EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4110004/2021

Held via Cloud Video Platform (CVP) on 1 March 2022

Employment Judge McManus

Mrs Natalie Ann Wright	**Claimant** **In Person**
Ark Housing Association	**Respondent** **Represented by:** **Ms S MacPhail - Solicitor**

PRELIMINARY HEARING DECISION

Decision

- The amendment in respect of a claim under section 44 of the Employment Rights Act is refused.
- The amendment in respect of the claim under section 13 of the Equality Act 2010 (sex discrimination) is allowed.
- The claim under section 13 of the Equality Act 2010 (sex discrimination) is time barred and is dismissed.
- The claims under the Equality Act 2010 based on the protective characteristic of disability (disability discrimination) proceed and a Final Hearing will be arranged.

Background

1. This Preliminary Hearing ('PH') was for the purpose of considering whether or not the claimants' application to amend the ET1 should be allowed. A Joint Bundle was prepared for today's PH, with page numbers from 1 - 110. The documents in that Bundle which are mentioned in this decision are referred to by their page number in that Bundle (JB1 – JB110)

2. A PH for the purposes of case management took place over the phone on 3 September 2021. In the Note issued following that Telephone Case Management Preliminary Hearing ('TCMPH'), it is recorded that the ET1 initiated claims for discrimination under the Equality Act 2010 relying on the protected characteristics of pregnancy and disability and referred to an incident where there were no suitable arrangements for breast feeding, as well as the respondent's position in respect of the claimant wearing a face mask at work.

3. It was recorded in the Note issued following the TCMPH in September 2021 that it was clarified at that TCMPH that in respect of the alleged failure to make suitable arrangements for breast feeding, the claimant was not bringing a claim for pregnancy discrimination but for direct sex discrimination under section 13 of the Equality Act 2010. That claim relies on the circumstances relied upon in the ET1 as being pregnancy discrimination. The labelling was changed to sex discrimination because the claimant's baby was over 26 weeks at the time of the alleged incident. The alleged incident relied upon is failure to provide accommodation for the claimant to express when making arrangements for the claimant's shift on 9 September 2020 and failure to carry out a risk assessment.

4. That Note records that the claimant relies on having disability status as a result of asthma, anxiety, depression and PTSD. The claimant's claims in respect of disability discrimination relate to the respondent's requirement for her to wear a face mask at work.

5. In their ET3, the respondent denies discrimination. It is their position that a claim relying on any failure to provide suitable facilities for expressing on 9 September 2020 is timebarred. It is further denied that the claimant raised with the respondent that there was any issue in respect of facilities due to be provided on that day. The claims in respect of disability discrimination, pregnancy and maternity discrimination or sex discrimination and unlawful deductions are disputed and further specification was called for. It is denied that the Tribunal has jurisdiction to hear a claim in respect of data protection.

6. At the TCMPH in September 2021, the claimant was directed to provide a disability impact statement. She was also directed to provide further specification of her claims by answering questions set out in the Note issued following the TCMPH. The questions include:-

- "*Are you making a claim under section 44 of the Employment Rights Act 1996?*
- *If so, specify the subsection of the Act under which the claim is brought (that is, section 44 1 (a) – (e)).*

7. The Note records that the claimant would consider whether she would agree to disclosing her medical records. It was noted that a further TCMPH would be arranged and that consideration would be given as to whether it was necessary to have a Preliminary Hearing to determine whether the claimant had disability status. There is no mention in that Note of any potential issue in respect of time bar.

8. The claimant subsequently sought to answer the questions set out in that Note. She provided further information on 17 September 2021 (JB59 – 66). The respondent provided their responses to that information (JB67 – 73) and asked for further specification (JB74-75). The claimant then answered that call for further specification (JB76-88). The respondent's position was that the claimant's claim required to be amended if the claimant sought to bring claims of sex discrimination and under section 44 of the Employment Rights Act 1996 ('ERA'). The claimant then made an application to amend, the terms of which are at JB89 – 90. This PH is to determine whether the ET1 should be allowed to be amended in terms of that application. The terms of the proposed amendment are:-

"*Sex discrimination.*

On 8th September 2020, the Claimant received an email from The Respondent's Ailsa Mitchell which said that it was a management instruction that her shift (for 9th September 2020) had now changed to the office. The Claimant was threatened with disciplinary action if she did not attend the

meeting at the office. This was to discuss the reasons why the Claimant was not wearing a mask which violated the Claimant's dignity. It is unreasonable for the Respondent to expect the Claimant not to be able to breastfeed during a 7 hour shift, which was not the mutually agreed upon venue. The Claimant's child was older than 26 weeks at the time the incident, so therefore comes under Sex discrimination. The Respondent never done a Risk Assessment for the Claimant to accommodate her breastfeeding needs, despite the Claimant requesting this to be done on 24th June 2020, which provided the Respondent with the information to be able to do this.

Section 44 of the Employment Rights Act.

The subsection of this act is 44 (1) [F4(1A) (a) + (b).

On 8th September 2020, the Claimant received an email from The Respondent's Ailsa Mitchell which said that it was a management instruction that her shift (for 9th September 2020) had now changed to the office. The Claimant was threatened with disciplinary action if she did not attend the meeting at the office. This was to discuss the reasons why the Claimant was not wearing a mask which violated the Claimant's dignity. This should have been up to the Claimant whether or not she wanted to discuss her disabilities. It is unreasonable for the Respondent to expect the Claimant not to breastfeed during a 7 hour shift, in a place which was not the mutually agreed upon venue, nor was there a clean, warm private room there.

The Claimant is making this claim because she was instructed to change her shift without adequate notice. The Claimant felt she would be placed in a circumstance of danger which she reasonably believed to be serious and imminent and which she could not reasonably have been expected to avert. The Claimant felt that she took appropriate steps to protect herself from the danger by declining the offer. The danger was the risk of mastitis which is harmful to the Claimant and the child she was/is breastfeeding. The Claimant has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer."

Findings in Fact

9. The following facts relevant to the issue for determination at this PH were found or admitted.

10. The ET1 claim form was submitted to the Employment Tribunal by the claimant on 16 June 2021 (JB4). Prior to starting these proceedings, the claimant contacted ACAS. The ACAS ECC Certificate (JB3) states that the date of receipt by ACAS of the Early Conciliation notification was 15 April 2021 and that the ACAS Early Conciliation Certificate was issued on 27 May 2021.

11. The circumstances relied upon in the ET1 included the respondent's alleged failure to provide facilities for the claimant, as a breast feeding mother, to express her milk at the work location of her changed shift on 9 September 2020 and reliance on alleged failure of the respondent to carry out a risk assessment. The date of the alleged treatment relied upon is 8 September 2020, being the date when the claimant was directed to attend the meeting on 9 September 2020 (which did not then take place). It is those circumstances which the claimant relies on in her application to amend, both in respect of the claim for sex discrimination and the claim under section 44 of the Employment Rights Act 1996.

12. Shortly after 8 September 2020, the claimant raised a grievance with her employer. The claimant believed that she could not contact ACAS until her employer had dealt with the grievance. The claimant took advice from her trade union advisor at UNITE. She originally spoke to Sandy Smart from UNITE. Graham Turnbull at UNITE accompanied the claimant to subsequent grievance meetings with the respondent. The claimant had difficulty obtaining advice from her Trade Union representative, who the claimant understood was suffering from a close bereavement.

13. There was some delay in the claimant's grievances raised with the respondent being dealt with. The claimant was advised of the outcome in April 2021. On receiving the outcome, the claimant contacted ACAS and thereafter submitted her ET1 claim form to the Employment Tribunal. The

claimant believed that she was going through the proper channels by awaiting the outcome of her grievance raised with her employer before submitting a claim to the Employment Tribunal. The claimant had thought that the issues would be resolved through the grievance process.

14. The grievance raised by the claimant in September 2020 was in respect of the respondent's requirement for her to wear a face mask at work and the way she was spoken to by managers. The claimant raised the issue of her not being provided with a suitable facility for expressing during her shift on 9 September as part of the appeal of that grievance (in November 2020) and also in a grievance raised in December 2020.

15. The claimant had been due to be on maternity leave until October 2020. The claimant was receiving counselling for postnatal depression. The claimant discussed with her counsellor that she would return to work following the end of her counselling sessions. The claimant has a history of mental health issues. It was thought that a return to work may assist her recovery. On 24 June 2020 the claimant wrote to the respondent giving 8 weeks' notice of her decision to return to work from maternity leave early, on 24 August 2020 (JB102 – 103).

16. The claimant was put on furlough by the respondent following her return to work in August 2021 and advising the respondent of her position in respect of not wearing face masks. The claimant was not certified as unfit for work. For two weeks she carried out administrative work for the respondent from home, using a laptop issued by the respondent. When the laptop was recalled by the respondent, the claimant did not carry out any work for them.

17. Following the laptop being returned to the respondent, the claimant's mental health deteriorated. She struggled to get out of bed. She avoided leaving the house. She experienced panic attacks. The claimant did not consult her GP about her mental health at that time because she knew that GP resources were tight because of implications from COVID 19 and because she had completed her counselling sessions with Postnatal Depression ('PND') Borders Counselling and Support Service and felt that she would be a failure

if she went back. The claimant had support from her husband, mother and friends. She used coping mechanisms which she had developed to deal with traumatic events in her past.

18. The claimant has a long history of suffering from mental health issues connected with traumatic events in her past. She suffers from panic attacks. Her reactions can be unpredictable and there are many triggers. A trigger for panic attacks was the fear of her breasts becoming engorged and leading to mastitis if unable to breast feed or express.

19. The claimant's extract GP records (JB110) record discussion with the claimant in October 2020 but do not record any discussion about the claimant's poor mental health at that time. The claimant had been discharged from Postnatal Depression ('PND') Borders Counselling and Support Service in July 2020 (JB104). The GP record for 5 December 2019 notes that the claimant did not wish medication (re mental health) and that she had open access to PND counselling.

20. The claimant sought advice from her Trade Union. The wife of her Trade Union advisor died and he was not able to be contacted to provide her with assistance in lodging her claim with the Employment Tribunal. The claimant knew that there were time limits for claims to be lodged with the Employment Tribunal. She believed that the claim had to be lodged by January 2022. Due to the difficulties she had in contacting her trade union advisor, the claimant drafted and submitted the ET1 claim form herself.

Relevant Law

21. Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules'), which states:-

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

22. The duty to deal with cases fairly and justly is a duty of the Tribunal towards all parties before it.

23. The claimant now seeks to bring a claim under section 44 of the Employment Rights Act 1996 ('ERA'). The proposed amendment refers to subsection " *44 (1) [F4(1A) (a) + (b)."* There is no such subsection.

24. The terms of section 44(1) are:-

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that - …….

(a) Having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) Being a representative of workers on matters of health and safety at work or a member of a safety committee –

(i) In accordance with arrangements established under or by virtue of any enactment, or

(ii) By reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions such as a representative or a member of such committee,

[(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise,]

(c) Being an employee at a place where –

(i) There was no such representative or safety committee, or

(ii) There was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful to health or safety,

(d) In circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) In circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or another person from the danger."

…."

25. The time limit for raising a claim under section 44 is set out in section 48(3) of that Act and is as follows:-

'*An (employment tribunal) shall not consider a complaint under this section unless it is presented –*

(a) Before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) Within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.'

26. The time limit for raising claims under the Equality Act 2010 is set out in section 123 of that Act, as follows:-

'(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

(3) For the purposes of this section –

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

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

27. The key test for considering amendments has its origin in the decision of the National Industrial Relations Court in *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR650, 657B_C:

"*In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those*

proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

28. The leading authority in respect of amendment applications is *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661,* [1996] ICR 836. There the EAT confirmed that 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, and set out the factors to be considered as including:-

(ii) The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;

(iii) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

(iv) The timing and manner of the application.

29. In *Selkent*, Mummery J, as he then was, set out at paragraph 26:

"…an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application."

30. The approach taken in Selkent was followed by the EAT in *Vaughan v Modality Partnership 2021 ICR 535,* where in a claim for unfair dismissal and alleged detriment as a result of making protected disclosures, the ET had refused to allow amendment to add two further disclosures. The EAT held

"..in deciding whether to exercise the discretion to allow an amendment, the employment tribunal had to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it; that, in doing so, it should take into account all the relevant circumstances, and, while it was impossible and undesirable to list all the relevant circumstances, they included consideration of the nature of the amendment, the applicability of time limits and the timing and manner of the application; that, however, the real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise; and that the employment judge had directed herself as to the relevant law, applied it on the basis of the submissions made to her and reached a permissible conclusion when deciding to refuse the amendment."

31. Lady Smith summarised the relevant law in respect of amendment applications (at paragraphs 20 – 26) in *Margarot Forrest Case Management V Miss FS Kennedy* UKEATS/0023/10/BI. That decision was made with reference to the 2004 Tribunal Procedure Rules, but remains relevant, as follows:-

> *"20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Rules 10(2)(q) and 27(7)). Thus, if a claimant's representative seeks permission to alter, add to or subtract from what is written in the claimant's form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim."*

32. In *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06MT, the EAT helpfully set out the normal procedure which should be followed by a Tribunal when considering an amendment to an ET1. That case made reference to *Ali v Office of National Statistics [2005] IRLR 201,* where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

"*39… …a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states."*

33. The position set out in paragraph 20 of *Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT*, is relevant to the issues in this PH:-

> *"20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661."*

34. In *British Coal Corporation v Keeble 1997 IRLR 336*, the Court of Appeal set out the factors to be taken into consideration when considering whether it would be just and equitable to extend the three month time limit, being in particular:-

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;

- The extent to which the party sued has co-operated with any requests for information;

- The promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action;

- The steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

35. In *E v X, L & Z* UKEAT/0079/20/RN(V) & UKEAT/0080/20/RN(V), the EAT gave a useful summary of relevant case law and then set out the principles to be applied when dealing with issues of time bar, amendment and strike out. The key principles were set out from para 50, as follows:-

"*50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:*

1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: ***Sougrin;***

2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: ***Robinson****;*

3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: ***Sridhar****;*

4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out,

*because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue: **Caterham**;*

*5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**;*

*6) An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz**; **Sridhar**;*

*7) The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**;*

*8) In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: **Caterham** (as qualified at paragraph 47 above);*

*9) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson** and paragraph 47 above;*

*10) If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**; 11) Thus, if a tribunal considers (properly) at a preliminary hearing*

*that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**;*

*12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**;*

*13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.*

36. The leading authority on the position where a claim has been submitted outwith the time limit as a result of a claimant following the advice of an adviser is *Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379 CA***.** In that case the adviser was a solicitor. The general principle in *Dedman* is that where a claimant puts their case in the hands of a solicitor, that solicitor's failure to present the claim within the relevant time period will

not lead to a finding that it was not reasonably practicable for the claim to be lodged in time. It is not every case where a claimant is bound by the fault of the adviser, as each case depends on its own facts and circumstances (*Riley v Tesco Stores Ltd and anor [1980] ICR 323, CA***).** The relevant circumstances may include whether the advisor was a solicitor or other advisor (*London International College Ltd v Sen [1993] IRLR 333, CA***).** Lord Phillips' view following his review of the Dedman principle in the Court of Appeal in *Marks and Spencer plc v Williams-Ryan [2005] ICR 1293, CA***,** was that the correct proposition of law derived from *Dedman* is that where the employee has retained a solicitor to act for them and that solicitor fails to meet the time limit because of the solicitor's negligence, the solicitor's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the tribunal (the test in respect of making a claim to the Employment Tribunal for unfair dismissal out with the statutory 3 month time limit) . That principle was confirmed in *Northamptonshire County Council v Entwhistle [2010] IRLR 740, EAT***,** by Mr Justice Underhill, then President of the EAT. Underhill P accepted that there could be exceptions to the Dedman principle, such as where the adviser's failure to give the correct advice was itself reasonable. In a case where a claimant has consulted skilled advisers, the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as he should reasonably in all the circumstances have been given. Following *Remploy Ltd v Brain EAT 0465/10**,*** the tribunal should look at the wording in section 111 and to what is essentially a question of fact for the tribunal to decide after taking into account the circumstances of the particular case, whether the adviser is a professional or another, such as a CAB or trade union adviser. That case law relates to the reasonably practicable test rather than the just and equitable tester time limits.

37. Where a claimant has a debilitating illness or condition, that may usually only cconstitute a valid reason for extending the time limit if it is supported by medical evidence. Such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the

claimant from submitting the claim on time (e.g. *Pittuck v DST Output (London) Ltd ET Case No.2500963/15).*

Submissions

38. The claimant relied on her evidence and her position that the claims now specified in the amendment application were included in her original ET1 claim form, the amendment application being made as a result of further specification being requested. She relied on the change of label from maternity/ pregnancy discrimination to sex discrimination being discussed at the previous PH and that the change of label was made because her baby was over 26 weeks old, but that the facts on which the claim was based remain the same.

39. In relation to the proposed amendment re section 44 claim, the claimant's position was that the facts on which that claim is based are set out in the ET1 and that she just put the name of the legislation relied on when asked for further particulars.

40. In response to the respondent's representative's position re the section 44 amendment, that no detriment had been suffered by the claimant, the claimant's position was that the detriment was that she had a panic attack at the thought of going to a place where there was no proper facilities for expressing and on being threatened with disciplinary action if she did not attend.

41. The claimant agreed that the only incident of sex discrimination was the incident re arrangements for the meeting on 9 September 2020.

42. The respondent's representative's position on the amendment application is set out in their email to the Tribunal of 20 January 2021 (JB 91 – 93). In their oral submissions, the respondent's representative accepted that the proposed amendment re sex discrimination is '*more of a relabelling than a new claim*'. It was argued that the proposed amendment re the section 44 claim is not a re-labelling. It was confirmed that objection was made to both proposed amendments. They invited consideration of the following

factors in considering whether or not the amendment should be allowed: time bar; time limits; whether it was the addition of new facts and the timing and manner of the application.

43. The respondent's position is that the claimant is seeking to introduce a new head of claim 7 months after the lodging of the ET1 on 16 June 2021. Following the guidance set out in *Selkent Bus Co Ltd v Moore 1996 ICR 836 EAT*, it is the Respondent's position that allowing the amendment would place the Respondent at a considerable disadvantage and the balance of hardship would be weighted disproportionality against them. Reliance was placed on *Vaughan v Modality Partnership 2021 ICR 535 EAT* and the overarching consideration being the balance of injustice and hardship to the parties in refusing or granting the amendments, noting that the Tribunal must also take account of the practical importance and consequences of allowing or refusing an amendment. Reliance was placed on the claimant pursuing other claims before the Employment Tribunal. They relied on the claimant still potentially having a remedy for her claim of disability discrimination, even if the proposed amendments are not allowed.

44. It is the Respondent's position that the injustice borne by the proposed amendment outweighs the hardship that would be suffered by the Claimant in not permitting the amendment. It is their position that whilst the facts of the proposed amendment remain similar to that already plead by the Claimant in her ET1, this new head of claim would require the Respondent to respond and defend a new claim and necessitate a new line of enquiry. (No details were given as to why that would be the case, given it is the same circumstances relied upon.) It was the respondent's position that a claim re alleged failures re the meeting on September was time barred at the time of the ET1 being submitted (16 June 2021), having taken place on 8 September 2020, and the claim being therefore 13 months out of time. Reliance was placed on there being no indication of reliance on a continuous course of conduct and that it not being disputed that breastfeeding arrangements were in place other than at the location for the proposed meeting in September 2020. It was submitted that both a claim for sex discrimination based on the

facts pled, and a claim under section 44 were timebarred at the time of the original ET1 being submitted. Reliance was placed on the claimant having had recourse to advice from a Trade Union and having possible recourse against that Trade Union. It was no argued that the claimants claim of disability discrimination was timebarred.

45. It was submitted that the proposed amendment to bring a claim under section 44 of the ERA is not simply a relabelling exercise by the Claimant. It was submitted that that proposed amendment introduces a new head of claim, not included in the ET1. Reliance was placed on the legal tests set out section 44 requiring different enquiry and consideration by the Tribunal than the other claims brought. It was submitted that allowing the proposed amendments would incur additional time and expense for the Respondent, not least because it will require a request for additional specification of this claim and thereafter amendment of the Respondent's ET3. It was the respondent's position that allowing the proposed amendment would then incur additional costs for the Respondent in preparing and defending the case, together with an increase in the time and resources spent. It was submitted that by contrast the hardship in not permitting the amendment will not be substantial for the claimant as she has legal recourse in the other claims proceeding in the case (particularly in respect of disability discrimination).

46. It was the respondent's position that the hardship suffered by the claimant would be less as this would be the refusal of a prima facie weak claim that lacks specification. Reliance was placed on the claimant not having specified what actual detriment she alleges to have been subjected to, as required under section 44(1)(a). It was the respondent's position that if the amendment is allowed re the section 44 claim, then an application would be made for strike out of that claim, based on it having no reasonable prospects of success. It was submitted that taken at its highest that claim could not be successful as only potential detriments are alleged. It was submitted that it would not be in line with the Tribunal's overriding objective to allow amendment to include a meritless claim.

47. Reliance was placed on the burden of proof being on the Claimant to convince the Tribunal it is just and equitable to allow the amendment, and that an extension should be an exception, following *Department of Constitutional Affairs v Jones [2008] IRLR 128.* Reliance was placed on the claimant being able to lodge her ET1 timeously in respect of her other claims, although acting without a representative. It was the respondent's position that there has been no substantial reason provided by the Claimant why this new claim is presented now, some 7 months after the lodging of her ET1.

48. The respondent's representative submitted that following *Selkent* and *Vaughan*, the Tribunal should consider the issues in respect of time bar and the applicable limitation periods, whether the proposed amendment seeks to introduce new facts and the timing and nature of the amendment. Reliance was placed on the claimant having recourse to advice from a trade union and the application to amend not being made until January 2022. It was submitted that the claimant may have recourse against her trade union in respect of the failure to lodge the claim within the applicable time limits. It was submitted that there would be little injustice to the claimant if the proposed amendments were not allowed and the respondent would have to rely on additional papers if the section 44 claim amendment was allowed.

49. Reliance was placed on there being no issue in respect of the facilities provided for the claimant to breastfeed / express at any other time and that the claim only relates to the proposed meeting on 9 September 2020. Reliance was placed on that being a one – off incident rather than a continuing act and on a claim arising from that being timebarred as at the time the ET1 was submitted.

50. In respect of the s44 ERA claim, it was submitted that that claim would also have been timebarred if included in the original ET1. Reliance was placed on it being unclear what detriment the claimant alleges to have been put to as a result of raising a health and safety concern. It is the respondent's position that the claimant did not raise health and safety concerns re that meeting, and that she did not suffer a detriment as a result of raising concerns. It is their position that if the amendment re the section 44 ERA claim is allowed, an

application for that claim to be struck out on the basis of no reasonable prospects of success will be made by the respondent. It is their position that even taken at its highest, the claim under section 44 would not be successful as it only alleges a potential detriment, no actual detriment. It was submitted that if allowed, that amendment were allowed, the claim under section 44 ERA is meritless and that it would not be in line with the overriding objective for that claim to proceed. It was the respondent's position that permitting the claimant to amend her claim would be contrary to the overriding objective as it would increase the time and resources of both the Tribunal and the Respondent and place the Respondent at further disadvantage.

Decision

51. I took into account the relevant law as set out above. I made findings in fact and applied the approach set out in the authorities (most recently by the EAT in *Vaughan v Modality Partnership 2021 ICR 535).* With regard to each proposed amendment, I balanced the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I took into account all the relevant circumstances, as relied on by the representatives in their respective submissions. That included consideration of the timing and nature of the amendments (including how they came about and whether they sought to bring a new claim or were a re-labelling of the facts previously pled) and the applicability of time limits. In my balancing exercise I looked at the real practical consequences of allowing or refusing each amendment. I carefully considered what was set out in the ET1.

52. With regard to the timing and nature of the application to amend, I took into account the procedural history of the case. The proposed amendments arose from the claimant being asked to provide further specification of her claims. That included a particular question about whether the claimant sought to bring a claim under section 44 ERA. That followed the claimant mentioning that in her agenda form completed for the initial TCMPH. There was no indication in the Note issued following the September TCMPH that any issue in respect of requirement to amend the claim may arise

53. I considered the balance of prejudice to each party should the amendments be allowed. It was not suggested that the respondent would require to call any additional witness. It was not suggested that the length of the hearing would be significantly extended. Reliance was placed on additional documents being required to be relied upon. There was no suggestion that these documents would not be available or that the veracity of the evidence had been affected by the passage of time.

54. I took into account that when considering whether to allow an amendment, time limit is a factor although not decisive of its self and must be weighed with other factors, but noted the consideration of *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209 at para 72 of *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, supporting the principle that *"out of time amendments should not be considered save in special circumstances."* I noted that I should not focus on one factor to the exclusion of others (*Conteh v First Security Guards Ltd* UKEAT/0144/16/JOJ). I took into account issues of timebar and noted that the test to be applied in relation to the sex discrimination claim is whether it would be in the interests of justice for the proposed amendment to be allowed, while the test to be applied in consideration of the proposed amendment to bring a claim under section 44 ERA is whether it was 'reasonably practicable' for the claim to have been brought in time.

55. I carefully considered the claimant's evidence with regard to her reasons for not having brought the claim sooner. I found the claimant to be entirely credible and reliable in her evidence. I took into account her stated position in her ET1 at box 15 'Additional information' that:-

"*My union representative was going through person family troubles which led to a bereavement. I never found out about the time limits on tribunals from him. After he went off sick I had to take it upon myself and contact ACAS and found out about the timescale when claiming for employment tribunals."*

And

"*I've faced discrimination as a breast feeding (BF) mother on 8/9/20 by Karen Tunc and Ailsa Tweddle. I was instructed to attend a meeting with them so they could discuss me not wearing a mask. I had my shift changed without adequate notice or agreement. Employers have a policy to support BF mothers. Workplace regulations require employers to provide suitable facilities; clean, warm, private room for expressing, a secure, clean fridge to store expressed milk, flexible hours for BF mothers. This was not done for me by them asking me to attend an unsuitable venue with no private room for expressing contrary to the Breastfeeding Act (Scotland) 2005. The venue I had originally agreed upon was at my place of work where I had been instructed not to attend by Ailsa. No risk assessment was ever done for my BF needs, despite me saying I needed one on my come back to work notice on 24/06/2020. I was threatened with disciplinary action if I did not attend this meeting.*

Understandably, my anxiety was heightened at the thought of attending a meeting with 2 managers against me alone. In the past I have been signed off with anxiety due to these stressful situations like this."

56. I took into account that there is no mention of a claim based on section 44 in the ET1 and that the facts now also sought to be relied upon re the section 44 claim are those relied upon in the disability discrimination claim. I took into account the lack of specification of the section 44 claim, with reference to the particular subsection(s) relied upon, as set out in the 'Relevant Law' section above.

57. I accepted the claimant's position that although she was experiencing mental health difficulties, she did not consult her GP about her mental health in the period between September 2020 and June 2021 because she did not want to use up her GP's resources during COVID times, because she did not want to take medication for that, and that because of her history she instead wanted to use learned coping mechanisms, with the support of her family and friends. I considered it to be significant that the claimant's evidence was not that she had recovered significantly to enable her to draft and submit her ET1 in June 2016. Although I did not doubt that the claimant had suffered from

mental health difficulties, I concluded from the claimant's evidence that the reason for the delay in submission of the ET1 was not because of those difficulties, but was because of her belief that she required to go through the internal grievance procedure before making a claim to the Employment Tribunal about the matter and because she had difficulty contacting her trade union representative and was not aware of the applicable time limitation periods. There was no documentary evidence before me on the content of the grievances raised by the claimant. The claimant's evidence that she had raised the issue of the lack of facilities on 9 September in her appeal in December 2020 was not disputed.

58. I took into account that both of the claims in the proposed amendments sought to rely on facts pled in the original ET1, and that it was the respondent's position in the ET3 that a claim arising from the alleged failures to provide suitable facilities on 9 September 2020 was timebarred. I took into account that although the proposed amendments did not seek to rely on an entirely new factual basis, the events relied upon occurred more than 9 months before the ET1 was submitted (the alleged failure being on 8 September 2020 re arrangements for meeting on 9 September 2020 and the ET1 being submitted on 16 June 2021). I considered it to be very significant that the facts relied upon in respect of the amendment re section 44 are also relied upon by the claimant in her claim of disability discrimination and that there is no argument that the claim of disability discrimination is time barred.

59. I took into account the effect on the length of the Final Hearing should the proposed amendments be allowed. That was relevant with regard to the costs involved as well as the issue of consideration of additional evidence. I balanced the potential loss to the claimant should the proposed amendments be allowed, and succeed, with the prejudice to the respondent of allowing the amendments, including additional costs involved in defending the claims, including preparation costs. Although the same facts are relied upon, I accepted that the legal issues involved are separate from those in the disability discrimination claim. There would then be some additional hearing

time and preparation time required, although it appeared that there would be no need for any additional witnesses.

60. I took into account the respondent's position that should the claim under section 44 ERA be allowed to proceed, the respondent would apply for that claim to be struck out on the basis of it having no prospects of success. I considered whether, taken at its highest, the claim in the proposed amendment seeking to rely on section 44 of the ERA had, on the face of it (prima facia) prospects of success. I was conscious of the decision of the EAT in *Woodhouse v Hampshire Hospitals NHS Trust* [2012] 4 WLUK 574. My consideration was not on the strength of the evidence in respect of the claims in the proposed amendment, but rather whether on the face of what is in the proposed amendment, the claims would be successful if proven. I accepted the respondent's representative's submissions in respect of the prospects of success of the section 44 claim. The claim lacks specification. A claim under section 44 is in respect of any detriment which the employee is put to by the employer as a result of raising health and safety concerns. It was not the claimant's position that the respondent had put her to a detriment because she had raised those concerns. The claimant's panic attacks and anxiety were as a result of the thought of requiring to attend at a place where there were no facilities for her to express, but were not caused by the claimant having raised concerns about that with her employer. That is an important distinction. Additionally, the proposed amendment contains no details of how or when the claimant raised her concerns with her employer at the time of the arrangements for the meeting, or the capacity in which the claim is made (e.g. having been appointed as a health and safety representative).

61. I took into account that time bar is a highly relevant factor in considering the balance of hardship (*Amey Services Ltd, Enterprise Managed Services Ltd V Mr R Aldridge and others UKEATS/0007/16/JW* and *Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07/LA*.)

62. Both the proposed amendment re sex discrimination and re the section 44 ERA claim rely on the same alleged circumstances. Those circumstances are set out in the original ET1, although on the basis of being the grounds for

a claim of pregnancy discrimination. The terms of the ET1 clearly sets out the facts which are relied upon in both proposed amendments. The issue before me then was not truly whether or not the amendment applications should be allowed but rather whether at the time of lodging the ET1 the claims under of (1) Equality Act section 13 (2) Employment Rights Act 1996 were time barred at the time of presentation of the ET1.

63. The case required to be dealt with in accordance with the overriding objective in Rule 2 of the Employment Tribunal(s) (Constitution and Rules of Procedure) Regulations 2013. Significant time has passed since the time of the allegations relied upon. The evidence heard at this PH has included evidence from the claimant as to the reasons why the ET1 was lodged when it was. Based on that evidence, I have made findings in fact which are material to the issue of time bar. In order to avoid further delay, in accordance with the overriding objective, rather than arrange a further PH on time bar, at which there would be duplication of evidence which has been heard at this PH and submissions on matters made before me here, I have determined the issues of time bar in addition to the questions of whether the amendments should be allowed.

64. Taking all the above factors into consideration, on balance, I decided that the proposed amendment re the section 44 claim should not be allowed. A factor taken into account in that decision which was not relevant to the proposed amendment re the sex discrimination claim was the position on prospects of success of that claim.

65. Taking all the above factors into consideration, I decided on balance that the proposed amendment re sex discrimination should be allowed. I accepted that that was a re-labelling of the facts relied on in the ET1, but said there to be pregnancy discrimination.

66. Applying Rule 2 of the ET Procedure Rules, I went on to consider the position on time bar re the sex discrimination claim. It was very significant that it was accepted that the only incident of sex discrimination was on 9 September 2001. On that basis, because the claimant may have recourse against her

trade union and because the claim based on disability discrimination continues, the claim based on sex discrimination is dismissed. The fact that the claims under the Equality Act 2010 relying on the protective characteristic of disability can continue to a final Hearing and that the claimant may have recourse against the respondent in respect of those claims was a significant factor in my consideration of the balance of hardship.

Further Procedure

67. A Preliminary Hearing for the purposes of case management will now be arranged. That will take place by phone. Parties should attend that telephone case management preliminary hearing ('TCMPH') with details of availability for the Final Hearing to proceed in the second half of 2022. Case management for the Final Hearing will be discussed at the TCMPH, including:-

    (i) Identification of issues for determination by the Tribunal at the Final Hearing.

    (ii) Timetable for Exchange of Documents and Preparation of Joint Bundle of Productions.

    (iii) Identification of the witnesses from which evidence will be heard and the necessity and relevancy of each witness' evidence to the issues for determination

    (iv) Issue of any case management Orders in respect of the Final Hearing

    (v) The duration and dates of the Final Hearing.

    (vi) Whether parties are interested in meaningfully engaging in Judicial Mediation

68. Both parties should attend this TCMPH prepared to discuss these matters. It would be helpful if the respondent's representative would prepare a draft List of Issues to be determined by the Tribunal at the Final Hearing and provide this to the Tribunal and the claimant, for the claimant's consideration prior to the TCMPH.

69. Apologies are given for the delay in this decision being issued. It is understood that parties received correspondence from the Tribunal office in March 2022 informing them to expect a delay.

Employment Judge: Claire McManus
Date of Judgment: 13 June 2022
Entered in register: 14 June 2022
and copied to parties