EMPLOYMENT TRIBUNALS

Claimant:	**Mr D Klosowski**
Respondent:	**Trelleborg Industrial Products UK Limited**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
On:	22 and 23 June 2022
Before:	Employment Judge Adkinson sitting alone
Appearances	
For the claimant:	Ms S Pankowski, paralegal
For the respondent:	Ms N Spencer, Solicitor

JUDGMENT

AFTER hearing from the parties it is ordered that:

1. the claimant's application to adjourn the hearing to obtain further evidence about the claimant's alleged disability of post-traumatic stress disorder is dismissed;
2. the claimant was not disabled at any relevant times because of post-traumatic stress disorder;
3. the claimant's applications to amend
   - 3.1. his claim of procedurally unfair dismissal are allowed in that he may rely on paragraphs 21, 22 and 23 of his "Claimant's Clarification of Claims" dated 12 August 2021,
   - 3.2. but otherwise are refused;
4. the respondent's application to strike out the claimant's claims because (a) it is scandalous and vexatious, (b) the manner in which the claimant or his representative had conducted the proceedings was scandalous or vexatious or unreasonable, (c) the claimant had not complied with case management orders, and/or (d) a fair hearing was no longer possible:
   - 4.1. succeed insofar as all claims of discrimination, harassment and victimisation are struck out, but
   - 4.2. are dismissed in relation to the claim for procedurally unfair dismissal;

5. the respondent's applications that (a) the claims be struck out because they have no reasonable prospect of success and/or (b) that the claimant pay a deposit as a condition of pursuing his allegations because they have little reasonable prospect of success are postponed generally with permission to restore;

6. the claim for procedurally unfair dismissal will proceed to a final hearing. Directions will be made separately.

REASONS

1. This was an open preliminary hearing listed by me on 9 July 2021 to determine various preliminary issues, to clarify the case and to manage it to a final hearing.

2. The issues to be determined were:

   2.1. whether Mr Klosowski was disabled;

   2.2. any application to amend;

   2.3. clarification of the claim;

   2.4. whether the claims or any part of them should be struck out because they have no reasonable prospect of success;

   2.5. whether the claimant should pay a deposit as a condition of pursuing a particular allegation in his claim because they have little reasonable prospect of success, and if so how much;

   and to make further directions as appropriate.

3. Between that hearing and this, Trelleborg also applied for the claim to be rejected because of a mismatch between the respondent's name on the ACAS certificate and their name as written claim form (ET1). The respondent also applied for the claim to be struck out because:

   3.1. it was scandalous and vexatious;

   3.2. the manner in which the claimant or his representative had conducted the proceedings was scandalous or vexatious or unreasonable;

   3.3. the claimant had not complied with case management orders; and

   3.4. a fair hearing was no longer possible.

   I have for simplicity called these the "additional grounds" for strike out.

Hearing

4. Mr Klosowski was represented by Ms S Pankowski, a paralegal. She has represented him throughout the proceedings. Trelleborg were represented by Ms N Spencer, Solicitor. I am grateful to both for their help.

5. Mr Klosowski's first language is Polish. Ms M Niedziolka was appointed by the Tribunal as interpreter and she interpreted the whole proceedings for him.

6. There was an agreed bundle of 567 pages. I have considered those documents to which I have been referred. Mr Klosowski expressed concern it did not contain the documents for the final hearing. Because this hearing was to deal with only the preliminary issues, I do not consider that was a problem.

7. Each party made oral submissions, which I have taken into account.

8. Ms N Spencer prepared a skeleton argument for the hearing. I have taken that into account too.

9. The first day started late because the Tribunal's administration erroneously told Mr Klosowski and Ms Pankowski to go to the Nottingham Hearing Centre. They made their way promptly to Leicester and I allowed them time to compose themselves after the worry caused by the error.

10. By agreement we dealt with the initial issues of rejection and disability first and then took a long lunch before dealing with the more substantive matters to allow Ms Pankowski time to consider the respondent's skeleton argument and to compose herself after the excessive journey caused by the Tribunal's error.

11. In relation to the allegation the claim should have been rejected, after hearing submissions from the respondent only and I discussing the matter with them, the respondent withdrew the allegation. I therefore make no further comment on it or decision in relation to it. Suffice to say, the claim is not rejected.

12. In relation to disability, Trelleborg conceded Mr Klosowski was disabled at all relevant times because of anxiety and depression. It did not accept he was disabled because of post-traumatic stress disorder (PTSD). Mr Klosowski applied for the determination of the issue to be adjourned. I heard and determined that application. I set out my conclusions later.

13. When it came to the application to amend and the application for strike out on additional grounds, the hearing proceeded as follows.

14. Initially it was agreed that the Tribunal would consider the respondent's strike out applications founded on the additional grounds only before considering the claimant's applications to amend.

15. Everyone also agreed that the issue of whether the claim should be struck out for having no reasonable prospects of success or the claimant should pay a deposit because his claim had little reasonable prospects of success deposit had to be dealt with separately and only once the claim had been clarified because, until one reached that point, one would be unable to say whether the claim had no or little reasonable prospect of success.

16. The Tribunal and parties also agreed that the respondent's application founded on the additional grounds would be dealt with by submissions only.

17. Because it was the respondent's application, it was agreed the respondent would go first and the claimant second, with the respondent having a right of reply.

18. During the respondent's submissions, it occurred to me that the issue of strike out for the additional grounds and the application to amend were best

dealt with together. I discussed this with the parties and they agreed, and so this is how we proceeded.

19. The claimant presented a new application to amend on the morning of the second day. By agreement we dealt with it as follows. The claimant made submissions on it (alongside their general submissions on the respondent's application) and the respondent replied to it.

20. Because of the shortness of time at the end of hearing and because any judgment would have to be translated which would require more time, I reserved my decision. It was agreed that, depending on outcome, any directions would be made by me without a hearing. It was also agreed the applications for strike out because there were no reasonable prospects of success or for a deposit to be paid because there were little reasonable prospects of success would be adjourned generally with permission to restore. That would allow more efficient management of the case, avoid a hearing if one is not necessary, enable the respondent to consider its position in light of the outcome of this decision and also it reflected the change in circumstances.

21. No-one alleged this was an unfair hearing. I am satisfied the hearing was fair.

22. Although this is a composite decision, the issues were dealt with discretely in the order they appear below.

Additional submission from the claimant on the application to amend

23. After typing up the judgment below but before I asked for it to be sent to the parties, the claimant sent to the Tribunal an email dated 27 June 2022 at 1903. This related to the application to amend. I offered the respondent an opportunity to make submissions on the matter.

24. Rather than rewrite the judgment which would require more time and Tribunal's resources I have dealt it separately. I have set out the new submissions and my conclusions below under the section on the application to amend.

Issues

25. The issues for me to decide therefore were as follows:

    25.1. disability: should I adjourn the application to allow Mr Klosowski a further opportunity to obtain medical evidence on his alleged PTSD?

    25.2. application to amend: Should I allow Mr Klosowski permission to amend his claim in line with the application made on:

        25.2.1. 12 August 2021?

        25.2.2. 13 June 2022?

        25.2.3. 23 June 2022?

    25.3. strike out on additional grounds: should I strike out all or part of the claim because:

        25.3.1. it was scandalous and vexatious?

25.3.2. the manner in which the claimant or his representative had conducted the proceedings was scandalous or vexatious or unreasonable?

25.3.3. the claimant had not complied with case management orders? or

25.3.4. a fair hearing was no longer possible?

Relevant background

26. The claim was presented on 14 April 2021. Early conciliation Day A is 8 April 2021. Early conciliation Day B is 12 April 2021. Ms Pankowski drafted the claim. In it, Mr Klosowski had alleged procedurally unfair dismissal (sometimes called "ordinary" unfair dismissal), that he was disabled because of anxiety, depression and PTSD and various act of harassment and discrimination based on his disability and victimisation. His claim was, beyond that, unclear, confused and missed various key details.

27. The respondent assert they have done nothing wrong. They maintain that while he was away from work ill, he trained as a gas plumber and worked for an alternative business he had set up, and because of that he was guilty of gross misconduct and so dismissed summarily. They also alleged a prolonged absence meant that he could no longer remain an employee.

28. As is usual for cases in the Midlands (East) Region, the case was listed on issue for a telephone case management hearing on 9 July 2021 and at the same time the final hearing for 3 days on 12, 13 and 14 December 2022 to ensure it was already in the Tribunal's listing diary. The final hearing remains listed. Experience in this region is that if at the case management hearing it transpires a longer hearing is required, then the hearing can usually be easily extended without having to postpone it further into the future. As the final hearing approaches that becomes far less likely to be possible because of the Tribunal's other cases taking up the time available. Currently if this case's final hearing required more than the 3 days currently listed, it would not likely be capable of being heard before July 2023 because of the other cases in the list.

29. The first case management hearing took place on 9 July 2021 before me. It was in person to allow for a translator to take part and assist the claimant. Both parties were present, represented by the same people who represented them before me today. My order was sent to the parties on 20 July 2021.

30. In that order I remarked:

"2. The claimant brings claims of unfair dismissal and harassment because of disability, victimisation, failure to make reasonable adjustments. The claims are lengthy and narrative in style. They do not make it clear why he believes he was unfairly dismissed, what acts of those mentioned he says amount to harassment or why he says they are because of his disability, the protected acts he relies on, the provision, criterion or practice ("PCP") he relies on for the claim for failure to make reasonable adjustments, how they put him at a substantial disadvantage or what the respondent should reasonably have done about it. They do not identify

when he began work. They do not identify his disability. They do not follow the guidance in **C v D [2020] UKEAT/0132/19** that claims should be brief facts, identifying the key elements of the causes of action relied on, and not narrative.

"3. The claimant makes references to claims for breaches of the **Health and Safety at Work etc. Act 1974** but accepted the Tribunal has no jurisdiction to deal with them.

"4. The respondent asked for further and better particulars. The claimant provided them. They do not clarify the claim but provide only more narrative. They purported to suggest the claimant also claimed direct discrimination because of disability and discrimination arising because of a disability. They add a personal injury claim.

"5. There is no application to amend.

"6. I also considered the schedule of loss. As the respondent pointed out it contains not detail of mitigation. However, on the case as best I understand it, it would appear to be unrealistic. I pointed out that the future loss of earnings claim for 4 years appears to contradict the pension loss claimed for 7 years. The salary is £27,550 but the claim for unfair dismissal is £60,000. The claim for personal injuries of £300,000 represents the sort of award for the most severe brain injury, loss of sight or quadriplegia according to the Judicial College Guidelines for the **Assessment of General Damages in Personal Injury Cases 15th edition**. There is an unspecified claim for £2,000,000 which is surprising. There is also a claim for VAT which makes no sense."

The schedule of loss at that time was for a loss of £5,817,936.18.

31. I made the following directions:

31.1. by 20 August 2021 Mr Klosowski had to provide:

31.1.1. further information to clarify his claim (my order also set out in a schedule the minimum information needed for each type of claim these are paragraphs 13 onwards of the case management summary);

31.1.2. make any application to amend;

31.1.3. provide a schedule of loss;

31.2. by 17 September 2021 Mr Klosowski had to provide a disability impact statement. My order set out the definition of disability and a series of questions that he should address in the statement. It also set out the definition of "normal day-to-day activities";

31.3. by 1 October 2021 Mr Klosowski had to provide copies of his medical notes relevant to disability

32. I set out the questions that needed answering to ensure the further information was adequate in paragraphs [13]-[24] of my order. They covered all potential claims whether actually pleaded or not, because it was not apparent what the claims were meant to be and, besides, if there were an application to amend then then application had to contain sufficient

information to enable the respondent and Tribunal to understand the proposed claim. Therefore the claimant had available at all times from 20 July 2022 details of what information was needed in respect of each potential or actual claim so he knew or ought to have known what he needed to provide to clarify those claims.

33. Neither party indicated that they disagreed with my case management summary. Neither party applied for those directions to be stayed, varied or discharged for any reason.

34. On 18 August 2021 the claimant filed:

34.1. a revised schedule of loss;

34.2. an "application to withdraw allegation of direct discrimination "20 August 2021" dated 12 August 2021;

34.3. a disability impact statement dated 12 August 2021; and

34.4. a document headed "claimant's clarification of claim" dated 12 August 2021.

35. The revised schedule of loss now sought £4,925,532.12.

36. The application to withdraw made it clear that the claimant no longer alleged direct discrimination and that (if there were not already a claim for direct discrimination) he was withdrawing it.

37. The disability impact statement was mostly focused on what happened in his employment and the dispute itself than on the issues that it should have dealt with, contrary to my order.

38. The clarification of the claims was again a narrative. In paragraphs 21, 22 and 23 it identified the basis of the claim of unfair dismissal. Using the headings only for brevity these were:

"21. The respondent did not carry out sufficient investigation into the allegation(s) they made against the claimant…

"22. The claimant was not given any particulars of the allegations the respondent made against him…

"23. The disciplinary hearing was conducted unfairly [it then sets out 7 reasons why]."

39. The respondent concedes, rightly in my opinion, that these paragraphs enable it to understand the allegation of unfair dismissal that it faces.

40. The clarification however provided no clarity on the victimisation claims (for example it did not set out the protected act even), harassment or other discrimination claims. It did not answer the questions I posed in my order that set out what the Tribunal and respondent needed to know, depending on the claims advanced.

41. On 14 September 2021 Mr Klosowski provided his medical notes. These included a report dated 10 August 2021 from Dr Robert Wojciechowski MRCPsych, Consultant Psychiatrist. While these all amply demonstrate long-standing anxiety and depression, none mentions PTSD. In particular, Dr Wojciechowski's report makes no mention of possible PTSD.

42. The claimant made no application to seek an expert report on PTSD. He did not apply in advance of the hearing for a variation of directions to allow more time to present further medical notes.

43. To try to assist to clarify the claim, the respondent supplied a table to the claimant on 1 June 2022 to try to get the clarity it felt it need. It listed each allegation so far as it could determine from the clarification document, and asked the claimant simply to identify the jurisdiction relied on (e.g. direct discrimination etc.) So far as I am aware (and neither party suggested otherwise) the claimant did not complete this document. Of course, there was no obligation to do so.

44. On 13 June 2022 Mr Klosowski provided:

    44.1. an updated schedule of loss;

    44.2. an application to amend set out in a document headed "Further Particulars" accompanied by the original claim with tracked changes.

45. The updated schedule of loss was now for £68,118.

46. The application to amend gave no explanation for the delay. The document headed further particulars did not provide, again, the information needed or required and which I had set out in the Tribunal's order. It only added to the confusion. For example the claimant said he still sought to claim victimisation, yet that was specifically crossed out in the tracked changes of the original claim. It was again in a narrative style.

47. On 15 June 2022 Mr Klosowski provided a statement of means to take into account if the Tribunal were minded to order him to pay a deposit. The statement gives no account of the £100,000 that his wife and he won in February 2019.

48. At the hearing I observed they did not provide the information I ordered. The claimant expressed some surprise at first because they had been run past someone (whose identity or qualifications was never revealed). That someone had delayed replying to the enquiry about whether they met the mark because they were acting pro bono (though Ms Pankowski confirmed she is not acting pro bono and it has not been made clear why she needed pro bono advice) but they had apparently reported they did. Mr Klosowski also accepted that in relation to the claims for failures to make reasonable adjustments, the document did not set out the provisions, criteria or practices (PCPs) he relied on. The clamant also accepted it did not set out the information needed to understand the claim of direct discrimination like which comparator was relevant to which allegation (and questioning revealed the comparator's circumstances were materially different from the claimant's in any event) and did not set out the protected acts relied on for the victimisation claims.

49. On the first day of the hearing Mr Klosowski indicated he was intending to produce further documentation later to show that he had PTSD at the material time. When I pointed out that my order did not provide for that, and also that my order made clear the issue was to be determined today, he made his application in the face of the Tribunal for determination of the

matter to be postponed. He accepted the documents currently before the Tribunal did not evidence a diagnosis of PTSD.

50. On 23 June 2022 (second day of the hearing) Mr Klosowski presented another application to amend. Mr Klosowski conceded however that this too did not comply with my order and did not provide the necessary particulars that I had ordered. It also became apparent that the document was erroneous even on the claimant's case. For example:

50.1. it did not set out a PCP for the claim for failure to make reasonable adjustments – at the hearing Mr Klosowski sought to allege the PCP was that all staff were treated the same but accepted that was too vague to be useful;

50.2. in submissions it was suggested there were many PCPs but only one was identified in the document;

50.3. it did not explain why any PCP put the claimant at a substantial disadvantage compared to non-disabled people;

50.4. it still did not identify which comparator related to which alleged act of direct discrimination;

50.5. some of the alleged acts of direct discrimination were in fact allegations of failures to make reasonable adjustments;

50.6. much of the detail was vague (for example "performance management" was identified as a detriment but it did not say when it occurred and the other was "unfavourable treatment towards the claimant regarding his health conditions", which lacked details);

50.7. further enquiry revealed one of the protected acts appeared to post-date the alleged detriment (the first performance meeting was in March 2019 but the act was not until April 2019) and wrong date had been provided for the other (the claimant alleges that he made an allegation of discrimination in August 2019 but the amendment says September 2019);

50.8. the claimant accepted that in relation to harassment he had provided insufficient detail to understand what it was alleged had happened.

The application for an adjournment to obtain evidence on Mr Klosowski's alleged PTSD

51. The claimant argued that there are extra reports and documents that have not been forthcoming. The doctor's records and the report from Dr Wojciechowski were already in the bundle. On further probing the claimant said that Dr Wojciechowski would not provide a more detailed report unless the Tribunal ordered him to do so. There is nothing in Dr Wojciechowski's report to suggest this is the case, or what the further report might allude to that he has not covered already. The report of Dr Wojciechowski is dated August 2021, and there is no explanation why there was no application between then and this hearing either to postpone the determination of the issue or to seek an order for the report from Dr Wojciechowski. Mr

Klosowski was not able to explain to me why his case required a determination that he be disabled because of PTSD given the respondent's concession on disability and anxiety. For example he did not highlight a particular claim or allegation that could succeed only if he were disabled because of PTSD.

52. I concluded that the adjournment would be contrary to the overriding objective in the **ET Rules of Procedure 2013 rule 2** and so refused it:

52.1. the respondent had conceded he was depressed because of depression and anxiety. The PTSD did not appear to add anything to the case. Refusal therefore presented minimal prejudice to the claimant. It did not seem proportionate to postpone dealing with the matter;

52.2. the order was clear that whether he was disabled because of PTSD was an issue to be determined today so he knew or ought to have known that it was a live issue at this hearing for deciding. There was nothing to suggest it was anything but the claimant's default that meant it was not ready to proceed;

52.3. there was an inexcusable unexplained delay raising this issue or seeking an extra report from Dr Wojciechowski;

52.4. there was nothing to suggest that anything would be produced that showed Mr Klosowski had PTSD since neither Dr Wojciechowski nor his medical notes suggested he had it. The prospects of success on this issue appeared to be less than reasonable;

52.5. to adjourn the matter would introduce further delay and incur further expense by both parties having to come back to the Tribunal for a hearing and having to prepare for that hearing too;

52.6. to adjourn the matter will require more Tribunal time that will impact on other cases waiting to be heard.

53. In the circumstances the claimant did not pursue the allegation he was disabled at all material times because of PTSD. Therefore I rule that he was not.

Applications to amend

54. The claimant argued in summary that the applications to amend should be allowed because:

54.1. the claimant is entitled to a fair trial;

54.2. Mr Klosowski genuinely believes he has a claim for discrimination, victimisation and harassment;

54.3. to refuse the amendments would be to allow the respondent potentially to avoid censure for discrimination;

54.4. there has been a delay but it was caused by:

54.4.1. the effect of the Covid-19 pandemic and the consequent restrictions imposed to deal with it;

54.4.2. delays in the office being able to perform the work;

54.4.3. the need to balance work with family life;

54.4.4. the need for a translator to interpret for Mr Klosowski when taking instructions;

54.4.5. the delay with a person acting pro bono providing feedback on the proposed amendments that were presented to the Tribunal on 13 June 2022;

54.4.6. the claimant now had had a proper opportunity to consider the evidence and there was a claim for direct discrimination.

55. The respondent's opposed the applications. They submitted in summary that:

55.1. of the first application of 12 August 2021:

55.1.1. it provided no clarification. In fact it adds obscurity;

55.1.2. the clarification document does not set out the information that I ordered to be provided if the claimant wanted to pursue a particular head of claim;

55.1.3. in short, it still made no sense because (as I describe above) it does not contain relevant information on the discrimination, harassment and victimisation claims;

55.1.4. there is no explanation why the application is made 4 months after the proceedings have been presented;

55.2. of the second application of 13 June 2022:

55.2.1. it repeats all the problems with and has the same defects as the first application;

55.2.2. in addition there is no explanation for the delay of over 1 year since the claim was presented and about 10 months since the deadline I set in my order;

55.2.3. the application now seeks to add direct discrimination having already withdrawn it. There is no explanation why it had taken from August 2020 to June 2021 to say that or why it was withdrawn;

55.2.4. the application did not comply with the order made by me because it was well beyond the date I set and did not provide the information ordered;

55.2.5. the additions are not mere relabelling but addition of new claims (e.g. the direct discrimination);

55.3. of the third application of 23 June 2022, the same matters that applied to the second apply to the third, with the extra difficulty that it is wrong in parts in that it incorrectly identifies the claims by mislabelling them.

Law on amendments

56. An amendment should be set out with the same level of detail as if it formed part of the original claim: **Scottish Opera Ltd v Winning UKEATS/0047/09 EAT; Chief Constable of Essex v Kovacevic UKEAT/0126/13 EAT**.

57. I have referred to the following cases on the principles of whether to allow or refuse an amendment to a claim:

    57.1. **Selkent Bus Company v Moore [1996] ECR 836 EAT;**

    57.2. **Abercrombie v Aga Rangemasters Ltd [2014] ICR 1148 CA;** and

    57.3. **Vaughan v Modality Partnership [2021] ICR 535 EAT.**

58. These cases draw on earlier authorities in turn. **Vaughn** in particular reviews the previously decided cases and brings them together to set out the principles.

59. I understand the principles as follows:

    59.1. The key principle is this: "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".

    59.2. The paramount consideration is the balance of the relative injustice and hardship of granting or refusing the amendment.

    59.3. The focus is not so much on the formal classification of causes of action, but the extent to which the new pleading is likely to involve substantially different areas of enquiry from the old: The greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted.

    59.4. I should look at the practical consequences, recognising that refusal is always going to cause some perceived prejudice.

    59.5. In **Selkent** the Appeal Tribunal suggested the following are relevant:

        59.5.1. the nature of the amendment,

        59.5.2. the applicability of time limits and the timing, and

        59.5.3. manner of the application.

    59.6. In **Selkent** the Tribunal observed:

        59.6.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing;

        59.6.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action

that would have been dismissed as out of time had it been brought as a new claim; and

59.6.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

60. I have also been reminded of the following cases:

60.1. **Transport and General Workers Union v Safeway UKEAT/0092/07 EAT**: I must not refuse amendments simply as punishment; however I am entitled to expect that party to explain how it is we have ended up in the situation that the amendment is being sought;

60.2. **Remploy Ltd v J Abbott and 1600 other employees UKEAT/0405/14/DM at [72]**: "When an application for amendment is made close to a hearing it will usually call for an explanation why it's being made then and not made earlier particularly when new facts alleged must have been within the knowledge of the Applicant at the time he presented his originating application. … **It will involve however, the Employment Tribunal considering the reason why the application was made at the stage it was made and why it was not made earlier.** It requires the Employment Tribunal to consider whether if the amendment was allowed delay would ensue as a result of the adjournments, whether they were likely to be additional costs, whether because the delay or because of the extent to which the hearing might be lengthened if the new issue were allowed to be raised particularly if the costs were unlikely to be recovered by a Party who incurs them. Delay may of course in an individual case have put the respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier. **The paramount considerations are the relative injustice and hardship involved in refusing, granting an amendment or refusing to do so. It is essential before allowing an amendment it must be properly formulated sufficiently particularised so that the respondent can make submissions and know the case it is required to meet.**"

61. In addition I should always have in mind the overriding objective.

Application to this case

62. I have concluded that:

62.1. the application to amend in respect of the procedural unfair dismissal claim as set out in the application of 12 August 2021 should be allowed;

62.2. all other applications should be dismissed.

63. I have considered each application individually. However the reasons are the same in respect of all of them and so for brevity I put them together.

64. The main factors that point against amendment in my view are below.

64.1. With the exception of the application of 12 August 2021, they are well beyond the deadline I set in my order. There has been no good explanation for the delay. I do not accept that the effects of the Covid-19 pandemic, language difficulties, staff shortages, work-life balance or the delay getting a reply from a pro bono review of the proposed amendments either together or individually explain the delay of nearly 10 months beyond the deadline I set:

64.1.1. the Covid-19 pandemic did not stop people working on cases or complying with orders. It is notable that despite the restrictions the Tribunal could conduct an attended hearing on the last occasion and that most restrictions ceased on 24 February 2022 in England;

64.1.2. while the fact that the claimant does not speak English well would be a barrier, that must be set against the fact that Polish is major European language with a large number of speakers. It is difficult to conceive that the language issue was such that it was impossible in all that time to find a translations service if needed;

64.1.3. the claimant provided no real information about staff shortages and their effect on the representative. It is difficult to see on the sparse information available why it would have delayed things;

64.1.4. work-life balance is important and the Tribunal does not want to detract from that. However if a person accepts work then they must abide by the deadlines. Even the need to preserve work-life balance does not explain the delay;

64.1.5. the wait for a reply from a review by someone acting pro bono is not a good reason in my opinion because Ms Pankowski is charging for her services and no doubt holds herself out to clients as able to represent them, and so there should be no need for a pro bono involvement.

64.2. I accept these factors may cumulatively cause delay but on the limited information provided I do not accept they are enough to explain the delay. These issues go to timing and in my view weigh against the exercise of discretion in the claimant's favour.

64.3. The manner of the application is also something that points against allowing the amendment. There is no good explanation why the application of 12 August 2021 is still defective or why the other applications were made so close to (13 June 2022) or in the middle of (23 June 2022) the hearing. They were presented without the information explaining why and instead it was left to the Tribunal to try to discern the reasons for itself.

64.4. Another significant factor is that any claim for direct discrimination was expressly abandoned by the claimant on 12 August 2021 (there is a dispute if any such claim was presented in the first place. In my opinion it does not matter because if there were it was withdrawn). The explanation that a review of the evidence showed there was such a claim does not make sense. The claimant did not explain why then it was withdrawn or why it took from August 2021 to June 2022 to seek to re-add it. The claim would ordinarily be woefully out of time and there is no good explanation given about why it would in any other circumstance be just and equitable to extend time. To allow this amendment would cause the respondent to have to deal with a claim that is delayed for no good reason and expressly withdrawn. I have assumed for the purposes of this ground that a claim that has been abandoned can be re-presented and therefore as a matter of logic be re-added by amendment.

64.5. Most importantly, none of the applications present the claim in a clear manner. They are not properly formulated. As I have noted in the background there are key details still missing and they contain errors. To allow the amendment would move the case no further forward since the amended claim would still be as defective as the original claim and the respondent would still not know the case against it. To allow the amendment would cause the respondent hardship of facing an amended claim that still was so poorly pleaded and incoherent that it could not properly understand it or respond to it. It would therefore require yet more time and more orders to get the claim into some semblance of a claim that can be responded to and understood. That would incur extra delay and extra expense. It means in addition I am unable to discern if this is mere relabelling, adding new facts or new causes of action or a mixture of all three.

64.6. I also repeat my order set out what type of information was required for each claim. The claimant admitted it's amendments did not provide the information. However there was no good explanation for that failure. The order would have been there next to his representative as she went through the claim. Besides she was entitled to drawn on her purported expertise. In my opinion I can only conclude (at best) the claimant simply ignored the order on what to provide – though I cannot say why. I also conclude that had they followed the order, then the proposed amendments would have made sense.

65. In favour of allowing the amendment is the following.

65.1. The application of 12 August 2021 makes it clear why the claimant alleges he was unfairly dismissed. That can be understood and responded to. No more delay or expense is needed to deal with it.

65.2. The claimant will be denied an opportunity to present discrimination claims etc. that he clearly wanted to bring.

However I believe that must be weighed against the fact he has had a chance to present the amended claims and to clarify them and was told what information was needed but ignored that.

65.3. The claimant is entitled to a fair trial: **Human Rights Act 1998** and see **Article 6(1)** of the **European Convention of Human Rights and Fundamental Freedoms**. That however is tempered by the fact that parties in civil proceedings must show due diligence complying with procedural steps and cannot normally rely on the convention to overcome their own errors: **Zubac v Croatia 40160/12 ECHR**; **Bąkowska v. Poland 33539/02 ECHR**. Here the claimant has had ample opportunity to get his case clear and to set out his amendments. He has not done so. In the circumstances he has had the chance but not taken it. I do not see this factor takes the claimant's case any further forward.

66. In the circumstances the balance of the two in my view falls firmly down in favour of the respondent. To allow the amendments would move the case no further forward, incur more delay and expense and the timing and manner of the application point against the exercise of discretion. In relation to the direct discrimination, that was clearly and expressly withdrawn.

67. However I do not think the refusal should be blanket. The procedurally unfair dismissal claim is clear and can be responded to. The issues with delay etc. do not detract from that. No more delay or expense is required to clarify that. The respondent incurs no undue hardship or prejudice having to deal with the claim. The amendment application that dealt with that was made in accordance with my order. Therefore I allow that amendment.

The claimant's further submissions on 27 June 2022 at 1903 on the application to amend

68. As set out above, the claimant sent in further written submissions on the application to amend. The claimant did not apply for permission to make these extra submissions and did not have permission to do so. The email read:

"Dear Judge Adkin [sic.],

"Please kindly take the below information into consideration,

"We think it is crucial that you should know the following details. After a discussion with my solicitor today about the P/H, I was informed that the reason for the late application to amend the ET1 was because the Claimant had only given instructions last month to amend his claim after a review with her (payment is being pending and she did not do it pro bono as I thought). Making the application to amend the ET1 has nothing to do with backlog of cases or translating issues that I thought were the reasons. I was not aware of this.

"My solicitor said that backlog of cases or translating of documents has nothing to do with the application to amend, it is purely because of the late instructions received from the Claimant only last month (which I was not

aware of) when you asked the question why the application was made after your Order.

"The other reasons why the application was not submitted in accordance with the deadline of your Order was that at the time back when the Order was issued, the Claimant was worried about the Unless Order being made and he was not in a financial position to make payments. He was worried.

"This was the reason why he did not instruct to amend earlier, he was worried, but now he is working and on that basis instructed to amend the ET1 form when his case was reviewed last month..[sic.]

"These are the reasons for the late submission of the application to amend. If you have any further questions, kindly get in touch.

"We sincerely apologize for any convenience. We are grateful for the assistance of the Employment Tribunal.

"Kind regards

"Ms Sharon Pankowski

"SAP Legal Services.

69. I have not been able to find any cases from the Employment Appeal Tribunal or higher courts about how to deal with uninvited submissions made after a hearing has ended but before judgment is sent to the parties. However in the civil courts and in the context of additional evidence the courts have emphasised a finality to litigation (see **Fage UK Ltd v Chobani UK Ltd [2014] FSR 29 CA** at [114] (in the context of an appeal) "The trial is not a dress rehearsal. It is the first and last night of the show.") and said they would allow admission of additional evidence only where to refuse it would be an affront to common sense: **Mulholland v Mitchell [1971] AC 666 UKHL** In **Swift Advances plc v Ahmed [2015] EWHC 3265 (Ch)**. I accept that submissions are different to evidence but see no reason why the same basic principle should not apply. I have therefore concluded that it would be contrary to common sense not to consider the submission when it corrects matters said at the hearing itself.

70. However having considered the claimant's addition submission, it does not persuade me that I should permit the amendments sought for the following reasons:

70.1. it does not address the defects in the proposed amendments;

70.2. it does not explain why the claimant did not provide the information that I ordered be provided in the first place, second place or third place;

70.3. it does not provide clarity to the application that is needed to ensure the respondent can adequately understand and reply to it:

70.3.1. it does not properly explain the delay in making the application. Being worried is not, without more, a good enough excuse in my opinion;

70.3.2. his inability to make payments does not justify the delay. There is no explanation why he could afford his representative's fees at the last hearing but not in the immediate aftermath when, even if the case had proceeded normally, he would have needed a solicitor;

70.3.3. there was nothing to prevent him from representing himself if he could not afford a representative (and it is notable his representative never came off the record at any time implying she was retained throughout);

70.3.4. He won £100,000 on the lottery in February 2019 and so it is not clear why he could not afford his representative;

70.4. though Ms Klosowski refers to an "unless order", there was not an "unless order". It is not obvious why worry there might be one would delay the application in any case. Surely an unless order would encourage compliance rather than delay it? Nor does it explain why the applications were defective in that they lacked key information;

70.5. it is not clear if the backlog or translation issues are said to be causes of the delay or not. Either way I am still unpersuaded that those are good reasons either themselves or taken together with other factors.

70.6. In summary, none of this explains a delay of nearly 10 months.

Strike out on additional grounds

71. The respondent says the claim should be struck out for the following reasons:

71.1. the claimant has had numerous opportunities to clarify and amend his claim but has repeatedly failed to do so;

71.2. the claimant has failed by a long margin to meet the deadline for providing clarification of the claims and for making an application to amend;

71.3. the clarification documents do not set out the information he was ordered to provide and there is no good reason for the failure;

71.4. therefore Mr Klosowski has persistently and deliberately failed to abide by the orders;

71.5. the discrimination, harassment and victimisation claims are still unclear even though they now stretch over 49 pages, and so the respondent still does not know what case it must meet or put another way, the case against it;

71.6. furthermore the Tribunal cannot manage the case in such a state;

71.7. if the discrimination, harassment and victimisation claims continue then the final hearing cannot take place as planned because of the need to clarify the claims still and then respond to them, carry out disclosure, prepare a bundle and statements etc.

71.8. the claimant has failed to provide a statement of means by the deadline prescribed in my order;

71.9. the statement does not deal with things like other income, such as the lottery win;

71.10. the schedules of loss are so exaggerated as to be scandalous or vexatious. They do not follow any comprehensible method of working;

71.11. the timings of the applications to amend are further evidence of vexatious or scandalous conduct;

71.12. the discrimination, harassment and victimisation allegations mostly relate to allegations about or against:

71.12.1. Mr Singh: Mr Singh is no longer an employee. He is not responding to enquiries. If summonsed, he will be a reluctant witness and so that is a further disadvantage to the respondent. He is unlikely to co-operate in the preparation of statements;

71.12.2. Mr Bradshaw: he has now passed away since the litigation began;

71.12.3. Ms J Riley: she too has left the respondent' employment;

Therefore the respondent is prejudiced if they are allowed to continue.

72. The claimant says that the claims should not be struck out because:

72.1. the claimant's failures are accidental and not deliberate;

72.2. the claimant has tried to comply as is demonstrated by the documents;

72.3. the claimant has revised his schedule of loss down to about £65,000. That should be recognised as the claimant heeding the Tribunal's observations;

72.4. a fair trial is still possible. Now the claimant understands what is needed it can be clarified once and for all;

72.5. the respondent can call Mr Singh and Ms Riley. The death of Mr Bradshaw is not something that should deny the claimant a hearing. Parties often have to deal with situations where a witness passes away or disappears. The respondent's predicament is not such to mean a trial cannot take place;

72.6. There have been issues and delays caused by:

72.6.1. the effect of the Covid-19 pandemic and the consequent restrictions imposed to deal with it;

72.6.2. delays in the office being able to perform the work;

72.6.3. the need to balance work with family life;

72.6.4. the need for a translator to interpret for Mr Klosowski when taking instructions;

72.6.5. the delay with a person acting pro bono providing feedback on the proposed amendments that were presented to the Tribunal on 13 June 2022.

72.6.6. the claimant now had had a proper opportunity to consider the evidence and make the applications to amend.

72.7. Though not mentioned I have considered the right to a fair trial, but remind myself of the observations above from the European Court.

73. I observe however that the email that I refer to in paragraph 68 above appears to undermine the points in paragraph 72.6.

Law on strike out

74. The **ET Rules of Procedure** provide (so far as relevant) the Tribunal may strike out a claim or part of a claim in the following circumstances:

"37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim … on any of the following grounds—

"(a) that it is scandalous or vexatious …;

"(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant … has been scandalous, unreasonable or vexatious;

"(c) for non-compliance with any of these Rules or with an order of the Tribunal;

"…

"(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim … (or the part to be struck out)."

Scandalous and vexatious

75. "Scandalous" means irrelevant or abusive of the other side or the Tribunal's process: **Bennett v Southwark LBC [2002] ICR 881 CA.**

76. Bingham CJ described "vexatious" proceedings as follows in **Attorney General v Barker [2000] 1 FLR 759, QBD (DC)**:

"[They have] little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, 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."

Manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious.

77. "Scandalous" and "vexatious" are defined above: **Bennett v Southwark London Borough Council 2002 ICR 881 CA**.

78. For conduct to be considered "unreasonable", it must either :

78.1. deliberate and persistent disregard of required procedural steps, or

78.2. have made a fair trial impossible;

see **Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA**.

79. In **Bennett** the Court said, when considering a representative's conduct:

79.1. it is not simply the representative's conduct that needs to be characterised as scandalous but the way in which he or she is conducting the proceedings on behalf of his or her client;

79.2. the tribunal must therefore consider: (a) the way in which the proceedings have been conducted, (b) how far that is attributable to the party the representative is acting for, and (c) the significance of the "scandalous" conduct;

79.3. what is done in a party's name is presumptively, but not irrefutably, done on his or her behalf. When the sanction is the drastic one of striking out the whole of a party's case, there must be room for the party to disassociate him or herself from what his or her representative has done.

80. However even if the criterion is satisfied, the Tribunal must still consider if a fair trial is possible: **De Keyser Ltd v Wilson [2001] IRLR 324 EAT; Bloch v Chipman [2004] IRLR 140 EAT; Blockbuster Entertainment Ltd; Bennett**. If it is then the case should be permitted to proceed except in exceptional circumstances. Even if a fair trial is not possible, the Tribunal must consider if a lesser remedy is appropriate.

for non-compliance with any of these Rules or with an order of the Tribunal;

81. If there has been non-compliance, I must consider whether to strike out the claim in light of the overriding objective. The relevant factors are:

81.1. the magnitude of the non-compliance;

81.2. whether the default was the responsibility of the party or his or her representative;

81.3. what disruption, unfairness or prejudice has been caused;

81.4. whether a fair hearing would still be possible; and

81.5. whether striking out is proportionate or some lesser remedy would be an appropriate response to the disobedience.

see **Weir Valves and Controls (UK) Ltd v Armitage [2004] ICR 371 EAT**. Also **De Keyser Ltd; Bloch; Blockbuster Entertainment Ltd; Bennett**.

Application to this case

Vexatious

82. I am not satisfied that the claimant's case or the conduct of either himself or his representative is vexatious. Nothing that I have seen suggests that the effect (yet alone purpose) of these claims or the way they have been conducted is to subject the respondent to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant. The respondent provided no evidence of how this has adversely impacted on them that shows it is above and beyond what might reasonably be expected in Employment Tribunal litigation. I see no evidence of what might properly be described as harassment. At this stage and given the lack of action on the claimant's part since the last hearing until shortly before this (which suggests the respondent will have incurred little expense) I am not satisfied the respondent can realistically say the inconvenience or expense is out of all proportion.

Scandalous

83. I am not satisfied that the claimant's claim or the conduct of either him or his representative can be described as scandalous. In my opinion there is nothing that shows that the claimant's claim or the conduct of it is irrelevant or abuse of either the other side or of the Tribunal's process in such a way that it engages this order. There has been non-compliance with orders (to which I will come) and a number of amendment applications shortly before the hearing but they do not cross the threshold of being abusive of the other side, Tribunal or show irrelevant conduct. Rather they are an attempt to progress the litigation, albeit they are poor and defective attempts to do so. I do not think the defectiveness can fairly be described as scandalous.

Unreasonable

84. I am satisfied that the conduct of Mr Klosowski's representative should properly be attributed to him. Whatever the reality about work pressures, translation issues, late instructions and payment from him and the like, I have seen nothing that suggested Ms Pankowski was acting at any time on her own initiative without his authority or instructions (i.e. what might be called going on a frolic of her own). If the most recent email is correct, then the lack of action on her part was because he did not instruct her do anything, so she did not do it.

85. The claimant's conduct in my opinion is unreasonable. The reason is that the conduct shows a deliberate and persistent disregard for the Tribunal's orders either attributable to his lack of instructions to Ms Pankowski or Ms Pankowski drafting documents that did not comply with my orders, which she could have had with her when working on the documents.

86. The first amendment/clarification paid no heed to my order or the information I was said was needed. The order would have been before the claimant or his representative. There has been advanced no reason for why it was ignored. I infer from the circumstances that the decision not to provide the information I ordered to be provided was deliberate decision to proceed without reference to the order they had, since otherwise the document would show some attempt to comply.

87. The same can be said for the other applications to amend. Again there is a significant delay before they are made that is not justified, they again do not abide by my orders as the claimant admits and the claimant has not suggested any good reason for not doing so. I draw the conclusion this shows a persistent failure that, again, is deliberate.

88. The one exception to the above is the unfair dismissal claim. In my opinion that was sufficiently clarified and the information that I ordered the claimant to provide was provided by him in time. I suspect that was more by accident that design, but that does not matter in my opinion.

Non-compliance with any of these Rules or with an order of the Tribunal;

89. I am satisfied for reasons set out above under background that there has been a failure to comply with my order. That is sufficient to make out this ground.

Fair trial no longer possible

90. I am on balance satisfied that a fair trial is no longer possible in relation to the discrimination, harassment and victimisation claims. My reasons are as follows which in my opinion cumulatively satisfy this ground:

90.1. it is now over a year since the claims were presented. Memories naturally fade. This is something that will disadvantage the respondent when it comes to presenting factual information;

90.2. Mr Singh has left the business and is not cooperative, Ms Riley has also left and Mr Bradshaw has passed away. While possibly not enough itself, I think it significant this has all happened before the claim is even clear and so before the respondent has had a chance to obtain and/or preserve evidence;

90.3. if I allow the claim to continue it will still require further attempts at clarification. Given I have ordered what information is required and the claimant has failed to set that out on 3 occasions and failed each time, it is reasonable to conclude that this will not be quickly resolved either and is likely to require further hearings. There is nothing to reassure me that this time he will get it right or comply;

90.4. if I allow the claim to continue then the respondent still will not know what case it is going to have to meet for some time;

90.5. in any event the final hearing is 12, 13 and 14 December 2022. There is no realistic chance if the Equality Act claims continue to that hearing being effective either because of too short time to prepare or because of it being too short a trial in any event. This has come about because of the claimant's deliberate and persistent failure;

90.6. the alternatives in my view do not adequately address the risk of unfairness:

90.6.1. a costs order will not resolve the problem that the claims are still not particularised nor give solace that the claimant will provide the information in future. This

is because of the claimant's repeated failures to prove a clear claim even though my order told the claimant was information he needed to provide. There is no reason to believe it will be correct on the claimant's fourth attempt;

90.6.2. an unless order would be inappropriate for the same reasons: it would not achieve the necessary outcome. Besides it would likely trigger more satellite litigation about whether there has been compliance with the order. The litigation itself would cause more delay and expense;

90.6.3. to allow yet another attempt to clarify the claims would make it unlikely that the final hearing could be saved. If clarified then the claims will likely need more than 3 days to determine – a rough guess is 7 days because of the need for translation. The nature of the Tribunal's listings means this is unlikely to be before July 2023 at the earlies. This means memories about events in 2019 onwards will have faded even more which is unfair to the respondent who is not responsible for the delay;

90.6.4. no order can satisfactorily address the following

90.6.4.1. Mr Singh, a key witness, is unlikely to take part willingly which is fresh prejudice;

90.6.4.2. Mr Bradshaw has passed away;

90.6.4.3. Ms Riley has also left the business.

91. I am satisfied however that a fair hearing is possible for the unfair dismissal. The processes have been documented (or should have been) and so the respondent suffers no prejudice about establishing the potentially fair reason, despite the passage of time. The question of fairness and unfairness has no burden of proof so again it is not unreasonable to expect the respondent to be able to engage in it. Nothing I have said previously applies to this particular claim, because the claimant did clarify why he said the dismissal was unfair and the respondent is capable of understanding the case it must meet.

92. In my opinion the current trial date can be met for the claim for unfair dismissal, and 3 days will be sufficient.

Proportionality

93. In my opinion it is proportionate to strike out the claims for discrimination, harassment and victimisation. I have set out much of the reasoning already. I simply highlight the headings here:

93.1. the claimant has had nearly 11 months to set out his claims but failed to do so;

93.2. the claimant has repeatedly failed to provide the information ordered despite having the order that told him what the Tribunal needed answers to;

93.3. The claimant has missed the deadline set for the clarification and application to amend by a significant margin;

93.4. The failures have been deliberate and persistent;

93.5. There is no reason to believe it will get any better given the failures so far;

93.6. No other lesser sanction will do;

93.7. The respondent is prejudiced by the non-availability of witnesses. It is disproportionate to expect the respondent to proceed handicapped when the claimant still has not clarified his claim;

93.8. To allow the claimant to clarify his claims will result in the final hearing being postponed and listed in July 2023 – a year later;

93.9. The claimant is to blame for the situation in which he finds himself. He has had an adequate chance to clarify his claims;

93.10. No other sanction or step would address the problems sufficiently to allow those claims to continue.

94. Because a fair trial is still possible in relation to the procedurally unfair dismissal claim, it is not proportionate to strike that claim out. That may continue.

Conclusions

95. Therefore:

95.1. I refuse:

95.1.1. the claimant's application for a postponement to obtain further medical evidence,

95.1.2. the claim that the claimant was disabled because of PTSD,

95.1.3. the claimant's applications to amend, and

95.2. I strike out the applications for discrimination, harassment and victimisation.

96. The claim for procedurally unfair dismissal will proceed to a final hearing. Directions will follow separately.

Employment Judge Adkinson

Date: 4 July 2022

JUDGMENT SENT TO THE PARTIES ON

.16 July 2022

FOR THE TRIBUNAL OFFICE

Notes

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.