Neutral Citation Number: [2022] EAT 132

Case No: EA-2020-000833-VP

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 26th April 2022

Before:

HIS HONOUR JUDGE AUERBACH
MRS N SWIFT
MRS E WILLIAMS

- -

Between:

MISS N KUMARI	**Appellant**
- and -	
GREATER MANCHESTER MENTAL HEALTH NHS FOUNDATION TRUST	**Respondent**

- -
- -

Adam Ohringer (instructed by Advocate) for the **Appellant**
Amy Rumble (instructed by DAC Beacroft LLP) for the **Respondent**

Hearing date: 26th April 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The claimant presented complaints of direct race discrimination and/or harassment that were out of time. She also applied to amend her claim to add a further **Equality Act** complaint, which, had it been raised as a freestanding claim at that time, would also have been out of time.

In refusing, at a preliminary hearing, to extend time, or to allow the amendment, the tribunal in each case weighed in to the balance its view that the merits of the complaints appeared to be weak. The claimant contended on appeal that it was in wrong in law for the tribunal to take account of its view of the merits, of a complaint which it did not consider were so weak that it had no reasonable prospect of success, when deciding whether it was just and equitable to extend time, and when deciding whether to allow an application to amend. In particular it was argued that this would undermine or circumvent the strike-out rule and the safeguards attendant upon it.

It was also contended that the claimant, a litigant in person, had not had fair warning that the merits of her proposed complaints might be considered and taken into account.

The appeal was dismissed. The potential merits of a proposed complaint, which is not plainly so weak that it would fall to be struck out, are not necessarily an irrelevant consideration when deciding whether it is just and equitable to extend time, or whether to grant an application to amend. However, if the tribunal weighs in the balance against the claimant its assessment of the merits formed at a preliminary hearing, that assessment must have been properly reached by reference to identifiable factors that are apparent at the preliminary hearing, and taking proper account, particularly where the claim is one of discrimination, of the fact that the tribunal does not have all the evidence before it, and is not conducting the trial. This tribunal had properly done that.

Lupetti v Wrens Old House Limited [1984] ICR 348; **Olayemi v Athena Medical Centre** UKEAT/0610/10; **Woodhouse v Hampshire Hospitals NHS Trust**, UKEAT/132/12, **Gillett v Bridge 86 Ltd** UKEAT/0051/17 and **Herry v Dudley MBC**, UKEAT/0170/17 considered.

The claimant had also been given a fair opportunity to advance her case and submissions on these points.

HIS HONOUR JUDGE AUERBACH:

Introduction – History of the Litigation

1. This appeal concerns the question of whether the employment tribunal may take into account its assessment of the merits of a proposed complaint and, if so, the correct approach to that: (a) when considering whether it is just and equitable for a time limit of longer than three months to apply in respect of a complaint under the **Equality Act 2010**, pursuant to section 123(1); and (b) when considering whether to permit a new complaint to be added by way of amendment.

2. We will refer to the parties as they were in the employment tribunal, as claimant and respondent. This is the claimant's appeal. We will start with the relevant chronology.

3. The claimant was employed by the respondent from August 2017. In May 2019 she gave notice of resignation. The tribunal indicated in its decision that there was some uncertainty as to the precise date and length of the notice that she gave; but in the claim and response forms both parties gave the effective date of termination as 11 August 2019.

4. On 16 January 2020 the claimant initiated ACAS Early Conciliation. On 27 January ACAS issued the EC certificate. That same day the claimant presented her claim form, acting as a litigant in person. She ticked the boxes to indicate that she was claiming unfair dismissal and race discrimination. She included a short narrative which explained that she was claiming that she had been constructively dismissed. She complained of what she called "numerous incidents" during the course of the two years of her employment, and gave some brief descriptions of certain episodes. She also referred to an incident after her employment had ended, on 8 October 2019, in which she said she had witnessed a former colleague drive to her street and stop their car by her car, before driving off. She wrote that she had decided to write to the respondent's Human Resources department that same day because, as she put it, "the harassment continued even after my employment ended".

5. We interpose that the claimant was therefore perhaps complaining of alleged incidents of

either direct race discrimination or harassment related to race; but, for the purposes of our decision, nothing turns on the difference, and we will, for convenience, refer to these complaints compendiously as being of race discrimination.

6. Solicitors for the respondent entered a response form. They contended that all the complaints were out of time. They also indicated that they considered that they lacked particulars, but the respondent denied constructive dismissal or any discriminatory treatment. They referred to the claimant having raised a formal complaint post-employment, on 8 October 2019, following which, they asserted, there had been a thorough investigation but no evidence of discrimination was found.

7. On 15 April 2020 there was a case management hearing before Employment Judge Warren. The claimant was in person. The respondent was represented by Ms Rumble of counsel. The minute recorded that a further preliminary hearing was listed to determine whether the claims were brought in time and, if not, whether time should be extended in respect either of the unfair dismissal or the race discrimination complaints. This was to be a half-day public hearing on 14 September 2020.

8. In a brief summary of the complaints in that minute, the tribunal referred to some of the incidents which the claimant alleged had happened during the course of her employment, and to the allegation of what it called "post-employment harassment" when a member of staff had driven to her street. It noted that the claimant now alleged that the last act of discrimination was on 9 December 2019. That, we interpose, was the date on which the Head of Healthcare, Ms Press, had written to the claimant with the outcome of the investigation into the matters raised in her letter of 8 October.

9. The tribunal noted that the respondent denied the discriminatory acts in general terms, as it did not yet have specific allegations. The numerous incidents and allegations were described by the tribunal as "not yet defined" and "so far quite vague". Accordingly, the directions given included for the claimant fully to particularise her complaints.

10. On 1 May 2020 the claimant indeed tabled a particulars document. This gave an account over

several pages of the various incidents complained of during her employment. It then referred to the alleged incident on 8 October 2019 and the formal letter of complaint sent that day. It referred to the claimant having met the Head of Healthcare, and then the latter's letter of response of 9 December 2019, identified as the last act of discrimination. In relation to constructive dismissal, it summarised why the claimant considered that she had been driven by the alleged treatment to resign.

The Tribunal's Decision

11. The preliminary hearing on 14 September 2020 came before EJ Dunlop, sitting at Manchester, conducted remotely. The claimant was in person and the respondent was represented by Ms Rumble. In the opening section of its reasons, the tribunal referred to a letter in which the claimant had set out why she had not begun the ACAS EC process sooner than she did, and to her 1 May particulars of claim. The tribunal noted that no witness statement had been prepared for her, but that she had given sworn oral evidence during the course of the hearing, elicited by questions from the judge and on which she had then been cross-examined.

12. The tribunal summarised the gist of the allegations of "serious bullying treatment" by a colleague referred to as "A", noting that it was not finding facts. It referred to the claimant's case that she had resigned when she could no longer tolerate this treatment. It noted that the letter of resignation was not before the tribunal but that the claimant had confirmed that it had made no reference to race. The tribunal went on to note that the claimant had said that she had not complained sooner (whether to the respondent or to the tribunal) because she was "burnt out" and in poor mental health; but she did not seek medical advice and no medical evidence was before the tribunal.

13. The tribunal summarised her account of the 8 October 2019 incident, noting that, in one document, the date had been given as 7 October. It noted that, while it had not seen the 8 October letter, the claimant had confirmed that it had made no reference to race. The tribunal noted that the further particulars identified 9 December 2019 as the date of the last act of discrimination.

Subsequent to receiving that letter, the claimant had approached the CAB which had, in turn, referred her to ACAS, and she had then begun the early conciliation process.

14. The tribunal went on to conclude that the unfair dismissal complaint had been presented out of time and that it was not the case that it was not reasonably practicable to present it in time. That complaint was therefore dismissed. There is no appeal against that decision.

15. In relation to the race discrimination complaint, the tribunal cited s123(1) of the **2010 Act** in relation to what it called the "primary limitation" period, noting that the ACAS EC provisions may extend the limitation period but only where early conciliation is commenced within the primary period. The tribunal referred to principles emerging from **Commissioner of the Metropolitan Police v Hendricks** [2003] ICR 530 and **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548 regarding conduct extending over a period. It noted that, in some cases, resolution of the question of whether what it called "the requisite connection" exists between the various alleged discriminatory acts may need to be left to the final hearing when all the facts have been found.

16. The tribunal continued as follows:

> **"(20) In some cases, however, it may be both possible and fair, to determine even at a preliminary stage that there is no continuing act which is within time (and then to go on to apply the just and equitable test to consider whether the claim should nevertheless proceed). The claimant at a preliminary hearing must demonstrate a *prima facie* case i.e. that there is a reasonably arguable basis for the contention that the various complaints are linked (Lyfar).**
>
> **(21) In considering whether to extend time on a just and equitable basis, tribunals have a much broader discretion than under the test of reasonable practicability. The factors set out in British Coal Corporation v Keeble [1997] IRLR 336 may be relevant. Those include the length of, and reasons for, the delay; the extent to which cogency of evidence may be affected; the steps taken by the claimant to obtain advice. Ultimately, it is for the tribunal to weigh up the prejudice that would result to the claimant in not allowing the claim to proceed, against the prejudice to the respondent in allowing it.**
>
> **(22) Given that the complaint in respect of Ms Press, and the letter of 9 December, was not referred to in the original claim, I also had regard to the 'Selkent' test (Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT). This again involves balancing the hardship to the respective parties of allowing/not**

> **allowing a proposed amendment to the claim, having regard to the nature of amendment, the applicability of time limits and the timing of the application."**

17. The tribunal then summarised the parties' submissions.

18. In relation to the race discrimination complaints the tribunal considered that, for the purposes of the present hearing, the claimant had advanced a sufficiently cogent case that the complaints about alleged treatment during employment, and that concerning the incident said to have occurred on 7 or 8 October 2019, could all form part of conduct extending over time.

19. But the tribunal then continued:

> **"(32) However, I am content that there is no link between that 'act' and the letter sent by Ms Press, received by Miss Kumari on 9 December. As Miss Kumari acknowledged, she had had no previous dealings with Ms Press. She was unable to explain cogently why she saw Ms Press's response to her complaint as discriminatory in itself, far less why it was part of the same discriminatory act as A's conduct."**
>
> **(33) That means that the final date of the continuing act is 7/8 October. Early Conciliation should therefore have been commenced by 6/7 January, but did not commence until 16 January. The claim in respect of all of those earlier alleged acts of discrimination is therefore out of time unless the time limit is extended.**
>
> **(34) Would it be just and equitable to extend time in this case? Weighing in favour of the claimant is that fact that the claim is only out of time by a few days (once the 7/8 episode is linked to the earlier acts) and that, once she had received the response from Ms Press, she acted reasonably promptly. Weighing against the claimant is the fact that the claim does seem to be very weak. Even on the claimant's case, it is difficult to discern anything which links the treatment received to the protected characteristic of race. There is nothing in the lengthy 1 May letter which even touches on such a link. In contrast, there are various points where Miss Kumari describes other staff at the respondent as being in the habit of acting in a particular way (e.g. sharing personal details) which would be detrimental to a range of staff and was not targeted at Miss Kumari (or others) on racial grounds. I accept that if the claim is allowed to proceed the respondent will face the prejudice of significant time and cost as more attempts are made to try to establish sufficient details of the earlier alleged discriminatory acts for them to be able to sensibly respond. The final hearing will inevitably be some further months away, and cogency of evidence may well be affected, particularly as regards those parts of the claim which go back to 2017/18. It is clear from the 1 May letter, and from what Miss Kumari has said today,**

> **that most, if not all, of the allegations relate to verbal exchanges and that there would be little documentary evidence to assist the tribunal in reaching a decision.**
>
> **(35) I still must return to the 9 December letter from Ms Press, now viewing it as a free-standing alleged act of discrimination, separate from the earlier linked acts. I agree with the respondent that allowing this claim to be advanced would require an amendment to the claim. I did not require Miss Kumari to make a formal amendment application, but considered the matter as I would have done if she had. Applying the balance of hardship, I have determined that the amendment should not be allowed. If granted, Miss Kumari would win the right to bring a claim, but it would not be the claim with which she is primarily concerned. It would also appear to me that it is a weak claim. The respondent would face the cost and inconvenience of dealing with these proceedings in circumstances where, absent the amendment, all other matters have fallen away. In those circumstances, it appears to me that the balance of hardship is clearly against allowing the claim to proceed."**

20. Accordingly, the whole claim was dismissed.

Reconsideration Decision

21. The claimant appealed to the EAT. She also applied to the tribunal for a reconsideration. One of the points that she raised in her reconsideration application was, in so many words, that she had not prepared and presented evidence about the underlying complaints themselves at the hearing, because she had not appreciated that the merits would be considered as part of that hearing.

22. Upon preliminary consideration of that application, the tribunal refused it. It noted that the claimant was given the opportunity during her evidence at the hearing to expand upon her case, and that, for the purposes of the limitation issue, the judge had proceeded on the basis that the claimant would be able to establish all the facts alleged in her claim form and 1 May particulars of claim.

23. The tribunal stated that the concern was not with whether she could prove the underlying factual allegations, but with whether she would, ultimately, be able to link the treatment complained of to her race, given, as the tribunal put it, that "the claimant's own arguments in her letter of 1 May 2019 did not seem to support this". Further on, the judge observed that the reconsideration application

did not explain or summarise any evidence that the claimant could have given, had she prepared differently for the hearing, which would have changed the tribunal's decision on this point.

24. The reconsideration decision also stated, at [20], that the judge did not consider the reason for the delay (on the claimant's case, her mental health difficulties), to be particularly significant in determining whether it would be just and equitable to extend time, continuing:

> **"The key factor … was the prejudice that would be caused to the respondent in facing a claim which was unparticularised and would inevitably be stale by the time it came to trial. Although the claim was only out of time by a few days, many of the acts complained about dated back much further than that and were also unlikely to be the subject of documentary evidence … which was a significant factor in the prejudice I considered the respondent would face …".**

The Grounds of Appeal

25. At a Rule 3(10) hearing in relation to the appeal, at which the claimant had the advantage of being represented by Mr Ohringer under the ELAAS scheme, the following amended grounds of Appeal were permitted to proceed to this full appeal hearing:

> **"Ground 1**
>
> **In considering whether it was just and equitable to extend time under s.123(1) of the Equality Act 2010 ("EqA 2010") and applying the 'balance of prejudice' test, the EJ erred by giving regard, or excess regard, to the merits of the claim:**
>
> **a. Without having found that the claim had met the 'no reasonable prospects of success' threshold; and/or,**
>
> **b. Without the Claimant, who was unrepresented, having advance notice that the merits of her claim would be considered as part of the assessment and that she should come to the hearing prepared to demonstrate that the claim had sufficient prospects of success.**
>
> **Ground 2**
>
> **In considering whether to permit the amendment of the Claim and applying the 'balance of prejudice' test, the EJ erred by giving regard, or excess regard, to the merits of the proposed new allegation:**
>
> **a. Without the EJ finding that the claim had met the 'no reasonable prospects of success' threshold; and/or,**

> **b. Without the Claimant, who was unrepresented, having advance notice that the merits of her claim would be considered as part of the assessment and that she should come to the hearing prepared to demonstrate that the claim had sufficient prospects of success."**

The Law

26. Section 123(1) **Equality Act 2010** states:

> **"(1) Subject to section 140B 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."**

27. Section 123(3)(a) provides that conduct extending over a period is to be treated as done at the end of the period. Section 140B provides for a prescribed extension of time where the ACAS early conciliation process has been commenced within what we will call the primary time limit.

28. We observe that section 123(1) simply directs the tribunal to consider whether it is just and equitable to extend time, without further elaboration. It is well established that, while the onus is on a claimant who requires an extension to persuade a tribunal to grant it, the discretion which those words confer on the tribunal is a broad one. No particular factors are identified in the statute, whether as necessarily or exhaustively relevant, or necessarily irrelevant. The assessment on each occasion of what factors are relevant to the particular case, and what weight to attach to them, is one to be made by the employment tribunal on the particular facts and circumstances of the case.

29. These points are well established in a number of authorities. We were referred today to **Robertson v Bexley Community Centre** [2003] IRLR 434. Regarding the non-exhaustive list of potentially relevant factors discussed in **Keeble**, mentioned by the present tribunal, we were referred to the recent discussion by the Court of Appeal of the correct approach to that in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, and there are also earlier authorities to similar effect.

30. The power to grant or refuse an application to amend is a case management power. Once again, there is no specific provision, whether in statute or in rule, as to how those powers may or may not be exercised, or as to what may or may not be relevant considerations in a given case. Once again, all the relevant circumstances fall to be determined and weighed up by the tribunal. The overriding principle is that the tribunal must balance the hardship, justice or injustice to each of the parties that would be occasioned by either granting or refusing the amendment.

31. Again, a number of authorities make these points, including **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650; **Selkent Bus Co Ltd v Moore** [1996] ICR 836; and see the very recent invaluable review in **Vaughan v Modality Partnership** [2021] ICR 535. Whilst **Selkent** identifies certain particular relevant considerations, it is not exhaustive, and how these are weighed will depend on all the facts of the particular case.

Arguments

32. We have had the benefit of articulate skeleton arguments and oral submissions from Mr Ohringer and Ms Rumble. We have taken them all into account, but, in what follows, concentrate on what seem to us, in summary, to have been the principal points relied upon by each of them.

Claimant's arguments

33. Mr Ohringer recognised, as he must, the limits on the EAT's ability to intervene in what is an exercise of discretion by the tribunal. The EAT can only do so if the tribunal has erred in law, but, he stressed, that would include taking into account as relevant a consideration which, as a matter of law, it should have regarded as irrelevant.

34. In relation to the just and equitable extension of time, Mr Ohringer accepted that **Lupetti v Wrens Old House Ltd** [1984] ICR 348 could be seen as providing some support for the proposition that a tribunal, when deciding whether to extend time, may take into account its view of the merits of the claim generally, provided that there has been an opportunity for the parties to make submissions

on the point. But he noted that this case was decided before the jurisprudence relating to the stringent and careful approach which must be taken to applications for the striking out of discrimination cases, in authorities such as **Anyanwu** [2001] ICR 391, was developed.

35. He also noted three decisions of HH Judge Peter Clark, sitting in the EAT – **Bahous v Pizza Express Restaurant Ltd**, UKEAT/0029/11, **Szmidt v AC Produce Imports Ltd** UKEAT/0291/14 and **Rathakrishnan v Pizza Express (Restaurants) Ltd** [2016] ICR 283 – in which it had been held that where a discrimination complaint has been considered at a full merits hearing and has been found (or could have been, subject to the time point) to be meritorious, it was then a relevant consideration, when weighing the balance of prejudice, that, if time were not extended, the claimant would lose the benefit of a claim that was, or might be found to be, meritorious.

36. However, submitted Mr Ohringer, these authorities, all of which concerned cases in which the time point fell to be considered as part of the full merits hearing, did not determine or assist as to the correct approach, where, as in the present case, a tribunal is considering whether it is just and equitable to extend time at a preliminary hearing, at which all of the evidence is not available and the merits of the proposed complaint, factually and legally, cannot be exhaustively determined.

37. In that context, he submitted, the power which the tribunal has to strike out a claim that has no reasonable prospect of success under rule 37 **Employment Tribunal Rules of Procedure 2013** is pertinent, as are the safeguards built in to rule 37 to enable a party at risk of being struck out fairly to be heard and make representations at a public preliminary hearing, if so requested. Further, the line of authorities, of which the most well-known are **Anyanwu** and **Ezsias** [2007] ICR 1126, recently reviewed by Choudhury P in **Malik v Birmingham City Council,** UKEAT/0027/19 warn of the caution that needs to be exercised when considering the possible merits of a proposed discrimination claim, at a stage when not all of the evidence is available to the tribunal and a full merits hearing is not being conducted.

38. Mr Ohringer also referred us to a point made in **Malik** and referred to again in **Cox v Adecco Group** [2021] ICR 1307. This is that, when considering at a preliminary hearing the potential merits of a claim sought to be advanced by a litigant in person, it may not be a reliable or fair approach to expect the litigant in that context to be able to articulate precisely the basis on which they would maintain that the treatment they seek to complain of was because of, or related to, the characteristic in question; and care must be taken fairly to examine whether this may be apparent from the pleadings or other documents before the tribunal, though the litigant has been unable to articulate it.

39. Mr Ohringer submitted that it was therefore wrong for a tribunal to take into account, when deciding whether to grant an extension of time, the prospective merits of the complaint, which it had not found properly and fairly (or at all) had met the strike-out test of having no reasonable prospect of success. To do that was wrong in principle, because it would deprive such a claimant of the safeguards of the strike-out rule and the jurisprudence on the exercise of that power in discrimination cases. He observed that, if time were extended, that would not prevent a respondent from then making a strike-out application, if it wished, which could then be fairly considered in the context of a separate and further hearing to which those safeguards would attach.

40. Speaking to the second limb of ground 1, Mr Ohringer submitted that it was also contrary to natural justice for the tribunal to have regard to its assessment of the merits of the proposed complaint without the claimant having been given specific advance warning that these would be considered and might be weighed in the balance, and that she should, therefore, bring to the hearing whatever evidence she wished to marshal in order to demonstrate that the claims did have merit. He relied here on the point discussed in **Malik** and **Cox v Adecco** to which we have referred.

41. The rule 3(10) hearing judge had suggested that some consideration of the approach in the civil jurisdiction might be merited. Mr Ohringer had researched this, but, having done so, he was not seeking to argue that there was any rule or principle in the civil jurisdiction to the effect that consideration of the merits over and above a complaint being found to have no reasonable prospect

of success, was in principle wrong, in the context of an application for an extension of limitation. But he included in our bundle the decision in the Court of Appeal in **Davis v Jacobs** [1999] 51 BMLR, which did contain a warning about the great care needed when deciding, in the context in a limitation issue, to take into account the ultimate prospects of success of the proposed claim.

42. On the matter of the amendment application, Mr Ohringer referred to a number of authorities. The first was **Olayemi v Athena Medical Centre and Anor**, UKEAT/0613/10. In that case, when considering a proposed amendment, the judge had observed that the prospects of success "do not appear good". Mr Ohringer suggested that there was some initial support at [49] in the indication that there was "some force" in a submission that the judge "was not in a position, on a paper application to amend, to go into the prospects of success." But he acknowledged that, in the succeeding paragraphs, the EAT concluded that, taking account of the nature of the claim sought to be added in that case, the judge had not, ultimately, erred.

43. The next authority to which Mr Ohringer referred us is **Woodhouse v Hampshire Hospitals NHS Trust**, UKEAT 0132/12, in which, he said, the EAT considered that the merits could be regarded as relevant to an amendment application if what was sought to be added was an utterly hopeless case, but otherwise it should be assumed to be arguable. He acknowledged that **Gillett v Bridge 86 Limited**, UKEAT/0051/17 came to a different conclusion, accepting that a tribunal could take into account its assessment of the merits of a claim, even though it was not assessed as so weak as to have no reasonable prospect of success. But the most recent decision on this point, of Slade J in **Herry v Dudley Metropolitan Borough Council and anor**, EAT/0170/17, followed the **Woodhouse** approach rather than the **Gillett v Bridge** approach.

44. Mr Ohringer invited us, faced with conflicting authorities, to follow **Herry** and **Woodhouse** in preference to **Gillett v Bridge**. The former were right in principle, for the same reasons that he had argued that merits above the strike-out threshold ought not to be taken into account in relation to an application to extend time, that is to say, because to take a less stringent approach would subvert,

and deprive a claimant of, the protections of the strike-out rule and procedure.

45. Once again, Mr Ohringer did not suggest that this was the approach in the civil jurisdiction. He had included in our bundle **SPI Noth Ltd v Swiss Post International (UK) Ltd** [2019] EWHC 2004 because it had been mentioned in the rule 3(10) reasons. But he did not argue that it showed that it was impermissible in the civil jurisdiction to consider the merits if they were better than no reasonable prospect of success. That seems to us to be right, reading [10] alongside [9] of **SPI Noth**.

46. So, once again, Mr Ohringer acknowledged that, if a proposed complaint had been properly found to have no reasonable prospect of success, so that it would fall, inevitably, to be struck out, then it should not be allowed to be introduced by amendment, as there would be no point. But in other cases, he submitted, the merits should not be regarded as relevant. That would subvert the strike-out rule and attendant protections and it would be contrary to at least some prior authority of the EAT. Once again, he submitted, in addition, that the present claimant had in any event not been given a fair chance to put forward evidence that she might have relied upon in support of the merits of her claims. In her reconsideration application she had mentioned having diaries and not having access to her e-mails. The judge had not had before her the resignation letter or the letter of complaint of 8 October. These aspects had not been sufficiently addressed by the judge.

Respondent's arguments

47. In relation to the just and equitable extension of time, Ms Rumble stressed the broad discretion which the tribunal has in that regard, and the limits on the EAT's powers to intervene in the exercise of that discretion. It is well-established that the ultimate test is the balance of hardship or injustice, and it is for the tribunal, in the particular case, to decide what are the relevant circumstances and to weigh them up. She contended that **Lupetti** provided some support, although recognising Mr Ohringer's points about the vintage of that authority. It did not establish that the merits are necessarily an irrelevant consideration. She accepted that the three authorities of HHJ Peter Clark, which all related to the context of cases in which the merits and the time point had fallen to be considered at

full hearings, fell to be distinguished, and she did not seek to rely upon them.

48. If **Lupetti** could not safely be relied upon, then, she submitted, the point was at large and for us to decide upon this occasion. It was not an error to take account of the merits over and above the strike-out test because it would somehow subvert or circumvent that test or the safeguards attaching to its application under rule 37. The strike-out test was and is applicable to consideration of strike-out applications and it should not be imported into the different arena of the consideration of whether it is just and equitable to extend time. That involves the exercise by the employment tribunal of a distinct power under a distinct provision and at a different, earlier stage, at which a claimant has to make good on an application to extend time, so as to confer jurisdiction upon the tribunal, and, in respect of which the statue had conferred on tribunals a broad discretion.

49. It did not undermine or circumvent the strike out rule or associated safeguards for the tribunal to be able to exercise that discretion in an unfettered way, taking into account its assessment of the merits of the prospective claim, if it considered they should be weighed in the balance. Rather, it would constitute a fetter on the tribunal's discretion to import such a requirement, not laid down in statute or the **Employment Tribunals Rules of Procedure**. It was proper for a tribunal to consider the merits at large, so long as the parties had had a fair opportunity to make submissions about them.

50. It was noteworthy that it was not suggested that such a restrictive approach applied in the civil jurisdiction. There was no reason for the employment tribunal to take a different approach. The present tribunal had correctly directed itself as to the law, including the overriding test being of balance and prejudice. It properly weighed factors that it was entitled to regard as relevant at [34]. It properly concluded that the claimant's claim seemed to be very weak, particularly given that it had taken her factual case at its highest, and had properly identified that it was difficult to discern anything in her pleadings which linked the treatment complained of to the protected characteristic of race.

51. The claimant had had a fair and sufficient opportunity to prepare her case. The tribunal had

identified at an earlier hearing the problems with her pleaded case and that the time issue was to be considered. She had been specifically ordered to provide further particulars of claim, which she then did. It was neither necessary nor desirable for the tribunal to be under a duty to direct her as to the nature of the primary evidence that she should marshal on this aspect. The tribunal was not going to be conducting a mini-trial or making findings of fact.

52. Ms Rumble submitted that, at the hearing, as the reconsideration decision recorded, the judge had taken into account the claimant's status as a litigant in person and made sure that she had had the opportunity to develop her case in her evidence and submissions. The tribunal had proceeded on the basis of taking her factual case at its highest and had identified, in its reconsideration decision, that it considered there was nothing in the reconsideration application to point to there being any evidence that might have affected its assessment of the merits. It would be unduly onerous and burdensome to expect a tribunal to forewarn a litigant in person of every factor or consideration that might be regarded as relevant to an extension of time. Whilst the tribunal had to make due allowance for litigants in person, it was not its function to give such a litigant legal advice.

53. On the matter of amendment, Ms Rumble submitted that both **Olayemi** and **Gillett** supported her position. She also disagreed with Mr Ohringer's submission that **Woodhouse** and **Herry** supported his position. She did not agree, therefore, that we had to choose between conflicting prior EAT decisions. There was support in **Olayemi** and **Gillett** for her position and nothing to say that they were wrong. Once again she submitted that it was in any event wrong in principle to import the strike-out test into a different context, of a claimant making an application to amend to introduce a new complaint. In that context the tribunal's discretion was at large.

54. Once again, the tribunal should not be overburdened by having to apply a specific threshold test when assessing the merits. The tribunal in this case properly applied the **Selkent** guidance and, at [35], had properly taken into account considerations that it was entitled to regard as relevant, including properly identifying that the claimant had not advanced any case as to why it should be

inferred that Ms Press' decision in respect of her complaint was related to race.

Discussion and conclusions

55. In relation to the just and equitable extension of time, the starting point is the words of the statute which confer a wide discretion on the employment tribunal, and the clearly-established and undisputed body of authority to the effect that there is no necessarily definitive or exhaustive list of considerations that a tribunal may or must regard as relevant or irrelevant. There is nothing that we can see, whether in the statute or the prior general case law in this area, to the effect that, for the tribunal to carry out some assessment of the merits over and above the conclusion that there are no reasonable prospects of success, is necessarily in all cases wrong.

56. **Lupetti** in fact suggests that this is not wrong. Having said that, we accept that it was decided before the modern authorities on the exercise of the strike-out discretion; and, indeed, the **1980 Rules** did not contain (so far as we can see) a distinct power to strike out, although there was a power to assess whether a complaint had no reasonable prospects of success, which might have led to costs consequences. We can also see that it may be argued that the observations in **Lupetti** on this point were, in fact, *obiter*. We, therefore, do not place reliance upon **Lupetti**.

57. But, even putting **Lupetti** to one side, we do not accept Mr Ohringer's principal argument that to allow the possibility of consideration of the merits over and above a conclusion that there is no reasonable prospect of success is wrong in principle, on the footing that it subverts or undermines or circumvents the strike-out rule and the appropriate safeguards. We do not think it is, in principle, right to import the no-reasonable-prospect-of-success test into the just-and-equitable-extension-of-time test as such. It does not form part of s123, nor is there any rule of procedure to that effect.

58. We agree with Ms Rumble that the exercise of the just-and-equitable extension jurisdiction involves the consideration by the tribunal of a different question and the application of a different test, in different circumstances, in which what is being considered (albeit with a wide discretion) is

whether a claimant has persuaded the tribunal that time should be extended so as to confer jurisdiction to adjudicate their claim. It is not, in principle, *necessarily* always wrong, in that context, to consider and assess the merits of that proposed claim, and to weigh these in balance, even if the tribunal is not in a position to say that it is so weak as to have no reasonable prospect of success.

59. Further, even if the merits are assessed as better than no reasonable prospect, or even if found meritorious at a full trial, subject to the time point, it does not follow that time will always in such a case be extended, because that factor may be outweighed by other considerations, including possible considerations of prejudice in favour of the respondent. See the discussion in **Ahmed v Ministry of Justice**, UKEAT/0390/14, at [67].

60. If a tribunal is in a position properly to conclude that the merits of a late complaint have no reasonable prospect of success, then plainly it could properly refuse to extend time, as there would be no point in extending time in relation to a complaint that would be bound to be struck out. But what is the correct approach, when considering just and equitable extension at a preliminary hearing, if the tribunal cannot say that the complaint has no reasonable prospect of success? We agree with both counsel that the trilogy of decisions of HHJ Peter Clark do not help on this point because, when a time issue arises for consideration at the trial, the tribunal can actually determine fully whether the complaint is meritorious or not, subject to the time point. But what we are concerned with is a situation in which, at a preliminary hearing, the tribunal does not have all the evidence before it.

61. **Lupetti** does make the point, but it is an obvious basic principle of natural justice, in any event, that it would be wrong for the tribunal to take account of its assessment of the prospective merits if the parties have not had a fair opportunity to make submissions on the point. The authorities also do warn, generally, of the need to take real care when seeking to assess the merits of a prospective claim on an occasion when the tribunal does not have all the evidence, particularly where the proposed claim is of discrimination. As to that general point, the warnings given in the authorities on strike-out of discrimination claims and, indeed, in a civil case such as **Davis v Jacobs**, should be borne

firmly in mind. But that does not mean that it is necessarily impossible in every case for the tribunal, at a preliminary hearing, fairly to assess the prospects of success of a potential claim to some degree, and to identify whether it has particular weaknesses or faces particular difficulties.

62. Indeed, this is something that employment tribunals may and can do entirely properly, when assessing, for the purposes of the deposit rule, whether a claim that cannot be said to have no reasonable prospect of success nevertheless has little reasonable prospect of success. To be clear, it would not be right to import the deposit rule threshold into the context of just and equitable extension of time, any more than the strike out threshold. The point is simply that this is an illustration of how a tribunal can sometimes properly make an assessment of the merits of a prospective claim at an early stage, though it must always approach the matter with due caution, recognising that it does not have all the evidence before it, as discussed, in relation to deposits, in **Van Rensburg v RB Kingston-Upon-Thames**, UKEAT/0096/07.

63. The tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and that it identifies sound particular reasons or features that properly support its assessment, based on the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

64. So: the tribunal needs to consider the matter with care, identify if there are readily apparent features that point to potential weakness or obstacles, and consider whether it can safely regard them as having some bearing on the merits. If the tribunal is not in a position to do that, then it should not

count an assessment of the merits as weighing against the claimant. But if it is, and even though it may not be a position to say there is no reasonable prospect of success, it may put its assessment of the merits in the scales. In such a case the appellate court will not interfere unless the tribunal's approach to assessing the merits, or to the weight attached to them, is, in the legal sense, perverse.

65. Turning to applications to amend, the overriding test is balance of prejudice and every case turns on its own facts as to what may be the relevant considerations in that case and the weight to be attached to them. Once again, there is no prescribed test or approach to the question of the merits, whether in statute or in rule. Once again, if the merits can be properly and fairly assessed as falling below the no-reasonable-prospect threshold, then the application should plainly not be allowed as it would be pointless; and, even if the prospects are thought to be better than that, this may still in a given case be outweighed by other factors leading to a refusal of permission to amend.

66. Once again, we accept Ms Rumble's submission that, in principle, neither the strike-out rule, nor the attendant safeguards, provide a warrant to import into the different context of applications to amend, where the onus is on the claimant to persuade the tribunal to grant the application and the discretion is at large, the strike-out test. Accordingly, we would not conclude that merits better than no reasonable prospect are necessarily always irrelevant, unless the existing prior authorities establish that this is the required approach.

67. We turn, then, to the authorities, and first **Olayemi**. That was a case in which the employment judge had refused a late application to add a complaint of automatically unfair dismissal by reason of making protected disclosures to existing complaints of sex discrimination and unfair dismissal. In exercising the discretion, the judge had remarked that the prospects of success of that proposed new claim "do not appear good". The judge was argued to have erred in a number of respects, including by taking account of that view of the merits.

68. At [49], the EAT (Recorder Luba QC, as he then was) said that it had been submitted with

some force that an employment judge dealing with an amendment of this nature, in a case of this broad substance, was not in a position, on a paper application to amend, to go into the prospects of success. But that is not a statement of law that it is in principle wrong to do so. It is a practical observation that a judge may not be in a position properly to do so when considering a paper application to amend. In any event, the Recorder went on to say that there was an answer to the submission in that case, which was that the judge had properly identified a factor in support of the judge's view, being that this claimant was seeking to introduce, at a late stage, a complaint as to the principal reason for dismissal, without any explanation as to why it had not occurred to the claimant sooner that that might be the main reason why they had been dismissed.

69. The EAT does not appear to us anywhere in this decision to have said that it would have been an error, as such, for the judge to have regard to the view that the prospects of success did not appear good, because the judge had not found that the case was so weak as to fall below the threshold for a strike-out. We conclude that this authority, if anything, provides support to Ms Rumble's case.

70. We turn next to **Woodhouse**, a decision of HHJ Mullen QC and members. This concerned an application, at a late stage, to add claims of disability and protected-disclosure discrimination to a claim of unfair dismissal and money claims. This had been refused, one of the reasons given by the tribunal being that the claimant's 142-page witness statement contained no evidence to support the contention of disabled status. The EAT stated, at [15] that it had difficulty with that. It continued:

> **"It is true that in the assessment of the balance of hardship and the balance of prejudice there may in all the circumstances include an examination of the merits - in other words, there is no point in allowing an amendment to add an utterly hopeless case. But otherwise it should be assumed that the case is arguable, for this is what Mummery P said in describing what Tribunal practice should be when an application is made: where the matter is arguable and of substance, there should be representations by the parties."**

71. But this passage is clearly referring to the part of the **Selkent** guidance concerned with practice and procedure, in which Mummery P contemplated that there may be some applications which are so

obviously weak and hopeless that it is not necessary to seek representations before simply refusing them on paper, but others where representations should be sought. **Selkent** does not say that, if the underlying complaint is arguable, then the merits are necessarily irrelevant.

72. In **Woodhouse**, the EAT stated at [16] that it asked for any authority that states there should be an examination of the merits, but counsel was unable to point it to any, except the reflection that all the circumstances should be considered in exercise of the discretion. But, respectfully, that does not indicate that there is any authority *against* that proposition; and, indeed, the very point that all the circumstances should be considered supports, as we have said, Ms Rumble's approach. Further, we note that, ultimately, the appeal in **Woodhouse** was successful on a perversity ground, being that the tribunal was wrong to say that there was no evidence in that case to support the contention that the claimant was a disabled person.

73. We therefore do not agree with Mr Ohringer that **Woodhouse** supports his position.

74. Mr Ohringer concedes that **Gillett** is against him, but we need to give it some further consideration because it crops up again in the last authority to which we will be turning: that of **Herry**.

75. In **Gillett** the claimant had presented a claim for unfair dismissal and disability discrimination and had then applied to amend to add a claim of unfair dismissal for whistleblowing. As a matter of fact, that complaint had been made at a time when a free-standing claim would still have been in time. The application to amend was refused, however, on the basis that the merits appeared to the judge to be weak and because of the prejudice to the respondent. In the course of submissions, Soole J was referred to both **Olayemi** and **Woodhouse**. At [26] he held that a tribunal could refuse an amendment where the proposed claim had no reasonable prospect of success, but he also stated:

> **"Nor do I accept that as a matter of principle the employment tribunal must never take account of its assessment of the merits of the claim. Selkent refers to all the circumstances and Olayemi is an example in which the prospects of success 'did not appear good' and were taken into account."**

76. He added that, if **Woodhouse** was said to support a bar against the consideration of the merits, save where the proposed new claim is obviously hopeless, then he respectfully disagreed. He went on to state that he found it difficult to conceive a case in which a pessimistic view on the merits, falling short of no reasonable prospect, could provide support for the refusal of an amendment application *that has been brought in time* and, whilst this might not be decisive, it must be a factor of considerable weight. It was this that, ultimately, led him to conclude that the tribunal in that case had erred in the way it had exercised the discretion.

77. **Gillett**, as was common ground before us, therefore plainly supports Ms Rumble's position.

78. The last authority is **Herry**. This case had the background of complex multiple litigation and multiple applications to amend. Slade J allowed an appeal against a refusal of an application to amend, because the tribunal had taken the wrong approach to a time point and had also given two decisions for respective reasons that were, upon examination, materially inconsistent.

79. Slade J went on, when it came to the disposal of the matter, to re-exercise the power to grant or refuse the amendment as such. In so doing, she stated at [64] that the paramount considerations are the relevant injustice and hardship involved in refusing or granting the amendment. At [65] she began: "In accordance with **Selkent** I consider the relevant circumstances to be taken into account." She then entered upon her review and weighing up of what those circumstances were in the particular case, summarising these at [77] and [78].

80. While she had found some factors to be in favour of the claimant, she went on [79] to [83] to explain why she decided to refuse permission to amend. At [80] she said this:

> **"80. It is not the function of this court in deciding whether to grant an application to amend an ET1 to decide upon the merits of the claim. If a party considers a claim to be unarguable they may apply to strike it out. If it has little prospect of success they can apply for a deposit order. The Employment Appeal Tribunal has considered that the merits of an amendment may be relevant in deciding whether to grant an amendment. In Miss Gillett v Bridge 86 Ltd UKEAT/0051/17/DM**

> **6 June 2017 Soole J observed:**
>
> **"26. … Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. Selkent refers to "all the circumstances", and Olayemi is an example where the prospects of success "did not appear good" and were taken into account.**
>
> **27. … If and to the extent that HHJ McMullen QC's observations in Woodhouse support a bar against consideration of merits, save where the proposed new claim is "obviously hopeless", I respectfully disagree.""**

81. Mr Ohringer submitted that Slade J there parted company with Soole J in **Gillett**. But it is not entirely clear to us that that is what this passage means. Ms Rumble submitted that a distinction was being drawn between deciding upon the merits of the claim definitively, and assessing the merits and treating them as potentially relevant, when deciding whether to grant an amendment. We consider it is unclear, but that that is at least a possible and arguable interpretation of the first part of [80].

82. We add that, although Slade J cited what was said in **Gillett**, she did not actually state anywhere that she disagreed with it.

83. She went on at [81], to state:

> **"In my judgment if a proposed claim is in the words of HH Judge McMullen QC "obviously hopeless" [a reference to Woodhouse] that is a consideration which affects the assessment of the injustice caused to a Claimant by not being able to pursue it. Nothing is lost by being unable to pursue a claim which cannot succeed."**

84. Leaving aside what we have identified, respectfully, as the deficiencies of the reasoning in **Woodhouse**, that is an uncontroversial statement, as such, by Slade J that an amendment should not be allowed in respect of a claim that is properly assessed as having no reasonable prospect of success. But it was not necessary for her, in order to reach that particular conclusion, to decide whether she thought **Gillett** was rightly or wrongly decided.

85. Further, it is clear from [82] and [83] that she decided the appeal before her on the basis that

there were no reasonable prospects of success, because the proposed claim was fundamentally deficient in failing to identify why, on the facts claimed, there would be a breach of any of the provisions of the **Equality Act** that might have been relied upon. As she put it at [82], the amendment did not "even get to the starting blocks of sections 13, 26 or 27"; and at [83] she stated:

> **"… in the particular circumstances of this case in which not only could the new claims not succeed but the allegations do not raise the matters relevant and necessary to bring them within the scope of claims for direct discrimination, harassment or victimisation, the Claimant would suffer no injustice or hardship by not being able to pursue them."**

86. It occurs to us that perhaps the reason why Slade J referred to **Gillett** was because that was a case in which, in common with **Herry**, the complaint was, as such, potentially in time, had it been the subject of a free-standing claim, but the merits were judged by Slade J to be so weak that that outweighed the in-time argument in favour of granting the application to amend.

87. Be that as it may, it is not clear to us that Slade J disagreed with **Gillett** as such; and, even if she did, that does not appear to us to have been an essential component of her reasoning, given that she found that this was a proposed claim which had no reasonable prospect of success. Ultimately, we do not, therefore, consider **Herry** to be an authority binding upon us in support of the proposition that it is, as a matter of law, wrong to take the assessment of the merits into account in a case in which they are not found to have no reasonable prospect of success.

88. Our conclusion, then, is that no prior authority requires us to hold that it is, as a matter of law, necessarily wrong to do so. Once again, we do say that the employment tribunal should proceed with care and caution and, if it is relying on its general view of the strength of a proposed complaint as a point against granting the amendment, then it must identify a reasoned basis for doing so on which it is properly entitled to rely, bearing in mind that it does not have before it the full evidence that the tribunal would have at a full hearing, and the need to avoid becoming drawn in to conducting a mini-trial. But, if it reaches that view properly, then questions of weight and balance are then for it to decide, and the EAT can only intervene on grounds of perversity.

89. We turn, then, to the question of whether the tribunal is obliged, specifically, to warn a litigant in person that some assessment of the merits may be conducted when the tribunal decides whether it is just and equitable to extend time and/or to grant an amendment application. We do not think it is necessarily always unfair for the tribunal to fail specifically to do that.

90. The starting point is that the onus is on a claimant to advance their case as to why they consider it is just and equitable to extend time or why the proposed amendment should be granted, and then for the respondent to indicate whether it opposes the claimant's application and, if so, to indicate why. Where consideration being given is to the substantive issue of whether it is just and equitable to extend time, there are some points on which a tribunal will need to hear evidence, or should permit evidence to be presented, and will need to make findings of fact, particularly where a claimant is advancing a disputed explanation for the delay, or as to what was going on between when the cause of action arose and when early conciliation was started and/or when the tribunal claim was presented.

91. But an assessment of the merits at a preliminary hearing does not and cannot involve consideration of all of the evidence, nor the tribunal making hard findings of fact about the underlying case, for the purposes of deciding whether it is just and equitable to extend time. Nor does or could the tribunal do anything of that sort when deciding whether to grant an application to amend.

92. What is required, therefore, is that a party has a fair opportunity to advance their case and to respond to their opponent's case. Indeed, in relation to applications to amend, which are matters of case management, it is not necessarily always essential to have a hearing, although, in some cases, it may be concluded that in order fairly to dispose of the application a hearing is required.

93. Where a party advancing an argument that it is just and equitable to extend time or to grant an amendment or, indeed, opposing such an argument, considers that there is a key piece of evidence, such as a particular document which points strongly or uncontrovertibly to a particular conclusion on the prospective merits, there is nothing to stop that party tabling that document to the tribunal. But

we do not consider that that means there is an obligation on the tribunal specifically to warn a litigant in person in every case that some assessment of the merits might be made.

94. This is one of those areas where a balance has to be struck between the fact that the tribunal should make fair allowance for the fact that a party is unrepresented and the fact that it is not the function of the tribunal to provide legal advice to a litigant-in-person, nor to assist them to advance or argue or develop their case. Potentially, the tribunal could also send a wrong signal if a litigant in person was given the impression that the hearing would be a suitable occasion for all of the underlying evidence, or swathes of it, to be placed before the tribunal, when the tribunal will be neither required, nor in a position, to consider all of the evidence, or to make findings of fact.

95. We have borne in mind the warnings in **Malik** and **Cox** about the pitfalls of expecting a litigant in person to put their finger on the evidence or the points that they say will be relied upon to support their contention that their treatment had something to do with the protected characteristic, in this case, race. And, as we have said, the tribunal must always keep in mind that it does not have all the evidence before it and, in discrimination cases, the cautious approach that may be required, the possibility of inferences being drawn from the full evidence presented at a full hearing, and so forth. But the exercise is not the same as it is when the tribunal is considering whether to strike out a claim.

96. Further, the emphasis in the **Malik** guidance is on the tribunal needing to be pro-active in considering, in particular, the pleadings and material before it, including any amended pleadings or statement of case. The tribunal may, in the context of considering an application for just and equitable extension of time, or to amend, be properly in a position to consider that material, possibly to identify a particular weakness or gap in it, and invite the claimant to address it, and/or consider for itself whether there appears to be any obvious answer to it. Even if the case falls short of one in which the tribunal could properly strike out, it may nevertheless have properly and fairly identified a real problem or source of weakness with the claim. If so, it may entitled to have regard to it, so long as it does not then go on to give it excessive weight to the point of reaching a perverse decision.

97. We add the observation that a tribunal directing that there be a hearing on a just and equitable extension or amendment point should always consider what particular directions may be needed; in some cases it may need to direct the claimant to set out the particular points that they will rely on in support of their application to extend time or to amend, and the respondent then to set out its response to those points, before the forthcoming hearing. But we cannot and do not say that there is only one right approach to such matters of case management; and, ultimately, the question for us in this case is not about what particular directions were or were not given, but whether each side, in fact, had a fair opportunity to put its case at the hearing itself, before the tribunal came to its decision.

98. We turn, then, to the decision in this case and the grounds of appeal against it.

99. In summarising the claimant's allegations and the background facts, the tribunal noted that it was part of the claimant's case that she had complained about her treatment during employment on several occasions to the Acting Service Manager, including making it known that she believed that this treatment was related to race. The judge also noted that the claimant had told the judge that the resignation letter did not refer to race and nor did the 8 October letter. The judge also summarised the claimant's evidence as to what had happened following her employment ending and why she had not commenced ACAS early conciliation, and then presented her claim form, sooner than she did.

100. At [21] and [22] the tribunal gave itself a brief but, as we have found, correct, self-direction in law both in relation to just and equitable extension and applications to amend, correctly emphasising the overriding test of balance of prejudice or hardship in both arenas. The summary which the judge gave of the parties' submissions indicates that Ms Rumble specifically contended that the existing discrimination claims appeared weak, as there was nothing on the face of the claim itself or the 1 May particulars letter to link the alleged bullying treatment to the claimant's race.

101. In relation to Ms Press' letter, there were no grounds to link it to the previous conduct, as she (Ms Press) had not been involved before the claimant raised her post-termination complaint. In

setting out its conclusion, that the decision of Ms Press was not linked to the earlier matters complained of, for the purposes of section 123(3)(a), as we have noted, the tribunal also observed, at [32], that the claimant was unable to explain cogently why she saw Mr Press' response to her complaint as discriminatory in itself.

102. In considering, at [34], whether it was just and equitable to extend time in respect of the complaints in the original claim form, the tribunal identified its view that "the claim does seem to be very weak" as weighing against the claimant, and that it had specifically come to this view because, even on the claimant's case, including as set out in the lengthy 1 May letter, it was difficult to discern anything in the alleged treatment which linked it to race.

103. The tribunal also identified features of the allegations which suggested that at least some of the conduct of which the claimant complained was not targeted peculiarly at her, which, the tribunal said, therefore undermined her case that the treatment was because of race. The judge also considered there, other factors which she considered to be relevant, and weighed them all in the balance together. As the judge confirms in the reconsideration decision, she did all of this, taking the claimant's pleaded case at its factual highest.

104. Even if, applying the **Malik** approach, these weaknesses might not have been sufficient to justify the conclusion that the claims had no reasonable prospect of success and to strike them out, they were properly and fairly identified by the judge as weaknesses, as such. Further, although the judge gave the claimant the opportunity to address this point, she did not rely on the fact alone that the claimant was not able to add anything, but clearly had herself considered the underlying pleadings and documents before her as supporting her conclusions. We had those documents in our bundle and we cannot say that the judge was wrong in her assessment of them. It would have been wrong had the judge gone on to attach excessively disproportionate weight to this feature, but we cannot say that she did. Indeed, Mr Ohringer fairly acknowledged, in the course of submissions, that, notwithstanding how the grounds of appeal were framed, he was not advancing a perversity argument.

105. It is clear from the original and reconsideration decisions that these points were also raised and discussed with the claimant in the hearing. True it is that the judge did not have the resignation or the 8 October letters in front of her, but she specifically checked with the claimant whether those had made any reference to race, and the claimant told her that they had not. Of course, that does not, by itself, mean that there might not have been reasons why the claimant did not mention race in those letters, nor that she could not possibly have succeeded in a race discrimination claim. But what the judge was effectively doing here was checking whether she was missing anything that might be found in those letters and that might positively support the assertion that the treatment was related to race.

106. The claimant also had the benefit of the judge's consideration of the reconsideration application. The judge was entitled to take the view that, whilst the claimant referred to having a diary and not having any access to her e-mails, she had not said anything as to why there was, or might be, evidence there that would support her case, specifically, that the treatment she complained of was related to race. The reconsideration decision also confirms that the judge attached particular weight to the heavy prejudice against the respondent of potentially having to deal with claims going back some two years, given the nature of the likely evidence available in relation to them, an approach which the judge was entitled to take, notwithstanding that she found that the claims had been presented only a few days out of time (see, on this point, the discussion in **Adedeji**).

107. Overall, we conclude that all these points were given fair consideration, including a fair opportunity for the claimant to put her case in relation to them; and that these matters were then properly weighed in the balance by the judge.

108. We reach essentially the same conclusions in relation to the judge's approach to the application to amend, given, in particular, that the judge appears, correctly and without dispute, to have identified that it was common ground that Ms Press had not been involved in any of these matters before she came to consider the 8 October letter; and that the claimant had confirmed that she had not raised a specific issue of race in that letter; and that it did not appear that there was anything in her

pleadings to explain why she considered that Ms Press' decision was itself somehow related to, or influenced by, race. The judge was, therefore, entitled to take the view that this proposed complaint was also weak and, indeed, somewhat peripheral to, or parasitic upon, the main complaints that the claimant sought to advance, which was about her alleged treatment during employment as well as the 8 October episode. We conclude that the judge also came to this decision having given the claimant a fair and sufficient opportunity to advance her points.

Outcome

109. For all of these reasons, we conclude that both grounds of appeal, in both limbs of each ground, fail; and, accordingly, this appeal is dismissed.