions

248. In addition to paragraphs 230 - 232 above, the Claimant submits that the Respondent does not understand the allegations and has misled its solicitor. He further says that the Respondent undertook a sham appeal.

249. In respect of the Equal Pay claim, he says my interpretation of the statutory code of practice is racist.

<u>Rule 37(1)(b) – the manner in which the proceedings have been conducted by or on behalf of the Claimant or Respondent has been scandalous, unreasonable or vexatious</u>

250. Scandalous and vexatious are used in the same way as rule 37(1)(a).

251. A claim (or response) can also be struck out if it has been conducted in an unreasonable manner. A Tribunal must be satisfied that either the conduct involved was a deliberate and persistent disregard of the required procedural steps or has made a fair trial impossible. Striking out must be a proportionate response - ***Blockbuster Entertainment Limited v James 2006 IRLR 630, CA***.

252. Even if a Tribunal concludes that there has been scandalous, unreasonable or vexatious conduct, it must consider whether a fair trial is still possible. If a fair trial is still possible, the claim (or response) should not be struck out - ***De Keyser Limited v Wilson UKEAT/148/00.***

253. In ***Emuemukoro v Croma Vigilant (Scotland) Limited and others EA-2020-00000 EAT***, the EAT held that it was not necessary to find that a fair trial had

not been possible at all : it was enough for the power to be exercisable that, as a result of a party's conduct, a fair trial was not possible within the trial window. It is right that the Tribunal should consider if any further delay would be contrary to the interests of justice.

The Respondent's submissions

254. The Respondent submits that in considering this argument, I should note the following key points;

i. The Claimant has demonstrated complete disregard for the estoppel judgment, and has sought, through further claims and lengthy schedules, to try and bring back into the litigation matters that relate to estopped events despite the operation of the principle having been clearly explained to him;

ii. the Claimant has submitted numerous unclear claims and schedules that are largely difficult to understand and seek to change the basis of his claims over a year after the presentation of claim 1. After guidance on the operation of a direct race discrimination claim, and following his dismissal, the Claimant is now trying to argue that his treatment is due to other reasons;

iii. the Claimant has sought to continue with an equal pay claim based on comparators of a different race;

iv. many elements of claims 2, 3 and 4, and possibly 6, must be considered following an application to amend. No formal application was made until this hearing. The Claimant is familiar with the application to amend process, having undertaken the same at the preliminary hearing on 5 and 6 May 2021 and having been provided with guidance at the preliminary hearing on 30 April 2021.

The 95-page document that is purportedly dealing with applications to amend seems to be a repeat of just some of the allegations rather than any form of proper submission, and this was a deliberate action with clear knowledge of what is required. If applications are not made, or are not able to be fully addressed, and the Respondent and the Tribunal do not have a clear view of what claims continue at the close of this preliminary hearing, it is unlikely that there will be sufficient time to prepare for the final hearing commencing on 12 September 2022;

v. significant time has passed since many of the allegations, many witnesses have left the Respondent and comments in response to the claim have been collated from documents. There is already a concern that a fair hearing cannot take place due to the passage of time, and further delay, and the loss of the trial window is not within the overriding objective; and

vi. many of the allegations have been brought out of time.

The Claimant's submissions

255. In addition to paragraphs 230 - 232 above, the Claimant submits that the trial window is not long enough given that it cannot start until 26 September 2022[2] and he has raised seventeen grievances since his dismissal. He suggests that it was always my intention to strike out his claims because they could not be heard within nine weeks.

256. In respect of the estoppel judgments, he says again that they are errors in law. He also explained his failed attempt to appeal and criticises my dealing with his '*appeal*' to the Employment Tribunal as a reconsideration.

257. In respect of the application to amend, he is adamant that all allegations correspond to an ET1 and criticises my order giving him three weeks to undertake the cross-referencing exercise.

258. In respect of delay, he blames the Respondent and relies on continuing acts.

Rule 37(1) (c) - a party has not complied with any of the ET rules or with an order of the tribunal

259. The Respondent has taken me to ***Weir Valves & Control (UK) Ltd v Armitage [2004] ICR 371*** in which the EAT said:

> *"But it does not follow that a striking out order or other sanction should always be the result of disobedience to an order. The guiding consideration is the overriding objective. This requires justice to be done between the parties. The court should consider all the circumstances. It should consider the magnitude of the default, whether the default is the responsibility of the solicitor or the party, what disruption, unfairness or prejudice has been cause and, still, whether a fair hearing is still possible. It should consider whether striking out or some lesser remedy would be an appropriate response to the disobedience."*

260. The Tribunal must always guard against allowing its indignation to lead to a miscarriage of justice.

The Respondent's submissions

261. The Respondent submits that although the Claimant has provided numerous lengthy schedules, there has not been material compliance which is evident when the content is reviewed. In respect of my orders, the PID schedule, victimisation schedule and detail of why the claimant says his dismissal was

[2] A trial window of 55 days was allocated to ensure that a judge was available for 39 sitting days within it and cannot commence until 26 September 2022.

unfair were all presented late. Only the post dismissal schedule was provided on time and was resubmitted again at a later date.

262. The Respondent's key submission is that whilst the Claimant has provided schedules, they are unintelligible.

The Claimant's submissions

263. In addition to paragraphs 230 - 232 above, the Claimant submits that there was considerable work to do on the schedules and not enough time and the relevant content is within them.

264. Notably, he said at this hearing that even if he had been given three months for this exercise, it would not have been enough time.

Rule 37(1)(e) - it is no longer possible to have a fair hearing

265. The matters for consideration under this rule are set out above – namely the guidance set out in ***De Keyser***.

266. The Respondent submits that it has been put to significant prejudice by the Claimant's conduct throughout these proceedings and that a fair trial is not possible.

267. The Claimant made no separate submissions on this point.

Relevant factors I have taken into account

Compliance with my orders

268. The Claimant has persistently failed to comply with my orders. At the first PH on 4 November 2020, I ordered him to clearly provide the factual elements of claim 1. He failed to do so, and an urgent PH was listed on 30 April 2021 to attempt to clarify them in advance of the hearing in May 2021. It was impossible to complete the task in the allocated time.

269. At the May 2021 PH, further time was spent attempting to understand the basis of the allegations subject to the application to amend and, as I also set out above, recorded:

> *"Regrettably, the specific allegations of discrimination remain unclear and we spent considerable time during the morning of day two of this hearing establishing what the complaints subject to the application to amend were, and why the Claimant says they amount to direct discrimination….."*

270. At that hearing, the Claimant was ordered again to provide clear particulars of each and every allegation of race discrimination by 26 May 2021. Whilst the

Claimant complied in principle, he failed to provide clear explanations and the Tribunal and Respondent spent two and a half days working through the allegations in claim 1 at the September 2021 and January 2022 PHs in order to understand them.

271. The time taken was entirely disproportionate and I witnessed the Claimant change his explanation for events over and over again. The Respondent submitted that he changes his explanation for events '*in a heartbeat'* and I agree this is a fair submission.

272. However, we ultimately arrived at a clear schedule of allegations relied on, but many were entirely new and not contained in the original pleadings which ran to 137 paragraphs of particulars.

273. Out of a total of forty-seven allegations in claim 1, only thirteen remain after the application to amend, four of which remain subject to a deposit/strike out application.

274. After the issue of claims 2, 3, and 4 the Respondent was in the same boat and could not sensibly respond to the claims. At the September 2021 PH, I ordered the Claimant to provide clear particulars of each and every allegation in claims 2 and 3 by 1 November 2021. The Claimant sent the Respondent nine different documents leaving it no further forward in understanding the basis of the claims. Indeed, at the January 2022 PH I recorded:

> *"…… it was simply impossible to understand the basis of claims 2,3 and 4 and I agree with the Respondent that the claims are still not in a format that can be properly responded to* …….".

275. The Claimant was of the view that the Tribunal should go through each allegation with him in the same way as claim 1, but I disagreed, it not being proportionate or in accordance with the overriding objective to do so.

276. I allowed him one last opportunity to explain his case in a clear and concise manner by 1 February 2022. He was also ordered to set out in writing the basis of his application to amend by the same date. The Claimant failed to comply with this deadline save in respect of the post dismissal schedule which was re-submitted at a later date in any event. He subsequently provided the various additional documents as per paragraph 30 above.

277. The Claimant says he was given insufficient time to complete the task, but I disagree given that it was an exercise in clarifying the existing claims. He was only required to put the allegations in each claim in the same document and cross refer them to the corresponding ET1. As I note above, he says that even if he had been allowed three months to complete the exercise it would not have been enough time.

278. At <u>this</u> hearing, the schedules facilitated little in understanding the legal basis of

the claims. It was hoped initially that they would assist the Claimant in making him respond to specific headings thereby drawing out with clarity what the factual and legal basis of each allegation from lengthy narratives. However, the result was voluminous additional allegations and this further hearing in which most of the allegations have been refused as amendments and little survives.

279. The only clear explanation of any claim is the document setting out the premise of his unfair dismissal claim which was received on 18 April 2022. I move on to this later.

280. It has been an immense exercise examining the allegations as part of the application to amend but it is abundantly clear that, despite such an unusual amount of assistance, the Claimant is largely unable to provide the necessary information to allow the claim to move forward.

The application to amend

281. The Claimant has continually sought to add to or change the basis of his claims. Applications to amend are not uncommon but this one involved the consideration of two hundred and sixty-nine amendments, many of which lacked clarity or any basis in law.

282. Claims 1, 2, 3, 4 and 6 have all been subject to the application ranging from the introduction of numerous new allegations to a wholesale relabelling of claim 6. The Respondent submits this is an attempt to '*hedge his bets'* and I am inclined to agree.

283. He also sought to re-introduce matters that were refused as amendments in May 2021.

284. Furthermore, even after this hearing the Claimant continues to try and introduce more matters that will no doubt be subject to a further application to amend (more below at paragraph 300).

Estoppel

285. The Claimant has sought to re-introduce allegations that he knows are estopped into subsequent claims. Despite being resolute that the Judge's decision on estoppel in 2009 and mine in 2021 were errors in law, he has failed to appeal them.

286. He made it clear in May 2021 that he was going to appeal my decision but, despite being aware of the deadline, failed to attempt to do so until January 2022. Even then, when he was unable to submit the documents electronically, he sent them elsewhere without giving a thought to following up to ensure receipt or seeking assistance from the EAT itself.

287. In this hearing, he said that he was going to apply for a judicial review of both,

but any application would be substantially out of time.

Delay

288. It is questionable why, when the Claimant is alleging discrimination dating back to 1991, he did not act on it between 2009 and 2020. He has given no cogent explanation for the delay and relies on arguing that the allegations amount to a continuing act.

289. He also continues to argue that he can sidestep estoppel because matters pre-dating the 2009 litigation form part of a continuing act.

290. In terms of the final hearing itself, the Claimant is keen for it to be vacated and I cannot comprehend why.

Arrears of pay/'other pay'

291. The Claimant has not attempted to particularise these claims, despite being ordered to do so, save where they fall under other legal headings.

Other matters

292. In explaining his delay in providing the detail of his claims, the Claimant asserted that there had been a stay of the ET process for a year to allow for internal processes to be completed. He went on to say that I directed the Respondent to conclude his grievances by May 2021 and that was why the May 2021 hearing could not complete.

293. He further asserted that I told him that the schedules could not be completed until the grievance outcomes had been delivered.

294. This is simply not the case. There was never a stay of proceedings, nor did I direct the Respondent to complete internal grievances. I do not understand how or why the Claimant has attempted to re-write the history of this litigation given the chronology to date. I add here that there is no suggestion of ill health on the Claimant's part.

295. Further, he also said that in November 2020, I told him that an equal pay claim could not be issued whilst he was still employed. Again, this is simply not the case. I explained to him at the time that if he was claiming differential treatment in terms of pay because of race it should be advanced as a race discrimination claim. I also recall explaining that he could not present a breach of contract claim whilst he was still employed. However, the Claimant was adamant that I had said this simply, in my view, to justify bringing a claim under the equal pay provisions to take advantage of the six-month limitation period. Had he presented the claim as race discrimination it would have been out of time.

296. Finally, he also suggested that I had deliberately postponed the November 2021

PH because I knew he was going to appeal my estoppel judgment which again, is simply not the case.

297. It has not helped that the Claimant has changed the basis of, and explanations for, his claims many times and still cannot articulate with any precision what they are. It is also difficult to elicit a clear answer to a clear question from him.

Future hurdles

298. As part of the disclosure process, the Claimant has requested a copy of every single e-mail he has sent whilst employed by the Respondent. This is neither necessary or proportionate and is indicative that the Claimant's conduct will thwart any final hearing preparation.

299. The Claimant will not seek professional legal assistance, despite having the means to do so (as evidenced by his means in respect of a deposit order). He believes that only he can put his case across.

300. Even after the close of this hearing, the Claimant continues to write to the Tribunal and the Respondent seeking to add new matters. Furthermore, he has submitted a reconsideration request of the equal pay strike out decision within which he states that he now wishes to pursue the claim on the grounds of sex and introduce a breach of contract claim.

Direct race discrimination

301. Returning to what is left of claim 1, as a I set out above, allegations 32, 33, 34 and 42(b) are rightly still subject to a deposit/strike out application. By way of example, allegation 32 simply reads:

> *"By not appointing acting up roles there was lack of opportunity for promotion".*

302. Those allegations not subject to an application are 29, 37, 38, 39, 40, 43, 44, 45 and 46 from a total of 216 allegations made across the various schedules. I set them out herein:

303. Allegation 29 dates back to January 2017 and reads:

> *"I was not invited onto the College Executive Committee despite being told previously by Louise Pigeon that my role was a College Executive Role. My four contemporaries in different colleges were invited into their Executive Committees"*

304. Allegation 37 dates back to August 2018 and reads as follows:

> *"There were three applicants for the Course Director role and Kim Smith and I were interviewed for the post in August 2018. I was interviewed by*

Warren Manning and Jenny Bennett.

Due to the positive comments I got in the interview from the Dean of College, Warren Manning, I think I did better in the interview but Kim Smith got the job anyway.

Warren Manning told me that Kim Smith answered one question better than me. He therefore lied because there were not any standard questions asked of us.

I didn't get the job because of my race. The decision not to appoint me came from Jenny Bennett or someone higher up, not Warren Manning.

The comparator relied upon is Kim Smith."

305. Allegation 38 dates back to September/October 2018 and reads:

"*Richard Side e-mailed Li Lui in September/October 2018 requesting I be removed from partnerships because of my race*". A hypothetical comparator is relied upon.

306. Allegation 39 dates back to 2018 and reads;

"Richard Side doesn't follow usual procedures and he intervenes after validation by requiring £60,000 from the TVI Partnership. This was because of race and he wanted to remove me from partnerships." A hypothetical comparator is relied upon.

307. Allegations 40 dates back to 2018 and reads:

"I was treated less favourably because of my race as I was disciplined for an alleged breach of the Anti-Bribery and Hospitality Policy when there is a culture of accepting gifts and hospitality by all international partnership staff both academic and administrative. The discriminators were Kamal Ometis – investigating officer, Warren Manning – disciplinary chair and Richard Side – who made the allegation. An actual comparator is relied upon – John Coyne, who attended Botswana Accounting College with his wife at BAC's expense, even though his wife was nothing to do with the collaboration".

308. Allegation 43 relates to without prejudice discussions.

309. Allegation 44 dates back to January 2019 and reads:

"I was interviewed for the post of Acting Head of Department. The panel comprised Louise Pigden, Li Lui and Sabuj Malik (Headof Engineering). Kim Smith was appointed. Louise Pigden, as chair, had no intention of appointing me. She was not going to appoint me because of my race.

She failed to direct panel members to take notes in order to hide discrimination". A hypothetical comparator is relied upon.

310. Allegation 45 dates back to a disciplinary hearing in May 2019 and he alleges that the disciplinary panel was not impartial because they had appointed Louise Pigden over him in 2013. He states that:

> *"I was discriminated against because the Panel only focused on my e-mail and didn't take all the circumstances into account. I was disciplined because I am black. Kim Smith lied and said in the disciplinary investigation he said he had told me not to speak to the student but he did not say that to me. He lied to ensure that I was disciplined. He wanted me disciplined because - I can't be sure - think it could be because of black (sic) or possibly because he felt threatened by me and my influence in the department - all I know is he lied to ensure this happened"*. A hypothetical comparator is relied upon

311. Allegation 46 dates back to August 2019 in relation to non-payment of over hours. He says:

> "*On 18 August 2019 I e-mailed Kim Smith attaching an over hours worked payment form and asked for payment. I was not paid. I do not know why I wasn't paid but I think it was because of my race*". A hypothetical comparator is relied upon.

312. The <u>last act relied on</u> therefore occurred in <u>August 2019</u>, a year prior to the issue of claim 1. The allegations still subject to a deposit/strike out application date back as far as 2017 and all occurred prior to August 2019. Accordingly, the claim is prima facie out of time and the question of whether the Tribunal has jurisdiction to hear it must be determined.

<u>Conclusions</u>

Conclusions - direct race discrimination

313. I have considered each element of Rule 37 in turn. Prior to doing this I have re-read the relevant section of the Equal Treatment Benchbook which describes the difficulties faced by litigants in person. I balance this with the fact that the Claimant is well versed in grievances and litigation, as well being a Trade Union representative at some point in his career, so has a good grasp of employment law.

314. I am not persuaded that the direct race discrimination claim is scandalous. Whilst I agree with the Respondent that it appears to be a commentary of his dissatisfaction with management decisions, this itself is not scandalous. His narrative explains all matters that he takes exception to throughout his employment, but not in a manner that amounts to vilification.

315. However, I am satisfied that the claim is vexatious. Whilst only thirteen allegations remain, they should be considered in the context of the allegations of direct race discrimination as a whole and the litigation more generally.

316. The Claimant alleges institutional racism spanning a period of thirty years. He litigated in 2008 and 2009 alleging race discrimination and notably, in the 2009 litigation he told the Employment Judge that his claim was limited to five allegations. In this litigation, he has sought to introduce allegations dating back to 1990 – some nineteen years prior. He has failed to explain why he neglected to advance those allegations in 2008/2009 or in a reasonable period thereafter. He only raised them for the first time in 2020 – some thirty years later.

317. The Claimant was estopped from relying on three matters in 2009 but has sought to reintroduce them, along with additional allegations that are estopped, in this litigation having fully understood the implications of that decision.

318. He has also chosen to ignore my 2021 estoppel decision and attempted to reintroduce matters that I have already determined are estopped.

319. He is adamant that both judgments are erroneous in law but has not taken any successful steps in instigating an appeal. If he truly wanted to appeal, he should have taken proper care to instigate the same within the correct time limits.

320. He further tried to re-introduce three allegations that I had refused in the May 2021 application to amend.

321. In terms of the allegations themselves, the Claimant has been unable to articulate them clearly. It was hoped initially that given the lengthy narrative accompanying the ET1, schedules with clear, simple headings would help extract the legal claims but this exercise proved fruitless.

322. Thereafter, it took two and a half sitting days to understand the allegations from the Claimant's perspective and, as I explain above, I witnessed the Claimant change his explanations both of and for events numerous times. If the Claimant cannot express in writing or orally, with assistance, what his complaints are with reference to the law (which has been explained to him in simple and clear terms), it begs the question whether the Claimant genuinely holds the belief that they amount to discrimination.

323. Of those remaining allegations, four remain subject to a deposit/strike out order and one relates to without prejudice discussions. If they survive the application, they will require further particularisation.

324. Allegations 29, 38, 39, 43, 44, 45 and 46 simply allege discrimination absent any further explanation and also require further particularisation. Referring back to the original particulars of claim, they open by saying "*why I feel discriminated against by the University of Derby*" and within the lengthy narrative race is not mentioned until paragraph 132 where within he explains generically that the

Respondent is institutionally racist but goes no further than that.

325. Tellingly, the fact that one hundred and sixty-seven new allegations of discrimination, whistleblowing and victimisation arose after his dismissal but predominantly pre-date claim 1 indicates that the Claimant raised them simply to subject the Respondent to inconvenience, harassment and expense way out of proportion to any gain likely to accrue to him. He offers no credible explanation for why they were not raised earlier.

326. I also remind myself of the 2009 judgment in which it was recorded that the Claimant had no further complaints and his comments in the May 2021 PH that he made an active choice about which allegations of discrimination he wanted to rely on.

327. I am with the Respondent's submission that the Claimant has attempted to '*hedge his bets'* by introducing more and more allegations and attempting to re-label allegations after realising the difficulties he faces with the direct discrimination claim.

328. The Respondent has already been put to significant cost attending six preliminary hearings following which very few allegations remain. Those that do remain must be subject to a determination on jurisdiction and four remain subject to a deposit/strike out application if the claim survives.

329. The Claimant's approach to these proceedings in trying to advance his claim in this way, in my view, amounts to an abuse of the Tribunal process.

330. Given all of the above, I am satisfied that the direct race discrimination claim is vexatious and is, therefore, struck out. I acknowledge that this is a draconian step but, in my view, having had the primary conduct of the case to date, it is a proportionate step in light of the Claimant's conduct in these proceedings.

331. For the avoidance of doubt, had I not struck out the direct race discrimination claim because it was vexatious, I would have struck it out because it has been conducted in an unreasonable and vexatious manner for the same reasons as above.

332. In addition, I have witnessed the Claimant change the facts and explanations in this case to suit and make false statements about this litigation which calls into question his reliability more generally. His assertion that these proceedings were stayed and that I directed the Respondent to complete internal grievances were not simply mistakes. Rather, his motivation for saying the same was in the context of seeking to blame the Respondent for his delay in bringing matters to these proceedings. He is quick to blame the Respondent and the Tribunal for matters that are his responsibility and within his control.

333. If I were to strike the claim out under this part of Rule 37, I must consider whether a fair trial is still possible. I would conclude it is not for a number of reasons.

334. As above, given that the last act relied on occurred in August 2019 the case is prima facie out of time and jurisdiction needs determining, as does the deposit/strike out application if the allegations survive jurisdiction.

335. Both points need resolving before the final hearing which will result in the existing trial window being vacated. There is simply not enough time to dispose of them beforehand and the Respondent should not have to attend a final hearing without knowing the case it has to meet if it is to have a fair hearing.

336. It has taken six preliminary hearings simply to get to this point due to the Claimant's conduct of the proceedings at cost not only to the Respondent but also other Tribunal users who are waiting to have their cases heard.

337. I have considered whether a lesser penalty would be appropriate, but a lesser penalty would not change the fact that the above matters need determining. Nor does it change the fact that the Claimant continues to seek further amendments.

338. In terms of further particularisation, I am conscious that the remaining allegations have been recorded after two and a half days of Tribunal resource and assistance and whilst I have done my best to draw the salient information out from him, to do more would result in me (or another Judge) effectively pleading his claim for him. I must balance the fairness to both parties and the Claimant has already received a disproportionate amount of assistance from the Tribunal.

339. If I were to issue an unless order to provide a clearer explanation of his claim where required, I have little confidence that he would be able to comply given that he has been unable to do so to date. He would require time to comply with the terms of the order which will also inevitably mean that the final hearing would have to be postponed.

340. Furthermore, as I have explained above, the Claimant's explanations change with such frequency which not only casts doubt on the veracity of his claims in the first instance, but also runs the risk of more allegations being introduced if he were given another bite of the cherry. This is already borne out in more recent correspondence from the Claimant referred to at paragraph 300 above and which still needs dealing with.

341. A costs order would also fail to remedy the problem for the same reasons.

342. If the final hearing is postponed and re-listed next year, the Respondent is faced with potentially defending allegations dating back to 2017 (if they survive further applications), some six years prior when relevant witnesses have already left the Respondent and others may do so too. Whilst this itself is not alone a barrier to a fair hearing, Article 6 of the European Convention on Human Rights sets out the right to a fair trial within a reasonable time. In my view, a trial some three years after the claim has been issued is not within a reasonable time.

343. If the Claimant had not conducted the proceedings in an unreasonable and vexatious manner the existing trial window could have been preserved. However, if the race discrimination claim was permitted to proceed, a fair hearing would not be possible within that window.

344. The overriding objective of the Tribunal is to ensure that the parties are on an equal footing and to deal with cases without delay where possible and to save expense. At this stage the Respondent is not on equal footing and there is no certainty that the Claimant will ever be able to advance his claim in a manner that allows it to be litigated fairly, proportionately and consistently, particularly given the Claimant's most recent attempts to change the basis of his equal pay claim and introduce a breach of contract claim. The Respondent is entitled to finality of litigation and another year's delay will affect the cogency of the evidence even further.

345. For these reasons, a further delay would not be in the interests of justice and I would conclude that a fair trial would no longer be possible.

346. I have also considered the Respondent's submissions that the claim should be struck out because it has no reasonable prospect of success, primarily because the allegations are not clearly pleaded. However, I think this consideration falls more appropriately within the claim being vexatious and the manner in which the proceedings have been conducted.

347. I say the same in respect of its submissions about his breach of the Tribunal's orders.

Conclusions - whistleblowing detriment, automatically unfair dismissal and victimisation claims

348. <u>All allegations</u> on which the whistleblowing detriment, automatically unfair dismissal and victimisation claims are predicated failed to survive the application to amend. Accordingly, there is no legal basis on which they can be advanced and must be struck out because they have no reasonable prospect of success.

Conclusions - arrears of pay/'other pay'

349. The Claimant has not particularised these claims as standalone claims so there is no legal basis on which they can proceed. Accordingly, they are struck out because they have no reasonable prospect of success.

Conclusions - the unfair dismissal claim

350. The situation is different in respect of the unfair dismissal claim which I do not consider to be scandalous or vexatious. Claim 2 has always been a claim for '*ordinary*' unfair dismissal and remains untouched by the application to amend.

351. The Claimant issued claim 2 shortly after his dismissal and claim 6 is merely a continuation of the same given that it relates solely to his appeal which was not concluded until November 2021. I have directed above that claim 6 should be consolidated with claim 2.

352. The Claimant has provided a succinct e-mail dated 18 April 2022 setting out clearly why he asserts his dismissal was procedurally and substantively unfair. Whilst the provision of this information was late in breach of my order, it does not render a fair hearing within the existing trial window impossible. The Respondent can respond to and defend the claim, and, with robust case management and adherence, it can proceed.

353. However, the claim must be confined to the ambit of section 98 ERA only and is not an opportunity for the Claimant to seek to re-introduce his race discrimination, whistleblowing and victimisation claims through the back door. I have made case management orders which will be sent to the parties separately and will set out the relevant matters within the Claimant's e-mail dated 18 April 2022.

354. I have also reduced the hearing length but to ten days to err on the side of caution. The case will be heard towards the end of the existing trial window thereby leaving enough time for the parties to comply with the case management orders in readiness for the same.

355. However, I urge the parties to consider if the hearing can be concluded in less time to free up any excess days for other Tribunal users.

____

Employment Judge Victoria Butler

Date: 25 May 2022

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.