EMPLOYMENT TRIBUNALS

Claimant: Dr Dennis

Respondent: The University of Leeds

Heard at: Leeds (by video) **On:** 16 August 2022

Before: Employment Judge Knowles

Representation
Claimant: In person.
Respondent: Ms Steed, Solicitor

RESERVED JUDGMENT UPON APPLICATION TO AMEND THE CLAIM

The Judgment of the Tribunal is that the Claimant's application to amend her claim to add a claims of disability discrimination (failure to make reasonable adjustments) is refused.

RESERVED REASONS

Issues

1. The issues listed for hearing today are what claims other than unfair dismissal, if any, are being brought and whether any claim should be struck out on the ground that it has no reasonable prospect of success because the Tribunal lacks jurisdiction, and a claim is out of time.

2. At the beginning of the hearing, I clarified the time limitation issue in relation to the claim of unfair dismissal with the Respondent because on the face of things the claim of unfair dismissal appeared to me to be in time. The Respondent agreed. Time limitation concerning the claim of unfair dismissal was therefore not an issue although it may be an issue in relation to any other claims.

3. The Claimant also accepted at the beginning of the hearing that she had

brought only a claim of unfair dismissal when she issued her claim form and had decided not to bring another claim. She confirmed however that she wished to make an application to amend her claim and I heard that application.

4. Specifically, the Claimant sought to amend her claim to bring a claim of failure to make a reasonable adjustment. The failures occurred in relation to:

a. Making her wait for 2 months to receive notes of an investigatory meeting on 22 July 2021. The notes were not delivered until 24 September 2021 which exacerbated the Claimant's symptoms.

b. Not providing a copy of the investigation outcome report prior to the meeting scheduled for 7 December 2021 which took place on 24 December 2021.

Evidence

5. This hearing was undertaken using HMCTS's cloud video platform.

6. The Claimant appeared in person and was supported by a friend during the hearing owing to her condition of post-traumatic stress disorder.

7. The Respondent was represented by Ms Steed, a solicitor.

8. I had the Tribunal's pleadings file including the parties joint agenda form. No bundle of documents was produced by the parties.

9. No evidence was given during the hearing, the matter was dealt with based upon the submissions of both parties.

10. I took an inquisitorial approach to the Claimant in gaining from her relevant information concerning her claim and application to amend because she is unrepresented. I refrained from suggesting what the Claimant might do and there was no need for me to do so. The Claimant confirmed that she had undertaken research on the Equality Act 2010, had taken advice on discrimination from the Citizen's Advice Bureau and was perfectly able to engage in discussions over, for example, the type of prohibited conduct she sought to bring into her claim.

Submissions

11. The Claimant confirmed that she chose not to include a discrimination complaint and only to claim unfair dismissal when she brought her claim on 25 February 2022. She initially suggested that that was because she did not receive the outcome of the investigation report until late but she acknowledged when I checked that she received the outcome on 28 January 2022 which was 4 weeks before she issued her claim.

12. The Claimant submitted that when she brought her complaint of unfair dismissal, she felt that that was the most appropriate case to put through.

13. The Claimant told me that after she issued her complaint, she learned that unless she claimed discrimination her compensation would be limited to a year's pay which has led her to reflect on her earlier decision only to claim unfair dismissal.

14. The Claimant submitted that she had suffered disability discrimination and sex discrimination over the years but was only seeking to amend her claim to include a claim of disability discrimination.

15. The Claimant confirmed, without being prompted, that the type of prohibited conduct that she wished to complaint about was a failure to make reasonable adjustments. She confirmed that there were no other types of prohibited conduct that she wished to include in her claim by way of amendment. The Claimant confirmed that her complaints related to two instances concerning the length of time it took to handle her grievance.

16. Specifically, the Claimant submitted that the failures occurred in relation to:

a. Making her wait for 2 months to receive notes of an investigatory meeting on 22 July 2021. The notes were not delivered until 24 September 2021 which exacerbated the Claimant's symptoms, and

b. Not providing a copy of the investigation outcome report prior to the meeting scheduled for 7 December 2021 which took place on 24 December 2021.

17. The Claimant submitted that she had advised the Respondent of her condition at a fixed term contract consultation meeting 18 March 2021 and that they were therefore aware of her condition.

18. The Claimant submitted that she would have expected them to deliver the notes of the meeting on 22 July 2021 sooner given her condition.

19. The Claimant conceded that she never requested that the notes were provided within a prescribed period.

20. The Claimant submitted that prior to the meeting on 7 December 2021, which was intended to be the grievance outcome meeting, she specifically requested advance sight of the outcome report but it was only 30 minutes prior to the rearranged date of 14 December 2021 that she was told that the report was not ready.

21. The Claimant submitted that she did not bring the complaint earlier because she was overwhelmed by it all.

22. The Claimant initially submitted that she had not received legal advice in bringing the complaint, and that she had completed the form herself.

23. Answering basic questions about the sources of support available to her the Claimant acknowledged that she had been supported by Remploy through her grievance process, was a member of UCU Trade Union and was represented through the grievance process and had also received advice on discrimination from the Citizens Advice Bureau around the time she brought her Tribunal claim.

24. The Claimant submitted that she had not sought the Trade Union's specific advice on completing her claim form because of time, confusion and her condition. She explained that her symptoms were becoming emotional, leading her to avoidance and isolation. She submitted that her living circumstances were such

that she feels quite isolated and prefers to do things on her own.

25. The Respondent submitted that although the issues are mentioned in the claim form they are not mentioned in any way other than as issues of general unfairness and there is no mention of any discrimination.

26. The Respondent submitted that therefore this was not a case of mere relabelling. There is no assertion of disability discrimination. The facts are alluded to in a different context.

27. The Respondent submitted that the timing of the notification of her condition is an evidential point.

28. The Respondent noted that the grievance outcome report was available from the end of January 2022 and it is not until the end of February 2022 that the Claimant brought her claim. She therefore had time to consider the report fully before bringing her complaint.

29. The Respondent submitted that the claim would have been brought out of time in relation to the delivery of the notes, but in time in relation to the delivery of the report.

30. I discussed with the Respondent the fact that the second issue appears to relate to a period after the Claimant had left the Respondent's employment.

31. The Respondent confirmed that they were not seeking that the unfair dismissal complaint be struck out. The hearing is listed for strike out on time limitation and they accept that the unfair dismissal complaint was brought in time. The Respondent also conceded that they were not suggesting that the unfair dismissal complaint was wholly misconceived.

32. The Respondent submitted that time may be an issue in terms of the amendments sought.

The Law

On amendments

1. The Tribunal's power to consider amendments to a claim is set out in the Employment Tribunal Rules 2013 which are contained in Schedule 1 to the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules".

2. The overriding objective of the Rules is set out as follows:

"2. Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

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

(b) dealing with cases in ways which are proportionate to the complexity and

importance of the issues;

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

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

(e) saving expense.

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

3. The specific rules which contain the powers are Rule 29 which permits the Tribunal to make case management orders and Rule 41 which allows the Tribunal to regulate their own procedure in the manner they consider fair, having regard to the overriding objective set out above. Amendments are thus a matter of judicial discretion.

4. Guidance given by Mummery J in ***Selkent Bus Company Ltd v Moore [1996] ICR 836*** at the time when he was President of the EAT is frequently quoted as the key test for determining an application to amend a claim. These were the key points made:

"(1) The discretion of a Tribunal to regulate its procedure includes a discretion to grant leave for the amendment of the originating application and/or notice of appearance: Regulation 13. See Cocking v. Sandhurst Ltd [1974] ICR 650 at 656G - 657D. That discretion is usually exercised on application to a Chairman alone prior to the substantive hearing by the Tribunal.

(2) There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground that the discretion to grant leave is a judicial discretion to be exercised in a judicial manner ie, in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions.

(3) Consistently with those principles, a Chairman or a Tribunal may exercise the discretion on an application for leave to amend in a number of ways:

(a) It may be a proper exercise of discretion to refuse an application for leave to amend without seeking or considering representations from the other side. For example, it may be obvious on the face of the application and/or in the circumstances in which it is made that it is hopeless and should be refused. If the Tribunal forms that view that is the end of the matter, subject to any appeal. On an appeal from such a refusal, the appellant would have a heavy burden to discharge. He would have to convince the Appeal Tribunal that the Industrial Tribunal had erred in legal principle in the exercise of the discretion, or had failed to take into account relevant considerations or had taken irrelevant factors into account, or that no reasonable Tribunal, properly directing itself, could have refused the amendment. See Adams v. West Sussex County Council [1990] ICR 546.

(b) If, however, the amendment sought is arguable and is one of substance which the Tribunal considers could reasonably be opposed by the other side, the Tribunal may then ask the other party whether they consent to the amendment or whether they oppose it and, if they oppose it, to state the grounds of opposition. In those cases the Tribunal would make a decision on the question of amendment after hearing both sides. The party disappointed with the result might then appeal to this Tribunal on one or more of the limited grounds mentioned in (a) above.

(c) In other cases an Industrial Tribunal may reasonably take the view that the proposed amendment is not sufficiently substantial or controversial to justify seeking representations from the other side and may order the amendment ex parte without doing so. If that course is adopted and the other side then objects, the Industrial Tribunal should consider those objections and decide whether to affirm, rescind or vary the order which has been made. The disappointed party may then appeal to this Tribunal on one or more of the limited grounds mentioned in (b) above.

(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of

adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

5. ***Ladbrokes Racing Limited v Traynor [2006] EATS 0067/06*** highlights that an application to amend must include details of the amendment sought in precise terms. They draw my attention to paragraph 20:

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

6. In ***Scottish Opera Limited v Winning [2009] EATS 0047/09*** it was held at paragraph 5 that "*clear and accurate pleadings are of importance in all cases, but particularly in discrimination claims. It is essential that parties seeking permission to amend to introduce such a claim formulate the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim; and tribunals should ensure that the terms of any such proposed amendments are clearly recorded.*"

7. ***Chief Constable of Essex Police v Kovachevic [2013] UUKEAT/0126/13/RN*** warns of the dangers of an Employment Judge engaging with the application to amend. At paragraph 21 it is stated:

"It is quite plain that the Employment Judge wrongly engaged with the application to amend in this case. Before even turning to the question of the right test, it is fundamental that any application to amend a claim must be considered in the light of the actual proposed amendment. The Employment Judge did not have before him, reduced to writing or in any form, the terms of the amendment being proposed. It might be, … that in certain circumstances (e.g. where a very simple amendment is sought or a limited amendment is asked for by a litigant in person) that an Employment Judge may be able to proceed without requiring the specifics of the amendment to be before him in writing. But this was a case in which the Claimant was being represented by a professional representative whom he had selected and recently instructed. The Employment Judge plainly could, and should, have required the representative to reduce the application to writing before considering it on its merits. The dangers of doing otherwise are obvious and are made manifest by what happened in this case."

And at paragraph 23:

"One of the dangers of permitting an amendment without seeing its terms is that, having been given the green light to draft an amendment, a party may go beyond

the terms which the Judge was led to understand might be included in the amendment he was permitting. In this particular case, the schedule later drawn for the Claimant in response to the Judge's order sets out a very large number of allegations and incidents which span a period of many years and involve many different individuals and occasions."

8. In the case of ***Vaughan v Modality Partnership [2021] ICR 535*** it was held that:

"This judgment may serve as another reminder that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The exercise starts with the parties making submissions on the specific practical consequence of allowing or refusing the amendment. If they do not do so, it will be much more difficult for them to criticise the Employment Judge for failing to conduct the balancing exercise properly.

The balancing exercise is fundamental. The Selkent factors should not be treated as if they are a list to be checked off.

An Employment Judge may need to take a more inquisitorial approach when dealing with litigants in person."

9. In ***Office of National Statistics v Ali [2004] EWCA Civ 1363***, the Court of Appeal held that *"the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference in the particulars to an event (as in Dodd), particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in Dodd, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet."*

10. In ***Baker v Commissioner of Police of the Metropolis EAT 0201/09***, where the EAT upheld a tribunal's decision that a claim form did not include a complaint of disability discrimination, despite the fact that the Claimant had ticked the box indicating that he was bringing that complaint. The rest of the form contained no particulars about any claim of disability discrimination. The EAT found that although a claimant could explain and elucidate a claim made in an ET1 by way of further particulars, the claim itself still had to be set out in the ET1. The EAT did however find that the tribunal in that case should have gone on to consider whether or not to allow an application to amend the claim to include a claim of disability discrimination.

11. The merits of a claim may be a matter to be taken into account when determining an application to amend ***(Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06***) but there are limits to how far they may be relevant and it should be envisaged that further evidence may be required to be served (***Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12***).

On time limitations

12. Time limits are not the determinative factor in an application to amend but are part of the consideration in determining the balance of prejudice in allowing the amendment compared to not allowing it.

13. Section 123 of the Equality Act 2010 contains the following provisions concerning time limits:

(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.

…

(3) For the purposes of this section—

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

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

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

14. In ***Kingston upon Hull City Council v Matuszowicz 2009 ICR 1170 CA*** the Court of Appeal considered the application of time limits in cases involving alleged failures to make a reasonable adjustment. The Court of Appeal noted that, for the purposes of claims where the employer was not deliberately failing to comply with the duty, and the omission was due to lack of diligence or competence or any reason other than conscious refusal, it is to be treated as having decided upon the omission at what is in one sense an artificial date. In the absence of evidence as to when the omission was decided upon, the legislation provides two alternatives for defining that point (see S.123(4) EqA). The first of these, which is when the person does an act inconsistent with doing the omitted act, is fairly self-explanatory. The second option, however, requires an inquiry that is by no means straightforward. It presupposes that the person in question has carried on for a time without doing anything inconsistent with doing the omitted act, and it then requires consideration of the period within which he or she might reasonably have been expected do the omitted act if it was to be done. In terms of the duty to make reasonable adjustments, that seems to require an inquiry as to when, if the employer had been acting reasonably, it would have made the reasonable adjustments. That is not at all the same as inquiring whether the employer did in fact decide upon doing it at that time. Both Lord Justice Lloyd and Lord Justice Sedley acknowledged that imposing an artificial date from which time starts to run is not entirely satisfactory, but they pointed out that the uncertainty and even injustice that may be caused could be, to a certain extent, alleviated by the tribunal's discretion to extend the time limit where it is just and equitable to do so. Sedley LJ added that 'claimants and their advisers need to be prepared, once a potentially discriminatory omission has been brought to the employer's attention, to issue proceedings sooner rather than later unless an express agreement is

obtained that no point will be taken on time for as long as it takes to address the alleged omission'.

15. The onus is on the Claimant to satisfy the tribunal that it is just and equitable to extend the time limit (***Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 Court of Appeal***).

16. Case law has made it clear that the Tribunal may be guided, in making a determination on time limits, by matters such as the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. Cases have also made it clear that lists such as these are only a guide and in some cases some of those factors may not be relevant. Case law has also suggested that the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh) are almost always relevant.

17. In all cases the Tribunal should take into account the balance of prejudice between the parties in granting or refusing an extension of time.

18. In cases involving one-off acts where there is no assertion of any continuing act, it will be usual for the tribunal to make a final determination on time limit, and determine whether or not time will be extended, within its judgment on the application to amend.

19. This approach might not be suited to a case in which the discriminatory act is alleged to be a continuing act. In such cases, given that they are fact sensitive, the issue of time limit may be reserved to the final hearing even if the amendment is allowed. That is because a determination of the issue of whether or not an act is a continuing one would require the hearing of evidence and substantive determination.

33. In ***Reuters Ltd v Cole EAT 0258/17*** the EAT held that it was only necessary for the claimant to show a prima facie case that the primary time limit was satisfied (or that there were grounds for extending time) at the amendment application stage.

On striking out a claim

34. Rule 37 of the Employment Tribunals Rules of Procedure 2013 sets out the Tribunal's right to strike out a claim or response.

35. This provides

> *37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim 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 been actively pursued;

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

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

36. In ***Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*** the Court of Appeal upheld a decision of the EAT (Elias J, sitting alone) which had allowed a claimant's appeal against an order of an Employment Tribunal striking out his unfair dismissal claim. Maurice Kay LJ said at paragraph 29:

"It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

Conclusions

37. I have reflected very carefully on the submissions of both parties and read the original claim form carefully to take into account what facts have already been pleaded by the Claimant.

38. I have also taken into account that the Claimant is unrepresented and has answered questions concerning many points during the hearing which is a difficult task for anyone, particularly where the matters being considered are complex even for lawyers experienced in handling these types of claim.

39. I also take into account the Claimant's condition of PTSD and the impact this may have had in her conduct of her claim to date and, importantly, upon her ability to engage in today's hearing given her expressed symptoms of isolation and avoidance.

40. In my conclusion the Claimant, in seeking to add a complaint of failure to

make a reasonable adjustment, is seeking to add a new label to already pleaded facts.

41. The Claimant does plead facts in her original particulars of claim concerning the delay in the notes being provided following the 22 July 2021 meeting. Specifically, she states this:

"22nd July 2021 – Investigation meeting held

This was handled very competently by the investigating officer and they were very sensitive to my needs and condition.

24th September, 2021 – Investigation meeting notes received

A 2-month delay in receiving the meeting notes goes against ACAS guidelines and was in the circumstances unsatisfactory."

42. The Claimant does plead facts concerning the failure to provide her with a copy of the outcome to the investigation report before the meeting originally scheduled for 7 December 2021 and then rescheduled for 14 December 2021. Specifically, she states this:

"3rd November 2021 – Informed of meeting for 7th December at which I would be presented with the outcome report for my grievance. This was later rearranged for 14th December.

14th December, 2021 – Grievance Outcome Meeting

I had specifically asked that I be sent copies of the report prior to the meeting to minimise shocks. Advice I had been given from my support worker with Remploy in respect to my PTSD. Not only did I not get a report, but I was given a further shock by being informed 30 minutes prior to the meeting, by email, that the final report wasn't ready, and I would have to wait until after Christmas."

43. I have taken into account the Respondent's submission that complaints are generic and do not assert any discrimination.

44. However, the question for me, at this stage, is whether or not the amendment to include a claim of failure to make a reasonable adjustment is "the addition or substitution of other labels for facts already pleaded to" (***Selkent***).

45. In my conclusion it is simply adding a label to facts already pleaded to.

46. It does not matter that the Claimant did not assert discrimination or disability discrimination when setting out these facts. Had she done so, we would not be considering an amendment application at all so it is clear that this would not be a necessary element of the factual pleading when considering an application to amend.

47. I do not consider that the adding of a new label to matters which have already been set out in the particulars of claim is a substantial alteration.

48. Those findings would tend to favour allowing the amendment.

49. However, in my conclusion, time limits are a further factor. The delay in providing the notes is a complaint about an omission. I consider this an allegation of a failure to do something which, under Section 123(3)(b) of the Equality Act 2010 is to be treated as occurring "*when the person in question decided on it*", and under Section 123(4)(b) the Respondent is to be taken to have decided on it "*on the expiry of the period in which P might reasonably have been expected to do it*".

50. As the Claimant submits in her claim form, the Respondent might reasonably have been expected to have delivered the notes within a period of 2 weeks, i.e. by 5 August 2022.

51. This means that the Claimant's claim form was submitted more than a month outside of the time limitation. The primary limitation would be 4 November 2021 and because early conciliation had not begun by that point there would be no extension under the ACAS regime. The claim has been brought some 16 weeks out of time.

52. I have noted that the Claimant never asked for the report to be delivered within a specific time period and take that into account.

53. It appears to me unlikely that the Respondent will not be able to provide evidence on the reasons for the delay; they referred today to the health of the person undertaking the process.

54. The Claimant has not acted promptly. I take into account that she has PTSD and was suffering from stress at the time these matters were being put through their processes.

55. However I note that the Claimant was able to put together a lengthy and detailed claim form in relation to her complaint of unfair dismissal.

56. But the Claimant has taken advice on discrimination from the Citizens Advice Bureau as to discrimination and it is now August 2022, a year after the notes might reasonably have been expected to have been delivered.

57. The Claimant had access to other advice through her Trade Union but I accept that her condition may have caused her to proceed alone.

58. The Claimant has not suggested that she did not have knowledge of her right to bring a complaint of disability discrimination earlier.

59. The Claimant appears to confirm that she made a conscious choice only to pursue an unfair dismissal claim.

60. The reasons for reflecting on that now is the statutory cap on unfair dismissal awards.

61. Looking at those circumstances in the round, even taking into account the Claimant's PTSD, I conclude that it would not be just and equitable to extend time in relation to the period of 16 weeks this claim appears to be out of time in all of these circumstances.

62. The balance of prejudice would fall more heavily on the Respondent in granting the application than it would on the Claimant in refusing it.

63. The Respondent would be entitled to assume that the Claimant was not pursuing any discrimination complaint in circumstances where the Claimant chose not to include one in her original unfair dismissal complaint, appearing to be aware of her rights to bring one, and acts slowly in doing so.

64. If an extension of time is not granted, the Claimant will retain her unfair dismissal complaint and will not be without a venue to explore the circumstances leading up to her dismissal.

65. In relation to the complaint concerning the late delivery of the notes, time limitation would in my view be a factor against granting the application to amend.

66. The failure to supply the outcome report before the meeting on 14 December 2022 is something that would clearly fall within the time limitation. Time is not an issue in respect of that part of the application to amend, which would be a factor supporting the grant of leave to amend in part.

67. In this case I do take into account the merits of the claims that the Claimant seeks to bring forwards by way of an amendment.

68. That is because there is no dispute between the parties on these matters of fact.

69. In relation to the delay in providing the notes of the meeting on 22 July 2021 I note that the Claimant did not specify that she required the notes within a certain timeframe, by reason of her condition or indeed for any reason. The Claimant describes the situation as “unsatisfactory”.

70. I do not see this claim as having a great deal of merit. The issues for the tribunal will be whether or not the Respondent complied with the duty imposed under the first requirement, i.e. where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter then the must take such steps as are reasonable to have to take to avoid the disadvantage.

71. The issue in the Claimant’s claim will be whether or not a mere delay in producing notes of a meeting amounts to a provision, criterion or practice. I do not see that claim as having much merit as it appears a one-off delay to a particular part of the process in particular circumstances.

72. Furthermore an issue for the tribunal will be not only whether or not they knew or could reasonably have been expected to have known about the Claimant’s condition of PTSD, the question will also be whether the disabled person is likely to be placed at the disadvantage.

73. Whilst I acknowledge that the circumstances were, as the Claimant describes them, “unsatisfactory”, this appears to me to fall short of a circumstance where the employer would know that the Claimant would be placed at a disadvantage, absent any communication from the employee about the need for a timely copy of the notes.

74. In these circumstances I conclude that the merits of the claim concerning the notes of the meeting in July 2021 are low.

75. I do not see that part of the claim as a material part of the claim from a remedy perspective. There is no suggestion that it impacted upon the termination of employment which occurred when the fixed term contract ended at the end of September 2021. Financial losses therefore are triggered by that event not by the delay in providing the notes. There may be an issue concerning injured feelings however that is not pleaded highly, in merely being described as unsatisfactory.

76. I therefore see the merits of the claim concerning the notes as something which would lean towards rejecting the application for an amendment.

77. In terms of the second part of the amendment, concerning the failure to give to the Claimant an advance copy of the outcome report before the meeting scheduled for 7 December 2021 then rescheduled to 14 December 2021, I consider that part of the claim bound to fail.

78. The Claimant needs not only to be describing prohibited conduct for the purposes Part 2 Chapter 2 of the Equality Act 2010, she needs also establish the right not suffer such prohibited conduct for the purposes of Part 5 Chapter 1.

79. Prohibited conduct is only unlawful under the Equality Act 2010 in certain settings, and Part 2 Chapter 2 of the Act sets out those settings.

80. The Claimant's claim concerning the advance copy of the outcome report is bound to fail in relation to this part of the application to amend because the Claimant was neither an applicant for employment nor an employee at the relevant time.

81. The Claimant had left employment therefore had not suffered this particular failure to make an adjustment as an employee, she suffered the failure she asserts as a leaver, an ex-employee.

82. In terms of the merits of the claims which are the subject of the application to amend, in my conclusion those are not supportive of a grant of leave to amend.

83. In most applications to amend a claim there are factors which point towards allowing the amendment and factors against.

84. My role is to reflect on the above factors and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In my conclusions this is an application to amend which seeks to bring in new causes of action which would put the Respondent to additional time and expense. There would be new preliminary issues concerning disability status.

85. The matters raised are not directly relevant to the issues in the unfair dismissal claim and therefore would gain more importance and prominence in the claim, the defence and in the hearing.

86. It would not be in accordance with the overriding objective to save expense and deal with cases in ways which are proportionate to the complexity and importance of the issues to allow an amendment which brings in a new cause of action of little merit or relative importance.

87. Refusing the application would I appreciate disappoint the Claimant in the

sense that it would prevent the unlocking of potential unlimited damages (as opposed to the unfair dismissal cap of one year) which has caused her to reflect on her claim at this stage.

88. However the Claimant would still have a claim of unfair dismissal which has potentially significant albeit capped remedy.

89. I do not consider that it would create very great hardship to the Claimant in view of the fact that she was aware of the potential to bring this claim when she issued proceedings but chose not to do so.

90. In my conclusion the balance of hardship would be greater upon the Respondent in allowing the amendment compared to the hardship to the Claimant in refusing it.

91. On that basis, I refuse the Claimant's application to amend.

92. I have not considered the strike out issue, as the Respondent has agreed that the unfair dismissal claim is in time and there are no other claims to consider in the light of the above conclusion upon the Claimant's application to amend.

Employment Judge Knowles
16 August 2022