EMPLOYMENT TRIBUNALS

Claimant: Dr T Burton

Respondent: Chesterfield Royal Hospital NHS Foundation Trust

Heard at: Nottingham Employment Tribunal (remote via CVP)

On: 6 December 2022

Before: Employment Judge K Welch (sitting alone)

Representation

Claimant: Mr R Ryan, Counsel
Respondent: Mr S Sudra, Counsel

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The claimant's application for leave to amend his claim is allowed in part, as set out below.

2. References to allegation numbers refer to those named in Appendix A Table Summary of Complaints in the claimant's further and better particulars dated 6 September 2022.

3. The claimant is allowed to amend his claim to bring the following claims:

    a. direct disability discrimination in allegations numbered 1, 3, 4, 5, 6, 7, 9 and 10;
    b. discrimination arising from disability in allegations numbered 1 and 4;
    c. failure to make reasonable adjustments in allegations numbered 1, 2, 3, 5 6 and 8; and
    d. harassment related to disability in allegations numbered 8 and 9.

4. The claimant's application to amend his claim to include a claim for detriment(s) under section 47B ERA and automatic unfair dismissal on grounds of making protected disclosures under section 103A ERA is refused.

5. The claimant's application to amend his claim to include the following claims is refused:

    a. direct disability discrimination in allegation numbered 11;
    b. discrimination arising from disability in allegations numbered 11 and 15;
    c. failure to make reasonable adjustments in allegation numbered 12; and
    d. harassment related to disability in allegations numbered 13, 14 and 15.

6. The respondent's application to strike out the claimant's claim is refused.

7. The respondent's application for a deposit order is refused.

8. The respondent accepts that the claimant was at all material times disabled within the meaning in section 6 of the Equality Act 2010 (EqA) by virtue of his condition of type 2 diabetes, but not in respect of bipolar affective disorder.

REASONS

Background

1. This open preliminary hearing came before me on 6 December 2022. The hearing was listed to determine the following:

    a. Consider whether to allow the claimant to amend his claim;

    b. Consider whether to strike out some, or all, of the claims;

    c. Consider whether to make a Deposit Order or Deposit Orders;

    d. If disability is not conceded by the respondent, decide whether the claimant was, at the time of the alleged acts of discrimination, disabled within the meaning of section 6 Equality Act 2010 (EqA) by reason of type II diabetes and/or bipolar affective disorder;

    e. Identify the claims and issues, following the provision of further information by the claimant, and agree a list of issues that will fall to be determined at the final hearing of the claim;

    f. Make case management orders to prepare the case for final hearing; and

    g. Discuss the length and dates for the final hearing.

2. The case had been case managed by Employment Judge Ayre on 9 August 2022, who listed the case for an Open Preliminary Hearing (OPH) to be held on 14 November 2022. This was postponed to today's date at the request of the Claimant.
3. The Case Management Order went on to provide that, should the claimant wish to amend his claim, he must do so in writing on or before 6 September 2022. On that date, the claimant presented further and better particulars of his claim [pages 50-82 of the agreed bundle referred to below]. This included an application to amend his claim to include claims for direct disability discrimination under s 13 EqA, discrimination arising from disability under section15 EqA and for detriment and automatic unfair dismissal for having made protected disclosure(s). It also included details of the harassment complaint that the claimant had alluded to in his ET1 claim form.
4. The respondent was ordered to set out its position in respect of the claimant's application to amend and confirm whether it wished to pursue its strike out and/or deposit order applications and, if so, on what basis on or before 27 September 2022. On this date, the respondent confirmed that it objected to the claimant's application to amend [P83-85] and that it wished to pursue its application to strike out and/or for deposit order(s) to be made [P86 – 89].
5. The claimant provided his medical records [P108-256] and an impact statement relating to his disabilities [P256 – 268]. A supplemental impact statement was sent on 31 October 2022 [P352 – 353].
6. The claimant also provided a witness statement for himself [P354 – 371] and his wife [P372-373] although she was unable to attend the open preliminary hearing to give oral evidence. The claimant's Counsel confirmed in the hearing that, as the claimant's statement dated 30 November 2022 principally related to the delay in presenting his claim at the end of February / beginning of March 2022, he was not

proposing to call him to give evidence, and no oral evidence was therefore given at the OPH. I took into account, so far as appropriate, the claimant's and his wife's statements both dated 30 November 2022.

7. On 11 November 2022, the respondent confirmed that it conceded that the claimant was disabled by virtue of diabetes, but did not concede that the claimant was disabled at all material times by virtue of his bipolar condition [P104-5]. The Tribunal had written to the parties 23 November 2022, noting the respondent's position as to disability, and varying Employment Judge Ayre's case management orders confirming that the Judge dealing with the hearing may elect not to determine the question of disability in respect of bipolar disorder if he or she considered it necessary to order additional medical evidence to be disclosed and or to permit and direct the appointment of a medical expert. Counsel for the respondent therefore noted in his opening statement that further medical evidence may be required in respect of the bipolar condition. It was therefore agreed by all parties that it was not appropriate to deal with that issue today. The claimant's Counsel considered that the respondent ought to have sufficient information/evidence already to concede disability relating to bipolar affective disorder, but that, if not, this could be dealt with at the final hearing by the panel determining the case. Counsel for the respondent agreed with this course of action. Therefore, further directions to deal with the disability issue were made and set out in a separate Case Management Order.
8. The hearing was a remote hearing held via cloud video platform ("CVP"). This was in accordance with the overriding objective and, whilst there were initial problems with both parties' representatives connecting to the hearing, this was overcome such that the hearing proceeded without further concern.
9. I was provided with a bundle of documents of some 378 pages which had been prepared for the OPH. References to page numbers within this Judgement refer to

page numbers within that bundle. The grounds of resistance and ET3 did not form part of the bundle, but I was able to look at the copy on file.

10. I was also provided with opening statements/ written submissions from both parties.

11. At the start of the hearing, the respondent's Counsel confirmed that it accepted that the claimant's unfair dismissal claim and discrimination claims concerning his dismissal were presented within time. The date of 9 February 2022 referred to in the response as being the date on which limitation expired for the purposes of bringing such a claim was noted to be erroneous.

12. Further reading time was required and the parties were requested to try and agree between themselves, which specific parts of the claimant's application to amend were agreed (if any).

13. The further and better particulars contained a useful Appendix A Table Summary of Complaints [P51], which I shall refer to in this Judgment as the 'Table Summary'. The respondent accepted that the allegations numbered 1 to 5 in the Table Summary were agreed amendments, either being a relabelling of existing complaints, or already set out in the ET1 claim form, with one notable exception. The respondent did not agree to any amendments concerning claims of victimisation (detriment) and/or automatic unfair dismissal for having made protected disclosures (which I will refer to as the 'whistleblowing complaints'). There being no objection, the amendments set out in allegations 1 to 5 of the Table Summary are allowed, save for those relating to the whistleblowing complaints, which I deal with below.

14. Therefore, the matters in dispute for the purposes of the claimant's amendment application were the whistleblowing complaints, and those numbered 6 to 15 in the Table Summary [P51].

15. The claimant accepted that should I be minded to make a Deposit Order, the claimant's means were such as to be able to satisfy any such Order.

FINDINGS OF FACT FOR THE PURPOSES OF THE PRELIMINARY HEARING

16. The claimant attempted to present his claim by email on 27 February 2022, but as this is not an accepted method of lodging a claim, this was rejected by the Tribunal. The claimant was informed of this on 28 February 2022. The claimant, with the assistance of his wife, then attempted to present his claim online on 28 February, but experienced difficulties in doing so. The claimant's wife called the Tribunal explaining the problems she was experiencing and was told that if she sent the claim form by special delivery, it would be accepted. There was evidence, namely emails, annexed to the claimant's witness statement and forming part of the bundle, which support this.
17. ACAS early conciliation took place on 19 December 2021 until 29 January 2022. Therefore, any claims for incidents prior to 20 September 2021 were potentially out of time.
18. The claimant's ET1 claim form and particulars of claim were presented on 1 March 2022. The original particulars of claim consisted of some 8 pages of relatively small type. This provided detailed claims for unfair dismissal, disability related harassment, and failure to make reasonable adjustments.
19. On 8 August 2022, as noted in the Case Management Order dated 9 August 2022, the "*claimant wrote to the Tribunal stating (amongst other things) that he intended to take formal legal advice after the Preliminary Hearing and to make a formal application to amend his claim to include 'a whistleblowing and a section 15 discrimination claim and potentially other claims'."*
20. The claimant was informed of the need to make a formal application to amend his claim and was further ordered to provide additional information on his harassment claim, which was not clear from the claim form. This resulted in the further and

better particulars [P50-82] sent on 6 September 2022. This provided sufficient detail of the proposed complaints, including those already contained within the claim form and the amendments sought, together with references (where appropriate) to where they were to be found in the original claim form.

21. The claimant's Counsel took me through each of the claims set out in the Table Summary, other than those amendments agreed by the respondent. I also read through the additional detail provided by the full further and better particulars.

22. The claimant wished to amend his particulars of claim, which was originally for unfair dismissal, one allegation of failure to make reasonable adjustments, and unspecified harassment claims to include claims for direct disability discrimination, discrimination arising from disability, a further two failure to make reasonable adjustments claims and additional/ detailed harassment claims.

23. Specifically, in addition to his ordinary unfair dismissal claim, he wished to be given leave to pursue the following claims, which I have set out chronologically under the relevant heads of claims, although have included the allegation numbers they refer to in the Table Summary:

    a. Direct discrimination under section 13 in relation to the following alleged less favourable treatment:

        i. In November/ December 2017, the respondent commencing and/or enthusiastically supporting the internal investigation into Patient A's death which sought to blame the claimant including for his conduct during the inquest (Allegation 11 of the Summary Table);

        ii. From November/December 2017 until 3 February 2019 BB/ HS of the respondent asserted that the claimant had a higher rate of patient complaints (Allegation 10);

iii. On 24 July 2019 and 13 September 2021 BB / HS of the respondent threatening the claimant with dismissal or encouraging the claimant to resign (Allegation 9);

iv. From November/December 2017 to 21 May 2021 HS and KL of the respondent asserting that the claimant said a contentious phrase to Patient A (Allegation 7);

v. Between 14 January 2021 and 28 September 2021, refusing to allow the claimant to apologise during the investigation (Allegation 6);

vi. On 28 September 2021, HS of the respondent providing inaccurate/ distorted information to the disciplinary panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 5);

vii. Dismissing the claimant on 30 September 2021 (Allegation 4);

viii. On 23 November 2021, BG/ HS providing inaccurate/ distorted information to the appeal panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 3);

ix. Rejecting the claimant's appeal or failing to issue a lesser sanction on 26 November 2021 (Allegation 1).

b. Discrimination arising from disability in respect of the following alleged unfavourable treatment:

i. BB of the respondent sent a letter dated 19 July 2012 suggesting that the respondent was not the place for the claimant in the long term and that the claimant was incompatible following the claimant's breakdown (Allegation 15);

ii. In November/ December 2017, the respondent commencing and/or enthusiastically supporting the internal investigation into Patient A's

death which sought to blame the claimant including for his conduct during the inquest (Allegation 11);

iii. Dismissing the claimant on 30 September 2021 (Allegation 4); and

iv. Rejecting the claimant's appeal or failing to issue a lesser sanction on 26 November 2021 (Allegation 1); and

c. A failure to make reasonable adjustments in respect of the following:

i. Between early 2016 and August 2017 failure to provide support, counselling or a mentor for the claimant whilst giving evidence at an Inquest (Allegation 12);

ii. Between November 2019 and 20/21 September 2021 failing to allow the claimant to leave work at midnight (Allegation 8);

iii. Refusing to allow the claimant to apologise or suggest such a step during the investigation from 14 January 2021 to 28 September 2021 (Allegation 6);

iv. HS providing inaccurate/ distorted information to the disciplinary panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 5);

v. On 23 November 2021, BG/ HS providing inaccurate/ distorted information to the appeal panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 3);

vi. Failing to delay the process in order to explore the need for medical evidence during the disciplinary/ appeal process on 23 November 2021 (or between June/ July and November 2021) (Allegation 2); and

vii. Rejecting the claimant's appeal or failing to issue a lesser sanction on 26 November 2021 (Allegation 1).

d. Harassment related to disability in respect of the following acts:

    i. BB of the respondent sent a letter dated 19 July 2012 suggesting that the respondent was not the place for the claimant in the long term and that the claimant was incompatible following the claimant's breakdown (Allegation 15);

    ii. In circa July 2015, BB of the respondent informed Dr Prosser that he had been reluctant to appoint the claimant due to the claimant's "prior history" (Allegation 14);

    iii. On 9 December 2015, KL of the respondent calling the claimant "psychologically weak" who she needed to stop from "going off the rails" (Allegation 13);

    iv. On 24 July 2019 and 13 September 2021 BB / HS of the respondent threatening the claimant with dismissal or encouraging the claimant to resign (Allegation 9);

    v. On 20/21 September 2020, the implementation of the adjustment to allow the claimant to leave work at midnight (Allegation 8);

e. Being subjected to the following detriments on the ground that the claimant made protected disclosures (whistleblowing):

    i. Between early 2016 and August 2017 failure to provide support, counselling or a mentor for the claimant whilst giving evidence at an Inquest (Allegation 12);

    ii. In November/ December 2017, the respondent commencing and/or enthusiastically supporting the internal investigation into Patient A's death which sought to blame the claimant including for his conduct during the inquest (Allegation 11);

iii. From November/December 2017 until 3 February 2019 BB/ HS of the respondent asserted that the claimant had a higher rate of patient complaints (Allegation 10);

iv. On 24 July 2019 and 13 September 2021 BB / HS of the respondent threatening the claimant with dismissal or encouraging the claimant to resign (Allegation 9);

v. From November/December 2017 to 21 May 2021 HS and KL of the respondent asserting that the claimant said a contentious phrase to Patient A (Allegation 7);

vi. Between 14 January 2021 and 28 September 2021, refusing to allow the claimant to apologise during the investigation (Allegation 6);

vii. On 28 September 2021, HS of the respondent providing inaccurate/ distorted information to the disciplinary panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 5);

viii. On 23 November 2021, BG/ HS providing inaccurate/ distorted information to the appeal panel including misrepresenting the outcome of the GMC/ MPTS hearing (Allegation 3); and

ix. Rejecting the claimant's appeal or failing to issue a lesser sanction on 26 November 2021 (Allegation 1).

f. Automatic unfair dismissal on the ground that the reason or principal reason was that the claimant had made protected disclosures under section 103A Employment Rights Act 1996 (ERA) (Allegation 4).

24. The respondent made no objection to the following amendments as these were already stated in the claim form and/or were accepted as being a relabelling exercise:

a. direct disability discrimination at paragraphs 23.a.vi to 23.a.ix;

b. discrimination arising from disability at paragraphs 23.b.iii and **Error! Reference source not found.**; and

c. failure to make reasonable adjustments at paragraphs 23.c.iv to 23.c.vii.

25. It was therefore necessary to consider whether to allow the other amendments sought by the claimant, including all of the whistleblowing complaints.

26. The parties had helpfully prepared written submissions and were given the opportunity to address me orally. I reserved my decision, since there was insufficient time to deliberate and give Judgment, although we were able to agree case management orders prior to concluding the hearing, which appear in a separate Case Management Order. This will hopefully prevent the need for a further case management hearing in this case prior to the final hearing.

27. I was impressed by both counsels' approach in that they were pragmatic and cooperated with each other, being a good example of the over-riding objective in practice.

28. The claimant's submissions, in brief, were that most amendments amounted to a relabelling exercise of claims which had already been referred to in the claim form. They were not wholly new claims, unconnected to the original claim. Amendments should not be refused solely because there was a delay in making them. As in the case of Evershed v New Star Asset Management Holdings Limited [2010] EWCA Civ 870, it was wrong to suggest that the whistle blowing claim would "*require wholly different evidence*". Even if the amendments were found to be new claims, there was still a connection with the existing factual assertions/ other amendments, such that the Tribunal should allow the amendments, subject to time limit points being reserved to the final hearing. The balance of prejudice, if amendments were not permitted, outweighed the prejudice to the respondent, who would be granted a windfall defence should leave not be given. The claims should not be struck out;

being a draconian step that should be taken only in exceptional circumstances. Without hearing the evidence, it would not be appropriate to make a deposit order.

29. The respondent's written submissions dealt with the strike out/ deposit order applications, however, oral submissions were provided on all aspects of the applications under consideration. The respondent stated that allegations numbered 11, 13 and 14 of the Table Summary were wholly new complaints, which did not appear at all in the ET1 claim form. The Tribunal should concentrate on the practical consequences of allowing or not allowing the amendments. If the amendments are allowed, there is a real danger that the respondent will not have fair hearing since at least one member of staff, BB, has left the trust and has not been there since 2016 (although the claimant expressed doubt on this). All claims prior to 20 September 2021, other than discrimination claims relating to the claimant's dismissal, were out of time. The out of time claims should be struck out for this reason, or alternatively a deposit order made in order to continue.

RELEVANT LAW

30. The starting point in an application to amend is always the original pleading set out in the ET1. In Chandok v Tirkey 2015 ICR 527, the EAT said:

"*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with the time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1*."

31. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal

footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

32. In Cocking v Sandhurst Stationers Ltd [1974] ICR 650 it was held that regard should be had to all the circumstances of the case and in particular the Tribunal should "*consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused*".

33. In Selkent Bus Company Limited v Moore [1996] IRLR 661 the EAT held that:

"…*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 has 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 e.g., in the case of unfair dismissal, [s67 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."

34. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in Cocking and Selkent.

35. In respect of re-labelling, the Guidance provides: "*While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further an employer is entitled to know the claim it has to meet*".

36. Under 'Time Limits' the Guidance provides: "*The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case*

management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent".

37. A Tribunal can allow an application to amend, but reserve any limitation points until the final hearing, which might be necessary in cases where it is not possible to make a determination without hearing the evidence – Galilee v Commissioner of the Metropolis UKEAT/0207/16.

38. In the recent EAT case of Chaudry v Cerebus Security and Monitoring Services Ltd EA-2020-000381, guidance was given on how to approach amendment applications. Namely:

    a. in express terms, identify the amendment sought; and

    b. balance the injustice and/or hardship of allowing or refusing the amendment taking account of all the relevant factors, including, to the extent appropriate, those referred to in Selkent.

Time limits

39. Section123 EqA provides:

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

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

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

(3) For the purposes of this section—

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

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

40. Section 111 of the ERA provides:

"111 Complaints to employment tribunal

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

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

41. Section 48(3) ERA provides:

"*An employment tribunal shall not consider a complaint under this section unless it is presented -*

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

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

42. I have a wide discretion to extend the time limit for a discrimination claim to be presented by such further period as is considered just and equitable (section 123(1)(b), EqA). In deciding whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed, the tribunal is entitled to take into account anything that it deems to be relevant.

43. However, I note that time limits should be strictly applied, and the exercise of the discretion is the exception rather than the rule. There is no presumption that the Tribunal should exercise its discretion.

44. The Tribunal is not legally required to, but may, consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:

    a) the length and reason for the delay;

    b) the extent to which the cogency of the evidence is likely to be affected by the delay;

    c) the extent to which the party sued had cooperated with any requests for information;

    d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and

    e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

45. The most relevant factors are the length of, and reasons for, the delay, and whether the delay has prejudiced the respondent. The Tribunal will consider whether a fair trial is still possible. The Tribunal may consider the merits of the claimant's discrimination claims when deciding whether to extend time on the basis it is just and equitable to do so.

46. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal advised against following the Limitation Act factors as a checklist, but rather advised that a tribunal should take into account all relevant factors including the length of and reasons for the delay.

47. The Tribunal may strike out a claim or allegation where it considers that it has 'no reasonable prospect of success under Rule 37(1)(a) which says:

    "*Striking out*

    (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."

48. This is a high hurdle and, particularly in discrimination cases, and where there are disputes of fact, it will rarely be appropriate; Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391.

49. Deposit orders are provided by rule 39 of the Employment Tribunal rules of procedure which states:

"*39 Deposit orders*

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

50. This is noted to be a lower threshold that than for strike out.

CONCLUSION

51. In respect of the amendment applications to bring claims for detriment and/or automatic unfair dismissal on grounds that the claimant made protected disclosures, I have considered firstly whether the amendment is a wholly new cause of action or whether it is a re-labelling exercise, as suggested by the claimant. I am satisfied, having read the particulars of claim, that this is a new cause of action and is not merely a re-labelling exercise.

52. Whilst the claimant referred to being unfairly dismissed in his particulars of claim, and to being "victimised", I do not accept that this formed the basis for any of the claimant's whistleblowing complaints. There is no reference in his claim form to the protected disclosures outlined at paragraphs 1d(i) to (iv) of Appendix B of the further and better particulars of claim [P53-54]. There is no reference, even obliquely, to the claimant alleging that any of the detriments he was subjected to, or his dismissal, was in any way linked to having made any such protected disclosures. I therefore, do not accept the claimant's assertion that to add an automatic unfair dismissal claim to his claim of ordinary unfair dismissal was similar to the case of Evershed v New Star Asset Management Holdings Ltd referred to above. In that case, there was specific reference to a grievance having been raised by the claimant in the ET1, and insufficient reasoning by the Employment Judge as to why he had come to the conclusion that the amendment would have required "*wholly different evidence*".

53. The claimant's Counsel took me to various points in the particulars of claim where "*victimising*" or "*victimisation*" was stated. However, having read the particulars of claim, it appeared that the claimant was complaining that from 2012, the Trust took a "*troublemaking, trouble-seeking and difficult harassing,*

bullying and victimising attitude to him". Some of this appeared to pre-date all of the alleged protected disclosures, the earliest being January 2014.

54. I do not accept that the references to victimisation were sufficiently clear to determine that the claimant was making a claim for detriment and/or automatic unfair dismissal for having made protected disclosures. There was, as stated above, no reference to the protected disclosures themselves.

55. The time limits for bringing automatic unfair dismissal claims and claims for detriment for making protected disclosures, mean that the claims were presented significantly out of time, by the time of the amendment application. The discretion to extend time for both these types of complaint provides a narrower discretion than that for discrimination complaints. The claims for automatic unfair dismissal and detriment for making protected disclosures both involve tests of reasonable practicability, and there was little to suggest that it was not practicable for the whistleblowing claims to have been included in the original claim form. Nor any reason put forward as to why this could not have been presented within such further period as was reasonable, if it was not practicable to have presented it within time.

56. The claimant provided little explanation of his reason for it not being included in the original claim form. Whilst I note that being out of time is not a bar to an amendment application, it is a factor which may be taken into account in considering the amendment application.

57. The nature and method of the application to amend: delay may be taken into account, but is not a bar to allowing amendments. The claim was presented on 1 March 2022 and the first notification of any possible amendment was the email to the Tribunal dated 8 August 2022, some 5 months after the claim was presented. I note that the claimant was a litigant in person at the time, but was able to present a detailed claim for his unfair dismissal claim, failure to make reasonable

adjustments claim and his harassment claim (although this was not properly particularised).

58. The most important factor is to weigh the relative prejudice between the parties in allowing or not allowing the amendments sought and the balance of injustice. As far as the whistleblowing complaints are concerned, I accept, that in not being allowed to advance a claim for automatic unfair dismissal and detriment for making protected disclosures, this will cause substantial prejudice to the claimant. The refusal of the amendment will not prevent the claimant from pursuing claims for both ordinary unfair dismissal and discrimination, which appeared to me to be the claims in the forefront of the claimant's mind when presenting his claim form, but I accept that prejudice to the claimant will follow any refusal to allow the amendments.

59. The respondent will be prejudiced if the amendments were allowed in having the additional costs and expense of defending the whistleblowing claims, although I note that an award of costs may mitigate this prejudice, it would not fully ameliorate them. Also, the alleged disclosures took place some years prior to the events complained about, and there may well be difficulties for the respondent in obtaining evidence about what disclosures (if any) were made dating back to 2014 and/or the circumstances surrounding those disclosures. The respondent referred to prejudice in its objection to the amendment application dated 27 September 2022 [P83-84] in providing, "*evidence to prove its position due to the passing of time, which would significantly limit documentary evidence from being produced and witnesses' testimonies may not be able to recall their version of events*." I accept that to be the case. The respondent's oral submissions were that there is a real chance that the respondent will be unable to have a fair trial if the amendments were allowed, and I have some sympathy with that. If the amendment was allowed it may result

in a longer hearing, since if it is not accepted that the disclosures were made, then evidence will be required on this.

60. I accept that the Tribunal will need to consider the reasons for the claimant's dismissal in any event to determine the claims which are continuing, but I still consider that substantial prejudice will be caused to the respondent were I to allow the amendment.

61. I take all of these factors into account in weighing the injustice caused by allowing or refusing the amendment. In light of this, I consider that the balance of prejudice and justice weighs in favour of the respondent so that I do not allow the claimant's application to amend his claim to include claims of automatic unfair dismissal and detriment for having made protected disclosures (the whistleblowing complaints). Therefore, the amendments sought in allegations numbered 1, 3, 4, 5, 6, 7, 9, 10, 11 and 12 in the Table Summary, relating to either section 47B ERA or section 103A ERA are not allowed.

62. Turning to the remaining amendment applications numbered 6 to 15 in the Table Summary [P51], I am satisfied that the following complaints were already contained within the ET1 claim form, or were sufficiently linked to, or arising out of the same facts as pleaded in the original claim. Therefore, they either do not change the nature of the original claim, but the grounds on which that claim is based, or were a relabelling of facts already pleaded:

    a. Allegation number 6: in respect of direct disability discrimination and failure to make reasonable adjustments as outlined above at paragraphs 23.a.v and 23.c.iii;
    b. Allegation number 7: in respect of direct disability discrimination and as outlined above at paragraph 23.a.iv;

c. Allegation number 8: in respect of both failure to make reasonable adjustments and disability related harassment as outlined above at paragraphs 23.c.ii and 23.d.v;

d. Allegation number 9: in respect of direct disability discrimination and harassment as outlined above at paragraphs 23.a.iii and 23.d.iv;

e. Allegation number 10: in respect of direct disability discrimination as outlined above at paragraph 23.a.ii.

63. As these complaints were either already contained within the claim form, or amount to a relabelling of facts I have found have already been pleaded, I consider that the amendments should be allowed, since the balance of injustice and hardship weighs in favour of the claimant in allowing the amendments.

64. In coming to my decision, I have considered the matters referred to above, and have taken into account the nature of the amendment, the time limits (noting that the claims are, on the face of it, out of time), the method and timing of the application and the relative injustice caused to the parties. The claims will not come as a surprise to the respondent, since the facts supporting them formed part of the particulars of claim. We are at a point in the proceedings where the respondent is able to respond to the claims, by being given leave to amend its response, and prior to witness statements taking place, and, unlike the whistleblowing claims, these are not new assertions.

65. I note that the facts pleaded did not set out the full details of the claims, or the label to be assigned to them, particularly the claims for failure to make reasonable adjustments, where a different alleged disability (bi-polar affective disorder) is relied upon for the amendments.

66. The only pleaded failure to make reasonable adjustments claim related to the adjustment of allowing individuals to leave work at midnight relying upon the claimant's disability of being diabetic (referred to as adjustment 6 in the further

and better particulars of claim, and set out in allegation 8 of the Table Summary). This requires no amendment, and therefore continues to hearing in any event.

67. The other claims for failure to make reasonable adjustments referred to as adjustments 5 and 7 in the further and better particulars of claim, and set out in allegations 6 and 12 of the Table Summary, appear to rely upon the condition of bipolar affective disorder. There is reference in the ET1 claim form to the refusal to allow an apology (paragraph 10), but this has not been pleaded as a failure to make reasonable adjustments and appears to be more than a relabelling exercise of particular facts. However, I am minded to allow this amendment since it did form part of the original claim, and the prejudice and injustice in not allowing it outweighs the prejudice of allowing it.

68. I also take into account that the complaints may, on the face of it, be out of time, however, I consider that this issue may be left for the final hearing to determine whether the Tribunal has jurisdiction to consider them once it has heard evidence on this, and is better able to consider whether there has been a course of conduct extending over a period which may affect their out of time status. This therefore mitigates some of the potential prejudice caused to the respondent in allowing the amendments.

69. Therefore, whilst I accept the respondent will be prejudiced in having to defend these complaints, and that memories may have faded, I do not feel that the respondent is unable to have a fair trial on these matters. The case will undoubtedly take longer to hear, but this does not in my view, outweigh the claimant's substantial prejudice in not having considered the claims he previously referred to in his claim form, and for the panel to consider whether it has jurisdiction to consider them having heard all the evidence, as they may have been presented out of time.

70. Turning to the final group of amendments, being those set out as allegations numbered 11 to 15 in the Table Summary, and set out in paragraphs 23.a.i, 23.b.i, 23.b.ii, 23.c.i, 23.d.i, 23.d.ii and 23.d.iii above. I do not find that these were contained within the original particulars of claim. They are, therefore, new claims. They do not appear to rely upon any facts previously contained within the original claim form. I will consider this group of amendments together.

71. All of these claims are significantly out of time, the latest allegation being in November/ December 2017, and dating back to July 2012. Even though the claimant says that he only knew of allegation 14 in the Table Summary in the Summer of 2021, there was little explanation of why the claim relating to this was not contained within his original claim. The rest were presumably known to the claimant at the time, and yet no claim was brought until the amendment application on 6 September 2022. Whilst I accept that being out of time is not a bar to an application to amend, and note that the claimant seeks to show a course of conduct extending over a period, I consider that the delay in bringing such a claim, and the prejudice caused to the respondent in dealing with such claims weighs heavily in favour of not allowing the amendments. There was no reason put forward as to why the claimant had not presented these claims sooner, and I feel that the prejudice to the respondent in not being able to have witnesses remember events from some years ago, far outweighs the prejudice to the claimant, whose primary case for unfair dismissal and discrimination continue to hearing. Therefore, I do not allow these amendments.

72. As far as strike out is concerned, the respondent made applications to strike out the claimant's claims for harassment (save that on dismissal) and failure to make reasonable adjustments on the basis that they were presented out of time. In respect of the claims that I have allowed to continue, I am not willing to strike out the claims on this basis. I do not consider that the high threshold has been met

for me to strike out these discrimination claims, as is required by rule 37 of the ET rules of procedure. Rather, I consider it to be in accordance with the overriding objective to allow the claims to continue, and for the Tribunal to consider whether the claims were presented in time or whether to exercise its discretion to extend time once it has heard all the evidence.

73. I further do not consider it appropriate to order a deposit in this case, since I cannot say that the claims show little prospects of success without considering any of the evidence as to whether there has been a course of conduct extending over a period. Therefore, the applications for strike out and deposit orders are refused.

74. The claims and list of issues as a result of my findings are set out in the Case Management Order of today's date.

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Employment Judge Welch

Date 17 December 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE