



EMPLOYMENT TRIBUNALS

Claimant: Miss F. Jabeen

Respondent: National Westminster Bank PLC

Heard at: Birmingham
By CVP

On: 13 and 14 December 2022

Before: Employment Judge Connolly, (sitting alone)
Members:

Representation

Claimant: Mr T. Kibling (Counsel)
Respondent: Mr E. Giligan (In-house Counsel)

A DECISION having been sent to the parties on 15 December 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claim was listed for a preliminary hearing to determine:
 - 1.1 The claimant's applications to amend claim number 1311165/2020 ('the first claim')
 - 1.2 The respondent's application to strike out claim number 1304421/2021 ('the second claim')

2. The claimant was employed by the respondent, latterly as a Stress Testing Controls Analysis Manager from the 10 September 2018 to the 30 September 2020. On 11 December 2020, after a period of early conciliation which started and ended on the 20 October 2021, she presented her first claim. At that time, she was unrepresented.

3. In May 2021, June 2021, January 2022 and July 2022, and after she had secured representation, she intimated or made an application to amend in various iterations which I will deal with in more detail below. The respondent objected to the entirety of the claimant's application to amend.
4. In addition, in October 2021, the claimant presented a second claim. The respondent applied to strike out the second claim on the ground that it was unreasonable, vexatious and/or an abuse of process because it advanced the same complaints as the first and/or which were sought to be advanced by way of the applications to amend. Mr. Kibling, on behalf of the claimant, helpfully clarified that there were 3 complaints advanced in the second claim which related exclusively to the respondent's alleged conduct after the termination of the claimant's employment and did not include any of the complaints advanced by the applications to amend the first claim. In the circumstances, the respondent did not pursue its application to strike out the claim.
5. The sole preliminary issue for determination was therefore the claimant's application to amend the first claim. This gave rise to 2 issues:
 - 5.1 to what extent the Claimant required permission to amend in the form set out in the application
 - 5.2 should permission be given and if so in what respect(s)?
6. I was provided with a core bundle of 196 pages and a supplemental bundle of 51 pages. Claimant's Counsel also produced a 20 page Skeleton Argument in support of the application to amend (and resisting the strike out application); Respondent's Counsel produced a detailed 14 page response to the application, supplemented by an 13 page Skeleton addressing both applications. I have annexed a copy of the proposed amendments to these Reasons.

Relevant Law

7. The Tribunal has power to grant a party permission to amend their claim by virtue of **The ET (Constitution and Rules of Procedure) Regulations 2013 rule 29** ('The Tribunal Rules'). The discretion contained within **r.29** must be exercised in accordance with the overriding objection in **Rule 2**.
8. The task for the Tribunal is to balance all relevant factors having regard to the interests of justice and, in particular, to consider the relative hardship, prejudice or injustice that will be caused to either party by granting or refusing permission to amend respectively (**Cocking v Sandhurst (Stationers) Ltd and Anor 1974 ICR 650** approved and restated in **Selkent Bus Co Ltd v Moore 1996 ICR 836** and further approved and restated in **Abercrombie v Aga Rangemaster plc [2013] EWCA 1148**).
9. Commonly, when considering the balance of prejudice, hardship or injustice, the Tribunal looks at a number of factors:

- 9.1 the nature, extent and impact of the proposed amendment including, as set out in **Abercrombie [48]**, to what extent it might raise new or different legal and factual issues
 - 9.2 the applicability of time limits
 - 9.3 the timing and manner of the application to amend.
10. In appropriate cases, the Tribunal is also entitled to consider the merits / strengths of the complaints which it is proposed be brought by way of amendment. This is subject to the proviso that the Tribunal does so on a reasoned basis and keeps in mind that it does not have the full evidence before it (**Kumari v Greater Manchester Mental Health NHS Foundation Trust EA-2020-000833-VP [88]**). That exhortation or note of caution is particularly pertinent in cases involving allegations of discrimination or public interest disclosure which are often fact sensitive and can involve drawing inferences which might only be clear once all the evidence is heard.
11. In relation to times limits, and with the agreement of both parties, I adopted the approach set out in **Reuters Ltd v Cole UKEAT/0258/17 [31]**: if I were satisfied the claimant had established a prima facie case that the primary time limit or any extended time limit had been met, I would leave the point to be definitively determined at Final Hearing. Alternatively, if I were satisfied the claim would be out of time had it been presented as a new claim at the date of the application to amend, the parties agreed that is a factor I am entitled to take into consideration but it is not determinative of the application to amend.

Procedural History of the Claims and the Applications to Amend

The Claim Form

12. It is agreed that the claim form, as presented by the claimant on 11 December 2020, included the following 4 broad claims:
- 12.1 sex discrimination
 - 12.2 breach of the duty to pay equal pay for like work
 - 12.3 'ordinary' unfair dismissal
 - 12.4 'automatically' unfair dismissal because the claimant had made a public interest disclosure
13. There is a dispute whether, generously interpreted, the claim form could be said to include claims that the claimant was (a) subjected to a detriment because she made a public interest disclosure and/or (b) a claim of race discrimination.
14. The respondent filed its Grounds of Resistance in which it complained of a lack of clarity and particularity in the Claim Form. On 27 May 2021 the claimant sent the respondent and Tribunal a document titled "Consolidated Particulars of the Claimant's Claims as Requested by the Respondent". The claimant was

represented by this stage. The following day she sent an amended form of the Consolidated Particulars. By these documents, the claimant sought to:

- 14.1 Advance public interest disclosure detriment claims,
 - 14.2 Expand the list of acts or omissions which were said to constitute sex discrimination
 - 14.3 Advance the same list of acts or omissions as complaints of race discrimination or claims of discrimination because of religious belief in addition or in the alternative to sex discrimination
 - 14.4 Advance the same expanded list of acts or omission as sex, race or religious-related harassment
 - 14.5 Identify a new comparator in relation to the equal pay claim.
15. On 1 June 2021 a preliminary hearing for the purpose of case management took place. At the hearing, the claimant's Counsel accepted that the complaints still required further clarification. The claimant was therefore ordered to provide particulars of each of her claims of public interest disclosure detriment, direct race, sex and religious belief discrimination and harassment in a prescribed level of detail and to submit a formal application to amend.

The June 2021 document and application

16. On the 22 June 2021 the Claimant made the application to amend as required and provided the list of each complaint as ordered (the 'June 2021 document and application'). She invited the Tribunal to grant permission for that document to stand in substitution for the original claim. The June 2021 document included the following:
- 16.1 7 public interest disclosures and 12 detriments
 - 16.2 3 complaints of sexual harassment
 - 16.3 6 complaints of direct discrimination because of religious belief or harassment related to religious belief
 - 16.4 A new comparator in relation to the equal pay claim.
17. The application was listed for hearing in November 2021.
18. In the meantime, in October 2021, the claimant presented a second claim related to the conduct of 2 grievance investigations and a grievance appeal. The claimant raised complaints that the conduct and outcome of these internal process were acts of public interest disclosure detriment and/or direct race or sex discrimination and/or victimisation.
19. The hearing listed in November 2021 to determine the application to amend did not take place because of lack of judicial resource. As a consequence of reading the claimant's submissions prepared for the November hearing, the respondent

apprehended that the substance of the application to amend seemed to have altered. On 17 December 2021, the respondent wrote to the claimant seeking clarification. On 14 January 2022 the claimant confirmed, firstly, that, in the June 2021 document, she had inadvertently omitted to characterise the claims relating to direct discrimination because of religious belief as claims of direct race discrimination in the alternative. Secondly, she had decided she no longer wished to proceed with any application to amend to include any complaint of discrimination because of religious belief or any harassment claim.

20. As at January 2022, the application to amend was therefore limited to:

- 20.1 public interest disclosure detriment complaints,
- 20.2 direct sex or race discrimination complaints
- 20.3 an additional comparator for the Equal Pay claim.

21. Today, Counsel for the claimant explained that he had inadvertently omitted any reference to race discrimination in the section of the June 2021 document dealing with direct discrimination or harassment because of or related to religious belief.

The January 2022 document and July 2022 application

22. On 14 January 2022 the claimant provided the respondent with a document setting out the changes to the June 2021 document ('the January 2022 document') and stating it was this document which the claimant now wished to stand in substitution for her claims and wished to be considered at the re-listed hearing of the application to amend. It is this document which is attached to these Reasons. On examination of the January 2022 document, it can be seen there are 5 'groups' of proposed amendments:

- 22.1 7 public interest disclosures,
- 22.2 10 detriments,
- 22.3 13 complaints of direct sex discrimination,
- 22.4 the same 13 complaints advanced as direct race discrimination in the alternative
- 22.5 an additional comparator for the purpose of the equal pay claim.

23. The Respondent objected to this change in position and expressed their view the claimant should make an application to the Tribunal. On 13 July 2022 the claimant applied for a retrospective extension of time to comply with the Case Management Order. This was, in effect, a second application to amend ('the July 2022 application'). The parties agreed that it was appropriate to consider the merits of the claimant's application as an application to amend without the necessity of determining a retrospective application to extend time. The respondent invited me to bear in mind the piecemeal way the application had been made when it came to exercising my discretion.

Conclusions on the application to amend

24. I will deal with the relevant facts and my conclusions on each group of the proposed amendments, look at how each evolved so I can establish if they require permission to amend, the effective date of the application to amend and the extent of the difference in substance between the proposed amended claims and the original claim.
25. It seems to me that it is important to set out what is contained in the original claim of December 2020, to compare that to the June 2021 document and the July 2022 application (acknowledging the substance of the application was provided in the January 2022 document).
26. The Claim Form, in broad terms, involved complaints about a reorganisation that took place from the end of February 2020 and resulted in the claimant's dismissal at the end of September 2020. The Claimant alleged that she made various disclosures, that she had been displaced as a result of the reorganisation, that she had worked in at least one alternative role but was not offered other suitable alternative employment. She asserted the dismissal was generally unfair or was 'automatically' unfair because she had made protected disclosures.
27. The claimant also referred to an appointment which had taken place in 2019. A woman (Miss Kang) was appointed to a role more senior than the claimant's role. The claimant alleged this was because there was a personal relationship between Ms Kang and a Mr Bosworth who made the appointment. The claimant alleged that Mr Bosworth had blocked her from a similar level role during the reorganisation because, she inferred, he wanted to be in a personal relationship or intimate with her. This was raised as an allegation of sex discrimination. The claimant went on to complain that she was not paid the same salary for like work and named a colleague as her relevant comparator. Although she identified this as discrimination on the grounds of sex, it was readily identifiable as a complaint of a failure to pay equal pay for like work. Finally, she alleged her health had suffered as a result of her treatment and her dismissal was in some way disability discrimination. This claim was withdrawn and dismissed in June 2021.

Application to Amend to Include 7 Public Interest Disclosures

28. The application to amend includes an application in respect of 7 protected / public interest disclosures. The claim, as presented, included a claim that the claimant's dismissal was unfair because she made protected disclosures. Neither the total number of protected disclosures nor each protected disclosure are clearly identified in the original claim form. The claimant simply set out the content of her alleged disclosures in general terms. In the narrative, she made reference to a number of instances which could be the instances of disclosure relied upon: one on the 21 April 2020 to Mr Boswell, one in June 2020 to HR, one thereafter to the Speak-up Team and a possible one relating to Ms Kang's appointment in a grievance of the 26 August 2020.
29. Turning then to the application to amend, the 7 disclosures advanced in the June 2021 document are the same as those in the January 2022 document / July 2022 application. The respondent makes some criticism that the claimant has still not

clearly identified the content of each disclosure. I am not satisfied that criticism is of any real weight. In my view, the January / July 2022 document adequately sets out the gist of what the claimant alleges she said which amounted to a protected disclosure.

30. I am satisfied that those at [15.2], [15.4] and [15.6] are, in essence, further and better particulars of those which were identified in the claim form: in April to Mr Bosworth, in June to HR and to the Speak-up Team thereafter. I find that the claimant does not require permission to amend to rely upon these disclosures. In the alternative, if she did require permission, I would have granted it because the factual content is largely set out in the claim form.
31. In relation to [15.1], [15.3] and [15.5], I am satisfied that they overlap with that part of the Claim Form where the claimant sets out, in bullet points, the failings which she says she disclosed. I accept the specific occasions on which she claims to have made a disclosure are not set out. I take the view the claimant requires permission to include the disclosures in these paragraphs. That at [15.7] concerns an entirely new issue of privacy for which the claimant would require permission.
32. I have considered the impact on each party of allowing / refusing the claimant permission to amend to include these 4 additional disclosures. Those at [15.1] and [15.3] to Mr Cross and Mr Bosworth seem relevant to her claim that she was dismissed because she made disclosures. It is clear from [19.5], where the claimant sets out her automatically unfair dismissal claim and her unfair dismissal claim generally, that she complains that Mr Cross and Mr Bosworth excluded her from suitable alternative employment opportunities because she made a protected disclosure. If I was to refuse permission to amend, that would cause her some disadvantage in running a claim that is already before the Tribunal in her original claim form. Furthermore, Mr Bosworth and Mr Cross are likely to be witnesses in the automatically unfair dismissal claims. To permit those disclosures would result in a very limited increase in witness evidence. I cannot see any basis on which the disclosures at [15.5] to Ms Arthur or [15.7] to HR about her privacy rights are potentially relevant to her automatic unfair dismissal claim. If I give permission in respect of [15.5] and/or [15.7], it seems likely to require evidence from 2 additional witnesses who are not relevant to the claim for automatic unfair dismissal as presented.
33. Turning then to the timing and manner of making of the application: it was intimated approximately 5 months after presentation of the claim, promptly after the claimant gained representation and promptly after the respondent complained of a lack of particularity. The substance of the amendment is clear and has remained consistent through the two applications to amend in June 2021 and July 2022.
34. Time limits are not applicable to this discrete aspect in that the public interest disclosures are relevant to the claim for unfair dismissal which is already before the Tribunal.
35. I have concluded that no permission is required in respect of [15.2], [15.4] and [15.6].

36. In respect of [15.1] and [15.3], having weighed all the above and primarily in light of the relevance to the unfair dismissal claim and the limited impact on the evidence I find that the hardship to the claimant of refusing permission would be greater than the impact on the respondent of granting permission. I refuse the application in respect of [15.5] and [15.7] because they do not relate to the unfair dismissal claim and involve new issues of fact and new evidence which would not otherwise be required. The hardship and disruption to the respondent and the hearing of permitting them, on balance, outweighs the hardship to the claimant.

Public Interest Disclosure Detriment complaints

37. In my view there is nothing in the Claim Form which could, even generously construed, be considered a complaint of whistleblowing detriment. The claimant says explicitly that she “*received an automatically unfair dismissal for whistleblowing in respect of these concerns*”. I take the view that these are ‘new’ complaints and each would require permission to amend.

38. Tracing the history of the application to amend: permission is sought in respect of 10 detriments which were contained in the June 2021 document. The relevant date of the application to amend is therefore 22 June 2021.

39. Turning to the substance of the complaints and the impact if they were to be permitted:

38.1 [16.1] concerns whether the claimant was given the opportunity to carry out an alternative role in the reorganisation. This seems likely to be relevant to the fairness of her dismissal. I see the point raised in her original claim form at **p22** “*subject matter experts were excluded from automatic mapping, however automatic mapping was given to a non-Stress Testing employee*”

38.2 [16.2] concerns whether the claimant was required to re-apply for her own role which she maintains was not redundant. Again, it seems to me this issue is likely to be relevant to her unfair dismissal claim and likely to be part of the factual enquiry the Tribunal will have to undertake in any event on the claimant’s claim as originally presented

38.3 [16.3] could be more clearly set out. It seems to relate to whether the Stress-Testing Control manager role was a suitable alternative for the claimant. As with [16.2] above, it seems to me this issue is likely to be relevant to her unfair dismissal claim and likely to be part of the factual enquiry the Tribunal will have to undertake in any event on the claimant’s claim as originally presented

38.4 [16.4] is a statement of the claimant’s opinion that Ms Kang, her line manager, did not have the skills to manage her. This seems unlikely to be relevant to the unfair dismissal complaint. The complaint is poorly defined and I struggle to understand precisely what the claimant complains of as a detriment.

- 38.5 in [16.5] the claimant complains that, after an unsuccessful trial period, she was demoted to a lesser role. As with a number of the detriments above, it seems to me this issue is likely to be relevant to her unfair dismissal claim and likely to be part of the factual enquiry the Tribunal will have to undertake in any event on the Claimant's claim as originally presented.
- 38.6 [16.6] seems to be a composite allegation that Mr Bosworth did not fulfil an undertaking to change the claimant's line manager and that Ms Kang as her line manager was permitted to or did access the claimant's personal data. This seems unlikely to be relevant to the existing unfair dismissal claim; likely to raise an entirely new line of factual enquiry as to what happened and why and involve at least 1 additional witness (Ms Kang).
- 38.7 [16.7] alleges that the claimant was detrimentally treated because her grievance was not seriously considered and/or was rejected by a Ms Arthur. As above, this seems unlikely to be relevant to the existing unfair dismissal claim; likely to raise an entirely new line of factual enquiry as to what happened and why and involve at least 1 additional (Ms Arthur).
- 38.8 [16.8] asserts that her application for an alternative vacant post was sabotaged. That seems potentially relevant to her unfair dismissal claim and, again, looking at [19.5] I can see that she raises her application for the Planning and Control Analyst post expressly as part of her complaint of unfair dismissal.
- 38.9 [16.9] contends that the redundancy process was used to justify her dismissal. This does not seem to me to be a detriment claim at all but is simply a statement that the claimant believes her dismissal was unfair.
- 38.10 [16.10] sets out the claimant's case that she was detrimentally treated by not being given the opportunity to apply for a 'Head of' role. it seems to me this issue is likely to be relevant to her unfair dismissal claim and likely to be part of the factual enquiry the Tribunal will have to undertake in any event on the Claimant's claim as originally presented.
40. In summary, [16.1], [16.2], [16.3], [16.5], [16.8] and [16.10] raise as allegations of detriment, conduct which is very likely to form part of the evidence the Tribunal would hear on the claim as originally pleaded. Permitting amendment in these regards may lead to some additional evidence or issues but it is likely to be very limited. Having considered [19.5] I can see that the claimant breaks down the overall assertion that the dismissal was automatically unfair or generally unfair. This seems to involve a consideration of each of these matters advanced as detriments in these paragraphs. The factual issues in [16.4], [16.6] and [16.7], however, seem to me to be new, would require the respondent to conduct additional factual enquiries and to adduce additional evidence. [16.9] simply seems inappropriate as a detriment claim as it concerns the act of dismissal.

41. In respect of time limits, I note that the last detriment complained of occurred on the 29 September 2020 ([16.8]). Assuming that the claimant could establish a series of similar acts or failures, on 27/28 May 2021, when the amendment was first intimated, the complaints would have been at least some 5 months out of time were they presented as fresh claims. On 22 June 2021, when the application to amend was made, the complaints would have been at least some 6 months out of time had they been brought as a fresh claims.
42. I am told that the reason why these complaints were not advanced until May / June 2021 was because the claimant was unrepresented, not familiar with legal causes of action and the form does not specifically direct litigants to the possibility of public interest disclosure detriment claims. That does not appear to me to raise a prima facie case or to satisfy the test that it was not reasonably practicable to present the claim in time. I find these complaints would have been out of time if they had been brought as a fresh claim at the date the application to amend was made.
43. The impact on the respondent of facing a claim outside the relevant time limits weighs heavily with me. This is particularly so where the detriments advanced arise from facts which are not set out in the claim form and not inextricably part of the unfair dismissal claim in any event. That point seems to me to have less weight where the detriments relate to the restructure and would be addressed in evidence and the consideration of the unfair dismissal claim in any event. I acknowledge however that the respondent faces defending detriment claims with the associated risk of an injury to feelings award which they would not have faced if the complaints been brought as fresh claims and struck out as out of time. Equally, if I do not permit them, the claimant, having explored whether the conduct/failure occurred and whether it was because she made a protected disclosure extensively in evidence as part of her automatically unfair dismissal claim, would not be able to recover an injury to feelings award, should she succeed in establishing that some part of the redeployment process was materially affected by her disclosure albeit this was not the principal reason for her dismissal.
44. As to the timing and the manner of the application, as with the disclosure amendment, it was made relatively promptly after the claimant secured representation. The content of the amendment has remained consistent throughout. It will not require any party to revisit steps already taken as part of case management such as disclosure or witness statements as no such orders have been made.
45. On balance, balancing the hardship caused to each party arising out of the above, I permit the amendments which I find would be inextricably part of the unfair dismissal consideration. I do so despite the fact that they are out of time because of the limited practical impact on the factual issue and evidence and the relatively prompt and consistent way in which they have been formulated and advanced.
46. I refuse the others because their impact on the factual issues and evidence is greater. Taking this with the fact that they are out of time persuades me that the injustice to the respondent of allowing them is greater than that to the claimant of refusing them. It is for that reason that I grant permission to amend in respect of

the 6 detriments at [16.1], [16.2], [16.3], [16.5], [16.8] and [16.10] and refuse permission in respect of the others.

Direct Sex Discrimination Complaints

47. I start with the original Claim Form and trace the history of the application to amend. The complaint of sex discrimination in the original Claim Form is on **p23**. It is alleged that the claimant believes that, in March 2020, Mr Bosworth blocked her promotion to Upper Manager on another team. That appears have been part of the restructuring process which took place from February 2020 onwards. It is not clear from the Claim Form whether the allegation is one of harassment or direct sex discrimination. The narrative surrounding the complaint is that the claimant believed Mr Bosworth was in a personal relationship with Ms Kang and she felt / inferred she would only be rewarded with promotion if she was in an intimate relationship with him. It is difficult to see how this may be a successful direct sex discrimination claim where the claimant says that the individual who was appointed to Upper Manager level was a woman, Ms Kang. Nonetheless, that is the complaint in the Claim Form.
48. In my view the claimant requires permission to advance any complaints of sex discrimination in addition to that set out above. I turn then to the additional complaints the claimant sought to advance in the June 2021 document. In that document the claimant sought permission to amend to include 3 complaints of sexual harassment. She also advanced 6 complaints of harassment related to religious belief. Complaint ([17.3]) was common to both and advanced as both forms of harassment. I cannot see the complaint from the claim form clearly rehearsed in the June 2021 document.
49. By the July 2022 application, the Claimant had expressly withdrawn any complaint of harassment related to sex or religious belief (which she confirmed today). The overlapping complaint of sexual harassment and religious belief harassment ([17.3]) and 2 of the other 5 religious belief harassment claims are advanced as direct sex discrimination only. Of the 9 factual contentions in June 2021, only 3 were repeated in the July 2022 document. To those, 10 'new' complaints of direct sex discrimination have been added. These were raised for the first time in the January 2022 document which formed the basis of the July 2022 application. One exception is that at [17.9] which could be said to overlap with although not entirely replicate the complaint of sex discrimination in the Claim Form.
50. The others relate to a variety of matters. The first 5 relate to the conduct of Mr Bosworth between October 2018 and August 2019 and so pre-date the reorganisation which formed the substance of the Claim Form. Those at [17.6], [17.7], [17.8], [17.9], [17.11] and [17.12] could be said to relate to the restructure and what opportunities were or were not made available to the claimant. Unfortunately, they are framed in a narrative style and it is very difficult to identify precisely what act is complained of. I refer particularly to [17.8] and [17.12] as examples of this. These seem to be composite allegations covering the restructure process generally without picking out what precisely it is the Claimant complains of as less favourable treatment because of sex.

51. In relation to 2 of the complaints ([17.10] and [17.13]), they relate to alleged failures to investigate unidentified concerns by Mr Cross and a Speak-up Investigator. Although Mr Cross has previously featured in the claim, this seems to be the first time it is suggested he or the other individual discriminated against the claimant.
52. I have considered the nature of these proposed amendments and the impact on the factual and legal issues of permitting them. 5 predate the restructure which is the subject of the original claim and relate to a date as early as October 2018. They involve entirely new areas of factual enquiry. If I permit those, I will open the door to matters that would have already been stale at the date of presentation in December 2020. I am satisfied that would have a significant and unsatisfactory impact on the respondent and the evidence in the case generally.
53. 4 of the remaining complaints could be said to overlap with some of the complaints about the fairness of the dismissal ([17.7], [17.8], [17.11] and [17.12]). They are, however, narrative in their terms, vague and lacking in precision and particularity. It difficult to understand what less favourable treatment is complained of. The remaining 3 ([17.6], [17.10] and [17.13]) seem likely to involve entirely new areas of factual enquiry and at least one new witness.
54. In relation to time limits, these are new complaints in respect of a type of claim, (direct sex discrimination) which could be said to have been raised in the Claim Form. The complaint in the Claim Form relates to an act in March 2020. The Claim Form was presented on 1 December 2020. That complaint, when presented, appears to be in the region of 3 months out of time. In relation to the complaints advanced by way of amendment in July 2022, it is difficult to identify the last act complained of. The latest date explicitly identified is the 14 August 2020. Assuming that the claimant could establish conduct extending over a period, and allowing for early conciliation, the time limit in which to bring a complaint of sex discrimination would have expired on 20 November 2020. In other words, the claims for sex discrimination may well have been out of time even if presented in the original claim form. Even if I assume, in the claimant's favour, that some of the acts for which no date has been given, occurred in the last month of her employment, the time to bring a complaint expired at the latest by the 29 December 2020. As at January 2022, when these complaints were first intimated, there were over a year out of time and, as at July 2022, when a formal application was made, 18 months out of time.
55. It is very unsatisfactory that the Tribunal and the respondent are not provided with exact dates, despite the opportunity given by Employment Judge Harding to provide full particularity. There is no prima facie case advanced as to why it would be just and equitable to extend time to January or July 2022, particularly in circumstances where the claimant was represented from approximately May 2021. The fact that the complaints appear to be substantially out of time had they been brought as fresh complaints and that there is no basis advanced on which to extend time weighs heavily in the balance in my mind against allowing an amendment. It seems to me unjust to require the Respondent to face complaints by way of amendment which would likely have been struck out as out of time, had they been

brought as fresh claims and where the complaint in the Claim Form may itself have been out of time at the date the claim was presented.

56. I note that a number of the complaints involve new factual matters and, where some might overlap with the existing factual matters in the case, they are too vague to understand the extent of any overlap clearly. It seems to me that gives rise to an obvious injustice to the respondent: it would have to meet allegations advanced for the first time a substantial period after the events occurred and which remain unclear to-date despite the opportunities for clarification that have existed.
57. Turning then to the timing and the manner of making of the application, by the time the application was made in July 2022, representatives had been instructed for over a year. Despite the fact there had been an earlier application to amend in June 2021, the majority of the proposed amendments are raised for the first time in January and July 2022. It is wholly unacceptable that these complaints are raised in this protracted piecemeal and unsatisfactory way. By piecemeal, I refer to the 3 attempts to clarify and/or amend the claim in May 2021, June 2021 and then the January/July 2022. By protracted, I refer to the period in excess of a year and 2 months since the claimant was represented. By unsatisfactory, I am referring to the fact that, even now, a number of the complaints remain unclear and would require further orders for further particulars to be provided if they were to proceed.
58. I have to consider any hardship caused by this unsatisfactory state of affairs. In my view the hardship is that the Respondent is still not in a position to plead its case and hardship is inevitably caused in assembling evidence required to meet a case which still remains unclear so long after the events have occurred.
59. I conclude that the claimant should be permitted to proceed with the complaint at [17.9] insofar as it reflects the complaint advanced in the original claim form. In respect of the other complaints, I have weighed the age of the allegations (dating back to 2018), the extent of new factual enquiries required, the absence of any prima facie case to extend the primary limitation period and my conclusion that they would be out-of-time were they fresh claims, the delay in making the application and the ongoing lack of clarity and I have concluded that the injustice and hardship to the respondent of permitting them at this stage, significantly outweighs the injustice and hardship to the claimant of refusing them.
60. It is unnecessary for me to consider the merits of the claims. I note that those against Mr Bosworth which relate to the restructure seem weak in that they seem predicated on the basis that he treated another woman more favourably. Those involving others who it is alleged failed to investigate the claimant's concerns seem weak in that no basis has been offered from which one could draw an inference that that failure to act was because of the claimant's sex. Nonetheless, I acknowledge that I have not seen or heard any evidence in this regard and my perception that they seem weak did not affect my decision to refuse permission to amend.

Direct Race Discrimination Complaints

61. My consideration of the application to amend to include complaints of race discrimination is very similar to that in relation to the sex discrimination complaints because they are the same allegations sought to be advanced in the alternative.
62. There are some areas where the relevant facts or factors are different which I will address. Firstly, I was satisfied that there was no race discrimination claim advanced in the claim form. The claimant directed me to a reference in the Claim Form to '*South Asian women of the same age and the same marital status*'. I do not accept, even on a generous reading, that can be interpreted as raising a claim of direct race discrimination. This is not least because it appeared under the heading "*sex discrimination*". It does not seem to be a complaint of race discrimination but an assertion that Mr Bosworth is attracted to single woman of a certain ethnicity and age. I find that the claimant requires permission to raise any complaints of race discrimination.
63. A possible race claim was raised in the May 2021 documents prior to the June hearing. No race claim was subsequently raised in the June 2021 document. I accept that was an error by Counsel who failed to include it in the heading for the sex discrimination or religious belief claims. As I understand it, had it not been for Counsel's error, there would have been 6 allegations of direct discrimination because of religious belief or harassment related to religious belief which would have been advanced in the alternative as direct race discrimination or race-related harassment claims. If that had been the only issue, I would not necessarily have refused permission to amend. The issues with the application are much greater than that. As set out above, it is not simply that the heading was omitted, it is that since the June 2021 document was formulated, the matters advanced under that heading have greatly altered. 3 remain but a further 10 have been added. My observations above: that a number are stale, that they lack specificity and clarity and that a significant number involve new areas of factual and legal enquiry are all equally apposite to the complaints of race discrimination sought to be advanced by way of amendment.
64. Similarly, my observations on time limits apply even more starkly in that there was no claim of race discrimination in the original claim form. The complaints are therefore very significantly out of time when formulated in the January 2022 document and even more so when the formal application was made in July 2022. There is no prima facie basis advanced on which to extend time. It has not been explained to me why it would be just and equitable to extend time when the Claimant was represented throughout that period. Again, therefore, there is the injustice to the respondent of facing a wholly new claim of race discrimination, no such claim having been advanced in the Claim Form and which is likely to have been struck out had it been raised as a fresh claim at the date of the application to amend.
65. My observations on the manner in which the application has been made similarly apply in that it has been piecemeal, protracted and it remains in an unsatisfactory form. As these various applications have unfolded, the claimant has moved from a complaint of sex discrimination to one of sexual / race-related or religion-related

harassment or direct race or religious belief discrimination, to then withdraw any claim of harassment and all claims relating to religious belief. The acts that she has identified as constituting these different forms of discrimination or harassment have also ebbed and flowed. After the case management hearing in June 2021, it was important that the claimant took the time to focus precisely on the acts of which she wished to complain and what type of discrimination she thought had occurred. She does not seem to have done so but, instead, has adopted a scattergun and changeable approach. The hardship this has caused is that the respondent to-date remains unclear as to what is advanced as race discrimination and has not therefore had the opportunity to properly prepare its response to those matters. Further clarification would be required which would lead to further delay where the claimant has been given ample opportunity to clarify her case already.

66. I have weighed the age of the allegations (dating back to 2018), the extent of new factual enquiries required, the absence of any prima facie case to extend the primary limitation period and my conclusion that they would be out-of-time were they fresh claims, the delay in making the application and the ongoing lack of clarity. I have concluded that the injustice and hardship to the respondent of permitting an amendment at this stage significantly outweighs the injustice and hardship to the claimant of refusing it.

67. I make the same observations on the apparent difficulties with the direct race discrimination claim as I did in respect of the direct sex discrimination claims above. It has not been part of my reasoning for refusing permission, but I would again observe that those against Mr Bosworth seem weak in that the claimant rehearses that he has treated another woman more favourably than her. It seems that the claimant identifies that woman as of South Asian ethnicity in the same way as she claimant identifies herself as of South Asian ethnicity. I repeat, however, that I am conscious that I have not seen any evidence in relation to the complaints and may not fully understand the claimant's complaints in this regard at this stage. I did not therefore take these potential difficulties into account in determining the application to amend.

68. I should also say that, although neither party invited me specifically to take this approach, I did stand back and consider whether any of my decisions were impacted by the fact that there is a second claim and that that second claim concerns race discrimination, sex discrimination and public interest disclosure detriment. I noted, however, that the complaints in the second claim are against different individuals to those against whom complaint is made in the first claim. The Tribunal therefore would be considering the mental processes of different individuals in each of the two claims and different issues of causation. I took the view that the existence and substance of the second claim did not cause me to alter my conclusions with regard to the balance of justice in permitting or refusing the applications in the first claim.

Equal Pay Complaints

69. The parties agreed that there was an equal pay complaint in the Claim Form as presented. The parties further agreed the complaint related to the work undertaken

by a named comparator Mr Arshad in the role of Upper Manager. It is correct that in the Claim Form the claimant referred to male colleagues which is to some extent ambiguous or confusing as to whether she is comparing herself to a singular colleague or more than one colleague. Nonetheless, the claimant named Mr Arshad as the relevant comparator. I am satisfied that she would require permission to amend to name an additional alternative comparator.

70. The June 2021 document contained an application to amend to include an alternative comparator, also in an Upper Manager role, namely Mr Rajat Grover. That application has remained consistent since that date.
71. In terms of the nature and impact of that amendment, as I understand it the parties are agreed that this is a new complaint and new cause of action akin to the situation as set out in **2 Sisters Food Group Ltd v Abraitte ukeat/0209/15/MC [46]**. It must be right that permitting an amendment in this regard will necessarily involve some new factual enquiry in respect of Mr Grover's role. It is not clear to me whether it would add a very great deal, in that, both he and Mr Arshad are Upper Managers. In the absence of specific information, I assume there some modest additional factual enquiry into the nature of that role in comparison to the claimant's role. The claimant says, however, that any prejudice caused is minimised because this was an issue which she raised in her grievance on the 28 December 2020. The claimant invites me to take into account the fact that, in her grievance, she specifically named Mr Grover as her comparator in addition to Mr Arshad. The claimant submits that the respondent therefore had the opportunity to investigate and assemble any relevant evidence in this regard. Further, the claimant says, the respondent relies on a genuine material factor defence apparently centred around the grading structure which seems likely to be largely the same in respect of Mr Arshad and Mr Grover. The respondent has not suggested otherwise in their response to the application.
72. The respondent invited me to consider the merits of the material factor defence and conclude that this claim was weak and permission should be refused. I do not accept that I am in a position to fairly or reliably do so at this stage. The respondent has not yet addressed the equal pay claim in its Grounds of Resistance in any detail. In the absence of a detailed pleading or some reference to undisputed contemporaneous documents about the grading system or material factors, I find it is inappropriate for me to take a view on that aspect of the claim at this stage.
73. In relation to time limits, Mr Kibling, on behalf of the claimant, accepted in oral submissions that the claim would have been brought out of time were it a fresh claim. The relevant time limit is contained in **s.129 of the Equality Act 2010**. The time limit is 6 months from the last day of the claimant's employment (30 September 2020). Time would have expired on 29 March 2021 for a fresh claim. The complaint proposed by way of amendment would therefore have been out of time at the date the application to amend was made - almost 3 months out of time on the 22 June 2021 and 2 months out of time when it was first intimated in May 2021. There is no discretion to extend time in respect of the equal pay claim. I have to consider, if I were to permit this amendment, that the respondent will have to face a claim which it is likely would have been struck out as out of time had it been brought as a fresh claim.

74. In terms of the timing and manner of the application, it has been made clearly in clear terms. It was made promptly once the Claimant obtained representation and it has remained consistent from that point.
75. On balance, I have concluded that given that the claimant was a litigant in person, that she raised this complaint within her grievance (which was submitted within the primary limitation period), that the respondent has had the opportunity to investigate it and given the overlap between the complaint in the original claim form and the proposed amendment (i.e both comparators are Upper Managers graded in accordance with the same grading system) that it was clearly signaled relatively promptly in May 2021 and followed by a formal application in June 2021, I have concluded on balance that the balance of justice and hardship is tipped in favour of permitting the amendment.

Employment Judge Connolly
23 January 2023