EMPLOYMENT TRIBUNALS

Claimant: **Mr S Wood**

Respondent: **JD Wetherspoon Plc**

Heard at: **Newcastle Employment Tribunal**

On: **02 September 2022 (deliberations on 23 September 2022)**

Before: **Employment Judge Sweeney**

Appearances: For the Claimant, in person For the Respondent, Rebecca Jones, counsel

JUDGMENT

1. **The Claimant's application to amend the Claim Form to add a complaint of failure to make reasonable adjustments based on his IBS is refused.**

2. **The Claimant's complaint of failure to make reasonable adjustments based on his foot injury is struck out pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.**

3. **The Claimant's complaint under regulation 30 Working Time Regulations 1998 is struck out pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013.**

4. **The Claimant's complaint of breach of contract is dismissed upon withdrawal**

5. The proceedings are dismissed.

REASONS

Legal principles

Strike out

1. Rule 37 provides that:

(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 or response on any of the following grounds –

a. That it is scandalous or vexatious or has no reasonable prospect of success;
b. That the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
c. For non-compliance with any of these Rules or with an order of the Tribunal;
d. That it has not bee actively pursued;
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)

2. Strike out is a serious and draconian step for a tribunal to take.

Amendment applications

3. When it comes to considering applications for permission to amend claims in the employment tribunal, the relevant line of authority starts with the decision of the National Industrial Relations Court in **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650. Sir John Donaldson set out seven steps to the correct approach in considering amendments "*changing the basis of the claim or… adding or substituting respondents*." At step number 7, he said that a tribunal should: "*have regard to all the circumstances of the case…and…consider any injustice or hardship which may be caused to any of the parties… if the proposed amendment were allowed, or as the case may be, refused*." [p.657C]. This test (the 'Cocking' test) has been expressly held to apply in 'out of time cases': **British Newspaper Printing Corporation (North) Ltd v Kelly** [1989] 222; **Selkent Bus Co Ltd v Moore** [1996] ICR 836.

4. The case of **Selkent** is the most commonly referred to authority – laying down well known guidance and setting out non-exhaustive factors to be considered by tribunals as being:

4.1 The nature of the amendment;
4.2 The applicability of time limits;
4.3 The timing and manner of the amendment;

5. The relevance and applicability of time limits is probably the most controversial and difficult of the factors for parties and tribunals alike. In **Selkent**, Mummery J said at 843-844 that it was '*essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions'*.

6. In **Ali v Office of National Statistics** [2005] IRLR 201, Waller LJ said:

> ***"There are, as Mummery J said in Selkent, many different circumstances in which applications for leave to amend are made. One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so. There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time [emphasis supplied]."***

7. In **Prest v Mouchel Business Services Ltd** [2011] I.C.R. 1345, EAT, at paragraph 12, Underhilil J (as he then was) said in relation to an amendment of a claim to add a new cause of action:

> ***"the date at which those proceedings were first instituted is logically an accident, and it does not make sense to determine the relevant time limits by reference to it. If the claim is new in substance then it is artificial and unreal to regard it as having been instituted at some earlier date simply because an earlier claim with which it has become procedurally entwined was instituted at that date …"***

8. In **Abercrombie v Aga Rangemaster Ltd** [2014] I.C.R. 209, the CA (Underhill LJ) said at paragraph 48:

> ***"…the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."***

9. Therefore, if at the date of amendment, a party seeks to introduce a new claim out of time, the Tribunal may nevertheless, exercise its discretion to grant the amendment – **Safeway** @ para 7. The test to be applied on any application is the Cocking test. In paragraph 10 of **Safeway**, the EAT cautioned against reading Mummery J's words in **Selkent**, at paragraph (5)(b) out of context:

"Point (b) might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P. meant. As Waller LJ observed in Ali v Office of National Statistics [2005] IRLR 201, at para 3, point (b) is presented only as a circumstance relevant to the exercise of the discretion; and the reasoning of the Appeal Tribunal on the actual facts of the case clearly turns on the exercise of a 'Cocking discretion' rather than the application of an absolute rule.…Thus the reason why it is 'essential' that a tribunal consider whether the fresh claim in question is in time is simply that that is a factor – albeit an important and potentially decisive one – in the exercise of discretion."

10. More recent guidance is found in the case of **Vaughan v Modality Partnership** [2021] I.C.R. 535 (see paragraphs 16, 21 and 26) where the EAT again placed emphasis on the fundamental exercise of balancing the injustice or hardship of allowing or refusing the amendment and in doing so to focus on the practical consequences of either step.

Background to today's hearing

11. The Claim Form, presented on **28th February 2022**, is a lengthy document and difficult to follow. As observed by EJ O'Dempsey at the Preliminary Hearing of **19th May 2022**, it consists of a number of attachments which related to the Claimant's grievance (11.1 to 11.9 below):

11.1 The Claimant's written grievance, dated **16th December 2021**.

11.1.1 Nowhere in this document is there any reference to IBS or to any issues that this caused him at work or to the Claimant having raised with anyone anything about IBS with the Respondent.

11.2 The grievance outcome letter dated **20th January 2022**, from Mike Graveson, pub manager.

11.3 The Claimant's Appeal Against Grievance Outcome document, dated **21st January 2022**.

11.3.1.1 In this document, the Claimant refers to having spent over 10 minutes with Rosie Lamb on **20th November 2021**, discussing what adjustments would be needed. He says that he asked for reduced hours – for shifts to be reduced by around 3 hours. He also refers to having to climb the stairs from the bottom bar on the ground floor to the top during working and on breaks.

11.3.1.2 He refers to the second period of sickness absence which, he suggests would not have taken place had he been permitted to work shorter shifts and on Bar 3 because this exacerbated his foot injury.

11.3.1.3 Nowhere in this document is there any reference to IBS or to any issues that this caused him at work or to the Claimant having raised with anyone anything about IBS with the Respondent.

11.4 The grievance appeal outcome dated **9th February 2022** from Owen Wacker, Senior Personnel Manager.

11.5 A document dated **13th February 2022** prepared by the Claimant 'in response to Owen Wacker's outcome email'.

11.5.1.1 That document is the Claimant's response to the outcome of his grievance appeal. In it, he refers to speaking to Shannon Simm and Rosie Lamb about how he struggled on shift due to his foot. He refers to CCTV footage of 20th and 23rd November 2021, which he says would show his pain on shift. He refers to asking to work on Bar 3 or middle floor as walking up and down the stairs between bars would cause pain.

11.5.1.2 Nowhere in this document is there any reference to IBS or to any issues that this caused him at work or to the Claimant having raised with anyone anything about IBS with the Respondent.

11.6 A letter from Saville Medical Group dated **17 January 2022**

11.6.1.1 In that letter, the GP refers to the Claimant's foot injury, that he had asked for adjustments (reduced duties/hours) to allow his injury to heal.

11.6.1.2 Nowhere in this document does the GP refer to IBS or to any issues that this caused him at work or to the Claimant having raised with anyone anything about IBS either with the GP or with the Respondent.

11.7 The two fit notes dated **15th and 30th November 2022**

11.7.1.1 There is no reference to anything other than foot injury.

11.8 A series of messages from and to the Claimant

11.8.1.1 Nowhere in this document is there any reference to IBS or to any issues that this caused him at work or to the Claimant having raised with anyone anything about IBS with the Respondent.

11.9 A Schedule of Loss dated **2nd March 2022**.

12. On **19th April 2022**, the Tribunal directed the Claimant to send a Disability Impact Statement. He was afforded an extension of time to **13th May 2022** to provide this and medical evidence. He did so on **15th May 2022**.

13. The Claimant identified 7 physical/mental health impairments:

13.1 Optic nerve hypoplasia and amblyopia;
13.2 Congenital sensi-neural deafness;
13.3 Anxiety disorder
13.4 OCD
13.5 EUPD
13.6 IBS

Preliminary Hearing before Employment Judge O'Dempsey

14. There was a Preliminary Hearing on **19th May 2022**, Judge O'Dempsey gave the Claimant some leeway on the basis that he is an unrepresented litigant. He made orders for the Claimant to set out his position on the medical evidence with a view to enabling the Respondent to further consider its position on the question of 'disability', noting that he sought to rely on conditions 1,3, 6 and 7 and on the condition of ADHD (see paragraph 21 of the case management summary of that hearing). The Respondent noted that only the foot injury had been referred to in the lengthy particulars of claim.

15. Judge **O'Dempsey** noted that there had not been any application to amend. He was not considering at that hearing whether permission was needed – in fact, he was unclear as to the complaints that were being advanced. Nevertheless, he directed that, if the Claimant wished to amend the particulars of claim, he must do so by **07 July 2022**, setting out the amendments that he sought (i.e. the words to be added to the original claim) and the basis on which the Claimant states that the amendment ought to be granted by the Tribunal. He also directed that there be a full day's CVP Open Preliminary Hearing to consider the matters set out in paragraph 26 of the case management summary and made orders for the parties to prepare for that hearing (orders 2.1 to 2.9).

16. On **13th June 2022**, the Claimant sent further particulars of his claim [**page 100-102**] in accordance with order 2.1. In a further email dated **12th July 2022** [**page 120**] he sought permission to amend his claim form to include those particulars. At today's hearing, he confirmed that the further particulars document contained the amendment he sought to the Claim Form. In that document, among other things, he refers to requesting reasonable adjustments. He said that he made requests to Rosie Lamb and John Hudson and in multiple grievances. Nowhere in the further particulars does he refer to IBS or what impact that had on him at work or that he had at any time mentioned IBS to managers.

17. On **30th June 2022**, the Respondent served an amended Grounds of Resistance [**page 103-119**] which was without prejudice to its contention that the Claimant

requires permission to amend the claim. Aside from not accepting that the Claimant qualified as a disabled person under section 6 Equality Act 2010, the Respondent denied actual or constructive knowledge of any disabilities. It also observed that the Claimant had failed to identify what provision, criteria or practice he was relying on and/or how that place him at a substantial disadvantage. It reiterated its application to strike out the complaint of failure to make reasonable adjustments on the basis of no reasonable prospect of success.

18. The Claimant also prepared a witness statement for today's hearing (at **page 195197**). In it, he gives an account of the events relating to his complaint of disability discrimination. It talks of how the Claimant struggled to work long shifts and to move between bars at work because of an injury he had sustained to his foot. He describes how he informed the pub manager that he was struggling with the long shifts and asked for them to be reduced by around 3 hours; that the shifts were not reduced and that he had to use the back stairs to move between bars. He describes how, following a conversation with John Hudson (Area Manager), the pub manager agreed to change the rota to 6 hour shifts at 30 hours a week.

19. In his disability impact statement [**pages 199-200** of the bundle], the Claimant gave the briefest of evidence in relation to these impairments. In relation to IBS, he said: "*this condition is linked to my anxiety when it occurs it can result in severe abdominal cramps causing me to double up on pain and gives me an intense feeling of needing to go to the toilet. This can be very embarrassing in public*."

Today's hearing

20. I wished to identify the claims before going on to consider the question of disability and strike out.

21. At today's hearing, the Claimant confirmed that:

21.1 His complaint under the disability discrimination provisions of the Equality Act 2010 was one of failure to make reasonable adjustments only;

21.2 His further particulars of claim at **pages 100-102** also consisted of the terms of his application to amend;

21.3 His witness statement at **pages 197-197** was not about the issue of whether he was disabled but dealt with the events that took place;

21.4 He relied on the impact statement at **pages 199-200** and the medical evidence at **pages 178-194** in relation to the issue of 'disability';

21.5 That he was not relying on ADHD.

21.6 He confirmed that he was not pursuing any claim for breach of contract;

21.7 He confirmed that his claim under the Working Time Regulations 1998 ('WTR') was fully set out on **page 101**.

22. In seeking to understand his complaints, I asked what all the other impairments had to do with his complaint, given that all his references to the difficulties at work were about his foot. I asked about IBS. He said for the first time that ne needed to work on the top bar for easy access to the toilet, because of his IBS which is exacerbated by anxiety. I asked where in any of the documents I could see any reference to this. The Claimant accepted that there was none, and that was why Judge O'Dempsey asked him to particularise his disability discrimination claim, which he did on **pages 100-102**. He said that he went through each of his disabilities with Rosie Lamb verbally on **20th November 2021** and said that he may need to use the bathroom. He accepted that this was not referred to anywhere in his claim form or particulars, or anywhere else.

The complaints

23. As far as I could discern, the complaints – subject to any amendment - were twofold:

23.1 A claim that his foot injury amounted to a physical impairment which had a long term substantial adverse effect on his ability to carry out normal day to day activities and that the Respondent was under a duty to but failed to make reasonable adjustments;

23.2 A claim under regulation 30 Working Time Regulations 1998 for a refusal to permit the claimant to exercise a right under regulation 13 (taking holidays)

Failure to make reasonable adjustments

24. Although the hearing had been set down for determination of disability in relation to a number of impairments, from the Claim Form and further particulars (all of which related to the Claimant's foot injury) I discerned from the Claim Form and the Further Particulars that this was advanced on the following basis:

24.1 That by reason of his foot injury, he was disabled within the meaning of section 6 Equality Act 2010;

24.2 That the Claimant was required to work his full shift and on bars 1 and 2 (the 'PCPs');

24.3 That these PCPs put him to a substantial disadvantage, namely pain and discomfort, an exacerbation of his foot injury and the likelihood of having to take time off work;

24.4 The Respondent knew or ought reasonably to have known that he was disabled and likely to be disadvantaged in this way by the PCPs;

24.5 The Respondent was under a duty to take such steps as were reasonable to avoid the disadvantage, those steps being: (a) reduce the Claimant's shift by around 3 hours and (b) permit him to work on bar 3.

24.6 The Respondent failed to do so.

The WTR complaint

25. The Claimant confirmed to me that his complaint was about one day: **10th December 2021**. I discerned that this was being advanced as follows:

25.1 That the Claimant had a right to take leave to which he was entitled under regulation 13(1) WTR on such days as he may elect by giving notice to his employer;

25.2 That in November 2021, the Claimant gave notice of the holiday he wished to take on **10th December 2021**;

25.3 That the Respondent refused to permit him to exercise his right;

26. Although there was a reference to breach of contract, the Claimant confirmed that he was not pursuing any such claim and that this was withdrawn.

Matters which are not in dispute

27. The Claimant was employed as a Bar Associate from **03 October 2021** to **14 December 2021** at a bar in central Newcastle, called the Mile Castle. The Claimant had been absent on sick leave for four weeks from **27th October 2021**. He returned to work on **20th November 2021** on which day he had a return to work interview with Rosie Lamb.

28. In an email on **12th November 2021**, the Claimant said that he would like his first shift back to be a shorter shift. He also said in an email of **12th November 2021** that after another week off, he would not need any adjustments at work. He said: "*I have just attended my GP who has advised a further week as the top of my foot is still sore when I put shoes on and climb stairs. I will forward the fit note. After this point I don't feel any adjustments will be necessary"*. The Claimant said at today's hearing that this was factually correct at the time, but that the position changed thereafter.

29. In a fit note dated **15th November 2021**, the Claimant's GP signed him as unfit for work from **12th to 19th November 2021** because of 'disorder of soft tissues of foot'. The GP referred to the Claimant needing 'reduced duties initially' on return to work. A further fit note dated **30th November 2021** signing the Claimant unfit for work from **27th November 2021** to **13th December 2021** says the same.

30. The Claimant worked a shift on Bar 3 (top floor) on **20th November 2022**. He worked a 4.5 hour shift on Bar 3 on **21st November 2021** (albeit the Claimant says this was

due to customer demand and not as an adjustment by management). He was not at work on **22nd November 2021**. He worked on **23rd November** on bar 1 (ground floor)**, 24th November 2021** on bar 2 (middle floor) **and 25th November 2021** on bar 1 – there is a dispute as to whether some or all of these shifts were full or shortened shifts. The Claimant then commenced a further period of sickness absence, returning on **14th December 2021**, on which day his employment was terminated.

31. His employment was terminated with immediate effect on that date. He raised a grievance with Antony Edwards on **16th December 2021**. This was heard by Mike Graveson, pub manager on **6th January 2022**. The outcome was sent to the Claimant on **20th January 2022**. He appealed the grievance in an appeal letter dated **21st January 2022**. This was heard by Owen Wacker, Senior Personnel Officer and a grievance appeal outcome letter was sent on **9th February 2022**.

The issue of disability

32. I then heard evidence from the Claimant, cross examination and submissions on the issue of disability (as it had been set down for this purpose). I gave my judgment with reasons, concluding that the Claimant was a disabled person by reason of IBS but not by virtue of the other impairments relied on. A separate judgment to that effect has been sent to the parties.

Further application to amend: IBS

33. I asked the Claimant where my conclusion on disability left his complaint of failure to make reasonable adjustments. I had concluded that he was not disabled by reference to his foot injury and, to date, his claim was entirely focussed on that. I explained how a complaint of reasonable adjustments was broken down: PCP, disadvantage, adjustments, knowledge. The Claimant said that he wished to proceed on the basis of his IBS. Eventually – with assistance from me in identifying the component parts of a section 20 complaint - the Claimant settled on the following:

33.1 He was required to work anywhere in the pub to fulfil his contractual duties and the staff toilets were located on floor 4;

33.2 This put him to a substantial disadvantage because of his IBS, which meant that he needed to or felt the need to go to the toilet in a way a person without that disability did not;

33.3 He requested a reasonable adjustment, namely to work on Bar 3, to be near to the staff toilet.

34. This was the first time that this had been articulated by the Claimant. Upon checking with him, the Claimant said that this was now the entirety of his complaint of failure to make reasonable adjustments. Ms Jones submitted that this was very different to what has been said to date. The Claimant accepted that and that he needed permission to amend to advance that claim.

35. I asked the Claimant what he had said to me earlier in the hearing: that he understood that, because his claims were unclear, EJ O'Dempsey had ordered that he should set out further particulars and if applying to amend, that he was to set this out too. The Claimant confirmed that his application to amend had been set out in **pages 100-102**, where there was no reference to IBS or any need to be close to toilet facilities. He accepted that, as now described at this hearing, this was a new application entirely; that he was not a lawyer and that he could have set it out more clearly. He referred to having to get his legal team involved now.

36. I asked whether the only evidence he intends to give about any reference to IBS at work was that he mentioned this to Rosie Lamb during the return to work interview on **20th November 2021**. The Claimant said that he mentioned it at that time, during a 10 minute discussion but also to Amanda Dunn on **23rd November 2021**. Although there is a reference to Amanda Dunn in the Claim Form, he acknowledged that he has not said anywhere that he discussed IBS with her. He also accepted that in the witness statement which he had prepared (setting out his account of the events – **pages 195-197** – there is no reference to him mentioning IBS on either of these occasions. The only documented reference (in contemporaneous messages and in the pleadings is to his foot). When I asked if his claim is not to be struck out, whether at the next hearing the Tribunal would see references to what he said about IBS, the Claimant said yes.

37. The Respondent opposed the application to amend. Ms Jones submitted that the Claimant had put together a lengthy claim form and has had a number of opportunities to state his case. The Respondent was concerned about how the claim had changed. The description of his complaint of failure to make reasonable adjustments is, she submitted, nothing near the case they had been looking at or understood to be advanced. There was a preliminary hearing at which the Judge explained what the Claimant had to do. The amended complaint makes no reference to IBS. His witness statement makes no reference to this or to what he says he told the respondent. Ms Jones submitted that there is a real risk that the claimant is simply changing his case to suit the situation he finds himself in; that he realised the 'writing was on the wall' with some of his disability claims and is attempting to shape something to survive what is left. She referred to the Claimant's reference today to a conversation with Amanda Dunn, which is the first time this has been mentioned.

38. She submitted that there is a real and substantial prejudice to the Respondent in having to respond so long after the event to a shifting case, which has been different on every occasion. The way the claimant is now seeking to advance his claim is not relabelling. It is substantially different, and will involve asking witnesses about short conversations, one on **20th November 2021** (Rosie Lamb) and possibly a conversation with Amanda Dunn (on **23rd November 2021**). The Respondent is very concerned that at this hearing there has been a new allegation based on conversations not previously referred to. Even then, at this juncture, the Claimant has not said what he said to Amanda Dunn (or what it was he said to Rosie Lamb about IBS) and the balance of prejudice favours the Respondent, in light of the difficulties in having to face such an unacceptable situation. She also submitted that

the time and cost of having to deal with what is clearly a shifting case is disproportionate and prejudicial to the Respondent, leaving aside the time taken by the Tribunal.

39. Ms Jones submitted that if this new application to amend were permitted, the application to strike out (or in the alternative to order a deposit) is still live.

40. The Claimant asked for his amendment application to be granted, that he had not set out his claim very well but now it was clear.

41. Ms Jones made her application to strike out the complaint of failure to make reasonable adjustments and the complaint under the WTR. The Respondent's written application was made on **21st July 2022**, on **pages 123-124**. In the alternative she sought a deposit order.

42. In light of the application for a deposit order, I heard further evidence from the Claimant on his means. He works as a bar supervisor and currently earns about £100 - £120 a week. He shares a home with his girlfriend and her children. He contributes to bills to the extent of about £25-£30. He also gets universal credit. After bills and rent, he is left with about £400 a month to live off.

43. Owing to the lateness in the day, I reserved my decision on the application to amend, on strike out and on the deposit order applications.

Conclusion on Application to amend

44. I first had to decide whether to permit the Claimant to further amend the Claim Form to add the following complaint:

44.1 That the Claimant was disabled by reason of IBS;

44.2 That the Claimant was required to work on bars 1 and 2 (the 'PCP');

44.3 That these PCPs put him to a substantial disadvantage, namely he would have to walk further to access the toilet on floor 4, which because of his foot injury would cause the Claimant stress and trigger the symptoms of IBS;

44.4 That the Respondent knew or ought reasonably to have known that he was disabled by reason of IBS and likely to be disadvantaged in this way by the PCP;

44.5 The Respondent was under a duty to take such steps as were reasonable to avoid the disadvantage, the suggested step being: to allocate him to work on bar 3 on **23rd, 24th and 25th November 2021**.

44.6 It failed to do so on **23rd, 24th and 25th November 2021**

45. I refuse the Claimant permission to amend. I make allowances for the fact that he is unrepresented. Nevertheless, I was deeply troubled by the way in which the Claimant has approached these proceedings. As he confirmed in cross-examination, he has experience of employment tribunal litigation and in particular disability discrimination. That does not mean that he is to be taken as being a sophisticated litigant – far from it. However, he has some familiarity with litigation and the need to identify claims and issues and to comply with directions, not only timeously, but for the purposes of setting a case out clearly. He understood why Judge O'Dempsey said that he needed to give further particulars and why he may have to make an application to amend his claim form, if seeking to add anything new.

46. The chronology and history of events is important here. The Claimant's employment was terminated on **14th December 2021**. The Claimant then submitted a grievance, which largely is a challenge to the decision to terminate his employment (although there were other aspects to it, such as holiday requests). In the documentation he produced following that dismissal there is not a single reference to IBS. Everything (and the Claimant accepts this) is to do with his foot injury. Nowhere is there a reference to the Claimant mentioning to Rosie Lamb (or Amanda Dunn) that he suffered with IBS. At today's hearing he suggested that there would be CCTV evidence coming into his possession and that the tribunal would be able to hear him discussing IBS with her. Ms Jones, on instruction, observed that the CCTV is without sound.

47. I was deeply concerned by the swift change of direction in this case. Until today, the Claimant's case had been all to do with his foot injury: that working long shifts made his foot hurt; that he wished to avoid having to walk up and down stairs over the day as this hurt his foot.

48. It was clear to me that by listing 7 impairments (as he did before Judge O'Dempsey) the Claimant was simply listing everything that he wished to have determined as disabilities, irrespective of whether they had anything to do with the events of which he was complaining.

49. It was only when I was asking the Claimant about the issues caused by IBS that the Claimant developed an argument about needing access to the toilets on the top floor of the building. I was troubled that the Claimant seemed to be developing this case as the day went on.

50. I was also troubled by the fact that, as things stood today, there was only the barest of references (made for the first time at this hearing) to what the Claimant says he told Rosie Lamb on **20th November 2021** (which was, that he had IBS and needed to be near a toilet) and latterly, Amanda Dunn, on **23rd November 2021 (**in respect of which, the Claimant said only that he had mentioned IBS to her too). I was further troubled when the Claimant said that in a future statement, there will be lots of references to IBS.

51. I had concerns about the reliability of the Claimant in this regard as demonstrated by him moving from a total absence of references to IBS to a position in the future where he intends to rely a lot on hitherto, unexpressed references to this.

52. Returning to the chronology. Not only was there no reference to IBS in the grievance documents or in the Claim Form (presented on **28 February 2022**), there was no reference to it in any emails, texts or messages before or after termination of his employment. Nor was there any reference to it in the further particulars sent on **13 June 2022**.

Timing and manner of application to amend

53. The application to amend the claim is late. It was made at the second preliminary hearing which is some 8 ½ months after his dismissal; approximately 9 ½ months after the Claimant says he mentioned it to his managers; over 6 months after presentation of the Claim Form.

54. The authorities make clear that an application to amend should not be refused solely because there has been a delay in making it. Amendments may properly be made at any stage. The timing is simply a factor. A relevant question is why the application is only made at the stage it has been made. The Claimant has not explained the delay. He has not explained why there was no reference to IBS and any substantial disadvantage caused by any PCP in the Claim Form, or in the Further Particulars and he had not explained why he did not raise it in those documents or why it has been left to this hearing.

55. As to the manner of the application, I had the very distinct impression that the Claimant was conceiving of the argument as discussions unfolded during today's hearing. This is directly linked to the timing of the application. I discerned that it was only through questions from me, whereupon the Claimant came to realise that I was keen to understand more about his IBS and its impact at work and what he had raised, that he mentioned that he had spoken to Rosie Lamb about it. It was during today's hearing that he also said CCTV would have recorded him saying this. Until now, certainly in the written documents that I had seen, the Claimant had suggested that CCTV would show his pain – due to his foot injury. There had been no suggestion that any conversation regarding IBS could be heard. Ms Jones, on instructions, said that the CCTV was without sound. I had grave doubts about the credibility of this particular assertion.

56. The Claimant had been given the opportunity by Judge O'Dempsey to clarify and set out exactly what his claims were. He did so in his further particulars on **13th June 2022** (which was late). There was no attempt to seek to amend further after that, until today's hearing.

57. Therefore, the timing and the manner of the application to amend are unsatisfactory. Together, they give rise to a genuine cause for concern on the part of the Respondent – and, I would add – on my own part, that the Claimant was seeking to

advance a new case to suit the moment. I was troubled by the ease with which he was able to change course and now say that he had told management about the impact of IBS on his work. I was unimpressed by the Claimant's assertion that matters were over his head and that he now needed to 'involve his legal team'. I did not accept for a moment that the Claimant had a 'legal team' and it was said only to deflect from a simple premise that was put to him, that he could have and should have raised these matters earlier.

The nature of the application to amend

58. This was not just a re-labelling exercise. This was a substantial amendment on any analysis. The whole emphasis of the case had switched to a complaint around the Claimant's IBS, whereas up until now, it was all about a short-term injury to his foot. Further delay will inevitably be caused. Knowledge is a key issue in these proceedings and the Respondent's position is clearly stated. At no stage prior to the termination of his employment, or during the grievance process, was it or could it have been aware that the Claimant was disabled by virtue of IBS. Its position is that this was never mentioned. Therefore, to the extent that the Claimant now says for the first time that he raised this with management, further information will be required for him (which will involve delay and cost). Further inquiries will be required of individuals within the Respondent organisation (which will involve delay and cost). Further amended grounds or resistance will be required (which will involve delay and cost). Further, given the delay, evidence – which could have been obtained had the Claimant raised this issue either during the grievance or on the original claim form – will be rendered of lesser quality, owing to the passage of time and the fact that the issue is dependent on recollection of a verbal exchange on a particular day over a course of about 10 minutes, according to the Claimant. It is not uncontroversial to proceed on the basis that memories may have dimmed in the time that has elapsed. Given the absence of any reference to IBS in the grievance documents, there is no reason to suppose that Ms Lamb or Ms Dunn were asked about IBS at the time, and the documents attached to the Claim Form reveal that the matter was not raised.

The merits of the claim

59. The duty to make reasonable adjustments under section 20 does not arise if the employer does not know and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in relation to his employment. Certainly all the written material points only to a reference to the Claimant's foot injury: the documents he created for his grievance; the fit notes; the return to work interview which he signed, the messages exchanged between him and the respondent. The Respondent's position is that it knew nothing about IBS. The Claimant accepts that he signed a return to work interview form on **20th November 2021** which records his answer 'no' to the question whether any further support is needed. He explained today that he accepts he signed the document but that he did not read it and was made to sign it.

60. It is for the employer to show that it did not have actual or constructive knowledge. However, the Claimant asserts (now) that he told Rosie Lamb and Amanda Dunn about his IBS and the need to be near a toilet. Therefore, he must prove this assertion. He will also have to prove the assertion that he was made to sign the return to work interview form without reading it. Further, the matters raised by the Claimant during his grievance about his foot injury and what was said to management about it and about what adjustments were required was investigated by the Respondent in response to his grievance. All of this will be relevant material in determining what, if anything, the Claimant ever said about IBS or toilet needs.

The balance of prejudice

61. The authorities are clear: I must consider the respective prejudice or hardship to the claimant and respondent and weigh them in the balance. Underlying that balancing exercise is an emphasis on the real practical consequences of allowing or refusing an amendment.

Prejudice to the Claimant

62. If I refuse the application, the Claimant's claim comes to an end. That is because, as currently pleaded in the Claim Form and Further Particulars and relying on his foot injury as the disability, his complaint of failure to make reasonable adjustments has no reasonable prospect of success.

63. Therefore, the complaint that he now seeks to advance, namely that his IBS was such that the Respondent's requirement for him to work on Bars 1 and 2 placed him at a substantial disadvantage in that it made it more difficult for him to access the toilet, will not, if I refuse the application be heard on its merits. However, it is a case that he had the opportunity of putting at the outset and in the further particulars or by way of an amendment following Judge O'Dempsey's orders.

Prejudice to the Respondent

64. The prejudice to the Respondent is that it has to meet an ever-shifting case. The Claimant has, by his actions, demonstrated this. That gives rise to the risk that there will be further matters raised by the Claimant which he has not hitherto raised. He confirmed that he now intends to set out in some detail what he says he said to Ms Lamb about IBS and toilet needs – something which he could have done prior to now but did not, and for which he has not advanced any explanation. The Respondent has pleaded to a case which was difficult to follow but which was all about a foot injury. It then served amended grounds of resistance after the Claimant had been asked to set out his case. It has incurred legal fees and time in responding to what it thought was the case being advanced. The change of direction by the Claimant will mean further time and cost as the Respondent will have to investigate and address the issues surrounding what the Claimant says about IBS.

65. The cogency of evidence is likely to be adversely affected by the delay in raising this particular issue as forming the basis of his complaint of disability discrimination. In circumstances where the grievance documents, and the pre-existing written documentation make no reference to IBS, Ms Lamb would need to cast her mind back to a short discussion on **20th November 2021** on the question of whether IBS was mentioned by the Claimant. That would, presumably, also be the case for Ms Dunn – although the Claimant has not said anywhere what he said to her. The Respondent is faced with further inquiries and costs in circumstances where the Claimant had every opportunity to clearly state his case.

66. From my observations at this hearing, having listened carefully to the Claimant and seeing how he sought to argue matters in these proceedings, I was firmly of the impression that he was now seeking to develop a case to suit the outcome of my judgment on disability. He was ready to change direction and focus very quickly to place an emphasis on a matter (IBS) which had hitherto not merited a mention in any of the documents. Thus far, it only featured in these proceedings because the Claimant had listed it alongside a number of impairments in respect of which he wished to have a declaration amounted to a disability – whether or not they had anything to do with his complaint. An example was the condition of hypoplasia. I had determined that the Claimant had not established that he was disabled and that I could not deem him to be disabled by reason of this as he had not produced an ophthalmologist confirmation of partial sight. Immediately after I delivered my judgment and reasons, the Claimant said that he did have such confirmation and could produce it. I said, in that case, he could apply for a reconsideration and, subject to the Respondent's position on such an application, I would have to think about whether my judgment on that part could be reconsidered. However, the Claimant said there was no need for that, as he agreed his hypoplasia had nothing to do with his complaint of disability discrimination. He was, I infer, simply looking for a conclusion that he was disabled in all these different respects.

67. There is a real prejudice to the respondent in having to respond to such an unpredictable approach to litigation. I considered the practicable consequences of permitting or refusing the application. As knowledge is a key issue in the case, the Respondent would require further information from the Claimant as to what he says he said to Ms Lamb and/or Ms Dunn back in November 2021. It would then have to investigate those matters with those individuals, whose recollection will very probably be affected by the delay. The Claimant, on the other hand, with a newfound zeal to develop a case about IBS intends to say a lot more about what he says he said to management and the impact of the condition at work. For the first time, almost a year after the event, he will reduce to writing what he says he said to those managers. His account of what he said will, in my judgement, be affected by the current narrative that he wishes to advance. The Claimant's account is and will be influenced by where he now finds himself in this litigation. I have already observed that I had concerns about the Claimant's tendency to shift direction, to suit where he finds himself in this litigation.

68. I recognise that the consequence to the Claimant is that his complaint about disability discrimination will not be heard, and he too may be left with a sense of injustice.

However, it must also be recognised that this is in circumstances where he has been given leeway as a litigant in person, has had every opportunity to set out his case; that he chose to advance it in the way set out at **pages 100-102** and that, having had the opportunity of listening to him, I was troubled by his tendency to alter the emphasis on the case. If I were to permit this new application, the Respondent would be left with a sense of injustice by the Tribunal permitting such a dramatic, late change of direction, necessitating further information from the claimant, further inquiry by it of witnesses, further amendment delay and cost.

69. In considering the hardship and practical consequences to the Claimant, I have also considered the merits of the new complaint. In particular, I bear in mind that all of the documentary material points to the Claimant referring **only** to his foot injury. He asserts that he mentioned it verbally to his manager. He must prove this assertion – in the face of that documentary evidence and in the face of his own witness statement prepared in advance of today. I consider his position on 'knowledge '– that is, that the Respondent will not be able to show that it did not know or could not reasonably have been expected to know about his IBS, to be relatively weak – recognising, as I do, that it remains untested by evidence.

70. Ultimately, I have a discretion whether to permit the amendment application or not. Considering all of the above factors, I conclude, were I to permit the application, that the prejudice and hardship caused to the Respondent by permitting the application would be greater than that caused to the Claimant by refusing it. Therefore, I refuse the application

The application to strike out the claims of failure to make reasonable adjustments and the claim under the WTR

The WTR complaint

71. The extent of the complaint is, as set out on **page 101**:

"Not allowing holiday entitlements." And
"Working Time Regulations"

72. Based on what is there set out, Ms Jones submitted that the complaint has no reasonable prospect of success. It is not in dispute that the contract permits employers to decline requests for annual leave or that at least 3 weeks' notice has to be given. She also relied on regulation 15(2) and (3) WTR. The extent of this complaint, as pleaded, is that the claimant has not specified dates on which he was not allowed to take time off. In light of this and the provisions within the contract and Regulation 15, the complaint stands no reasonable prospect of success.

Conclusions on application to strike out under rule 37)1)(a)

The WTR complaint

73. Looking back over the Claim Form (in particular, the Claimant's grievance) he refers to two dates: **4th and 10th December 2021.** His case is that he was told in advance that he could not take the leave on those dates. It is not in dispute that the request for the 10th December holiday was made on 23rd November. In the Claim Form (the document called 'response to Owen Wacker email'), the Claimant accepts that the **4th December 2021** request was declined due to trade reasons – he confirmed today that he was not complaining about this date. He also says that he accepts the reasons for the **12th and 13th December** request but not for the **11th December 2021** request, as this was for a tribunal hearing. I take the reference to the **11th December** and the earlier reference to **10th December 2021** to be the same event (one or other of the dates being wrong – the Claimant refers to both). However, the Claimant's case is that it was the **10th December 2022**, which was a Friday, and that he needed the day off to attend a tribunal.

74. Therefore, at its highest, the Claimant's claim is that he requested on **23 November 2021** to take a day's holiday on **10th December 2021** (which is less than three weeks' notice as required by the annual leave policy); that he was given notice in advance that he could not take it on that day. He confirmed that all accrued and untaken holiday as at the date of termination of employment was taken. His complaint is about the reason for the rejection. He says that he told the Respondent it was to attend a tribunal and that his manager is lying when she said that he did not say this and that the policy allowed for court and tribunal attendances.

75. In light of the wording of regulation 15 and taking the Claimant's case at its highest, his claim under regulation 30 for refusing to permit him to exercise a right under regulation 13 WTR has no reasonable prospect of success. That is because, all that is required is that the Respondent give counter notice to the request to take holiday on a particular date. Whether or not it was for attendance at tribunal, and whether or not there is a dispute as to what the claimant said about the reason for the holiday, the agreed position is as to when the request was made and refused. The documents will speak for themselves and all outstanding untaken holiday was paid on termination. In those circumstances, there is no reasonable prospect of the Claimant establishing an infringement of his right in respect of the **10th December 2021**.

Failure to make reasonable adjustments

76. Prior to this hearing the Claimant's complaint of failure to make reasonable adjustments was set out in:

76.1 The Claim Form (consisting of all the documents referred to above)

76.2 The further particulars of claim / amendment

77. As the Claimant accepts and as set out above, nothing in these documents refers to IBS or to any issue regarding toileting or to the need to access toilets or to the Claimant mentioning to Rosie Lamb or Amanda Dunn, or anyone else anything to do with IBS or the need to access toilets. The Claim Form and the Further particulars,

he accepts are all about his foot injury. That is also the case for the witness statement which the Claimant prepared and which is at **pages 195-198**.

78. Having refused the amendment application, his complaint of disability discrimination was in respect of an impairment (foot injury). I had concluded this not to amount to a disability, given its short-term effects. I considered the further particulars of the complaint of failure to make reasonable adjustments. Save for the complaint of breach of contract (which was not being pursued) I did not consider anything in that document to require permission to amend. The particulars were simply a repetition of what the Claimant had already set out in his grievance and appeal documents attached to the ET1.

79. As set out above, the complaint amounted to a complaint of failure to make reasonable adjustments as follows:

79.1 That by reason of his foot injury, he was disabled within the meaning of section 6 Equality Act 2010;

79.2 That the Claimant was required to work his full shift and on bars 1 and 2 (the 'PCPs');

79.3 That these PCPs put him to a substantial disadvantage, namely pain and discomfort, an exacerbation of his foot injury and the likelihood of having to take time off work;

79.4 The Respondent knew or ought reasonably to have known that he was disabled and likely to be disadvantaged in this way by the PCPs;

79.5 The Respondent was under a duty to take such steps as were reasonable to avoid the disadvantage, those steps being: (a) reduce the Claimant's shift by around 3 hours and (b) permit him to work on bar 3.

79.6 It failed to do so.

80. As I had concluded that his foot injury did not amount to a physical impairment which had a **long-term** substantial adverse effect on his ability to carry out normal day-today activities, and that he was not, thereby, disabled, his complaint of failure to make reasonable adjustments has no reasonable prospects of success and must be struck out.

Proceedings dismissed

81. The parties confirmed that the only complaints were a failure to make reasonable adjustments and the complaint under the WTR. Having struck out both those claims and refused permission to amend the Claim Form to add a complaint of failure to make reasonable adjustments relying on IBS as a disability, the proceedings are dismissed.

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Employment Judge Sweeney 24 September 2022