EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114277/2019 and others

Preliminary Hearing Held at Dundee remotely on 31 January 2023

10 **Employment Judge A Kemp**

Mr I Mkwebu	**Claimant** **In person**
The Aedan Burt Care Trust (ABC Trust)	**First Respondent**
Elizabeth Sophia Jans	**Second Respondent**
[Claim against Third Respondent dismissed]	
Victoria Elrick	**Fourth Respondent**
John Burt (deceased)	**Fifth Respondent**
Aedan Burt	**Sixth Respondent**
Fiona Mundy	**Seventh Respondent** **Represented by** **Mr D McFadzean** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The applications by the claimant to sist the Executors of the fifth respondent in his place, and to amend the claims made, is refused.

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REASONS

Introduction

1. This Preliminary Hearing was arranged to consider an application by the claimant to substitute the executors of the fifth respondent for him in light of the fact that he has sadly died during the conduct of this litigation. That is opposed by the respondents. Related issues arise including as to amendment.

2. I issued a Note with provisional views as to the former matter on 16 November 2022, and gave parties a further opportunity to make submissions. This Judgment should be read together with that Note. This Judgment is longer than might normally be expected given the lengthy history of the case, the number and variety of the issues that have been raised, and the detail placed before me by the claimant in particular. There have been a series of claims made by the claimant, which have been combined in earlier case management orders.

3. The respondent set out its position in an email on 28 November 2022, with attachments that included an amended paper apart for the Response Form. The claimant sent emails on 1 and 2 December 2022, which included a list of events and documentation in support.

4. The parties have made further submissions today, which are referred to in outline in the commentary and analysis below. During the latter stage of the hearing the claimant asked to be allowed to send an email he had received dated 27 May 2021 from a solicitor acting for the first respondent, which I agreed that he could do. He sent that email, but also many others, which he had not asked permission to do at the time of the submissions. I did however read all of them, and took them into account.

5. I repeat below the points on the law that I made earlier, and have added further aspects to it from those that have been raised. Whilst that involves a measure of duplication from the last Note it is I consider appropriate to do so particularly where the claimant is a party litigant.

6. It appeared to me to be appropriate to consider firstly whether amendment of claims was required for the claimant to pursue the arguments that he wishes to make in relation to the fifth respondent in particular, but also other respondents, identify the claims pursued against the fifth respondent

thereafter, and then consider whether or not to sist his executors in stead of the fifth respondent. I outlined for the benefit of the claimant the tests that are applied to the issue of whether to allow an amendment being the nature of the amendment, the application of time-limits, the timing and manner of the amendment, and any other relevant circumstances.

7. At a relatively early stage in the discussion Mr McFadzean gave notice to the claimant that he reserved the right to make an application for expenses on the basis that the arguments being made by the claimant had already been determined against him, and that the application for amendment was unreasonable and vexatious. The claimant denied that in a brief response.

Background

8. I did not hear evidence, and make no findings in fact. There are however a number of background circumstances that are relevant to the issues before me. The ones that appear to me to be most relevant, and therefore not set out fully comprehensively, as follows.

9. The claimant was formerly employed by the first respondent, a trust.

10. On 10 and 11 August 2019 the fifth respondent sent the claimant emails with regard to a grievance he had raised, in the latter of which he asked whether the claimant would consider withdrawing it if the second respondent made a sincere and compete apology. The claimant replied to that in detail, both referring to breach of the Equality Act 2010 and drafting a document containing an apology.

11. The claimant initially commenced a series of 10 Claims against a series of respondents. It included the first respondent, the ABC Trust. The Trustees at that time were the second, fifth and seventh respondents (the seventh respondent being later added as a respondent to these proceedings as referred to below). The Claim pursued against the fifth respondent as an individual, in which he was named specifically as a respondent, was under number 4114337/2019. In very summary terms it referred to the said exchange of emails between the claimant and the fifth respondent. The claimant argues, in brief summary, that the messages sent by the fifth respondent were unlawful discrimination on grounds of

race by the first respondent for which the fifth respondent has personal liability. Whist not referred to specifically it is understood that the claimant founds on sections 110, 111 and 112. The claimant accepted in discussion at the hearing that that was the pled claim against the fifth respondent (subject to a later claim which he sought to pursue, which was dismissed as outwith jurisdiction, with an amendment refused in all but one aspect, addressed below).

12. On 9 March 2020 the claimant requested of the first respondent access to documents in relation to himself, as a subject access request. On 6 and 12 May 2020 the claimant was provided by the seventh respondent with some of the data, some of which was redacted to remove personal data of others. That did not include the notes that the fifth respondent had made with regard to the claimant's contract.

13. On 6 and 11 May 2020 the seventh respondent emailed the claimant in relation to documentation he had sought by a subject access request. That included that the fifth respondent had specifically refused consent to release any document containing his personal data.

14. The claimant's employment with the first respondent terminated on 7 May 2020.

15. On 12 May 2020 some documentation was provided to the claimant by the seventh respondent which was heavily redacted to remove personal data.

16. The claimant made applications to amend the claims, which were determined at a Preliminary Hearing on 21 July 2020. A Judgment was issued dated 28 July 2020 allowing the amendment in part, and refusing it in part.

17. On 12 April 2021 the fifth respondent died. On that being intimated to the Tribunal the claim as directed to the fifth respondent was sisted, for a period. There was correspondence with the parties in relation to the same, and hearings postponed, pending appointment of Executors.

18. On 27 May 2021 Miller Samuel Hill Brown, solicitors for the first respondent, wrote to the claimant alleging in effect that the said notes were legally privileged and were not disclosable to him accordingly.

19. The said notes were provided to the claimant on 23 August 2021, as further response to the subject access request. It was not stated at that stage who had authored them. The claimant thought that it was the seventh respondent. He did not ask the respondents to clarify that matter, nor did he seek an order for information from the respondents under Rule 31 then or later.

20. On 30 August 2021 the claimant presented a claim against the first respondent (the second respondent in that claim) and seventh respondent (the first respondent in that claim) under number 4111168/2021. A Preliminary Hearing was held in relation to it before me on 29 October 2021 at which, inter alia, further particulars of the claims made were ordered.

21. On 1 September 2022 EJ Eccles in a Note and Orders held that the said notes were not legally privileged.

22. The claimant submitted further and better particulars of the claims referred to in paragraph 20 on 1 December 2021. He made a number of proposed complaints in doing so. Complaint 2 referred to the said notes, with his understanding being that the seventh respondent had been the author of them, and referring to what he considered to be a conspiracy between the three trustees. That complaint was directed to a number of respondents, one of which was the fifth respondent. Another complaint was complaint 10 which related to alleged detriments of delay in receiving documents sought by the subject access request. He also sought to add a claim for having suffered detriments and dismissal for making protected disclosures.

23. On 21 January 2022 a hearing was held before EJ Eccles at which, inter alia, she considered the said particulars. She decided by Judgment dated 12 February 2022 that there was no jurisdiction to consider the complaints included within the particulars, save for complaint 10. Leave to amend the

claim to add a claim of victimisation under section 27 of the Equality Act 2010 was given in respect of complaint 10 only, covering the period 9 March 2020 to 23 August 2021, but otherwise the application to include the complaints within the particulars was refused.

24. On 7 June 2022 the respondent's solicitors emailed the claimant to confirm that the fifth respondent was the author of the said notes.

25. On 12 July 2022 Executors Nominate were appointed to the fifth respondent's estate by Grant of Confirmation.

26. A Preliminary Hearing was held on 4 August 2022 to address a dispute about documents which the respondents objected to the admissibility of.

27. By email dated 11 or 27 August 2022 (both dates were given in submission) the respondent's solicitors again wrote to the claimant and informed him that the said notes had been authored by the fifth respondent.

28. On 1 September 2022 a Note with orders was issued following the hearing on 4 August 2022, sent to parties on 27 September 2022. It decided that there was no legal privilege attaching to the said notes, but did attach to other documents.

29. On 16 November 2022 a Preliminary Hearing was heard before me, after which a Note was issued.

30. On 28 November 2022 the respondent wrote with submissions on the position.

31. On 1 December 2022 the claimant sent an email with details of the claims he sought to make against the fifth respondent. He did not specifically state that that was an application to amend the claims. He provided further details and documents by email on 2 December 2022. In the email of 1 December 2022 the claimant made four proposed claims –

    1. "Racial harassment", in respect that the fifth respondent was allegedly asked to retract his complaint, when other complaints and a grievance were not similarly treated. He refers to victimisation, but does not

name the fifth respondent in the list of those he accuses. He refers to the notes when disputing the arguments of the respondent that the emails were not discriminatory as alleged.

2. “Aiding unlawful discrimination”, which refers to the said notes, and alleges victimisation under the 2010 and 1996 Acts. There is an allegation of collaboration between trustees.

3. **“**Inducing and causing a detriment & aiding unlawful discrimination”, referring to the fifth respondent sending his notes to the seventh respondent. Seeking dismissal or placing him on short time working is alleged to be victimisation by, inter alia, the fifth respondent.

4. “Aiding unlawful discrimination – actively involved in delaying access of my personal data from 9.3.20 – 23.8.21” in respect of which it is alleged that the said notes are evidence that the fifth respondent was actively involved in delaying access to personal data, alleged to be victimisation and collusion to cover up contraventions of the 2010 Act.

Law

Amendment

32. A Tribunal is required when addressing such applications as for amendment to have regard to the overriding objective, which is found in the Rules at Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 which states as follows:

“2 **Overriding objective**

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

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

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

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

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

(e) saving expense.

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

33. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34. Whether or not particulars amount to an amendment requiring permission from the Tribunal to be received falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

"**29 Case management orders**

The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order…."

co-operate generally with each other and with the Tribunal."

34. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require to be borne in mind when addressing earlier case law.

35. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. In that case the application to amend involved adding a new cause of action not pled in the original claim form. The claim originally was for unfair dismissal, that sought to be added by amendment was for trade union activities. The Tribunal granted the application but it was refused on appeal to the EAT. The EAT stated the following:

"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.

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

(a) The nature of the amendment

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

(b) The applicability of time limits

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

(c) The timing and manner of the application

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

be recovered by the successful party, are relevant in reaching a decision."

36. In ***Harvey on Industrial Relations and Employment Law*** Division PI, paragraph 311, it is noted that distinctions may be drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought, of which ***Selkent*** is an example.

37. The first two categories are noted as being those where amendment may more readily be allowed (although that depends on all the circumstances and there may be occasions where to allow amendment would not be appropriate). The third category was noted to be more difficult for the applicant to succeed with, as the amendment seeks to introduce a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

38. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action and therefore in the third category, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

39. In order to determine whether the amendment amounts to a wholly new claim and in the third of the categories set out above it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123***). In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a

claim she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment

5 "was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time".

40. The Court of Appeal has commented that the extent of any new factual enquiry following an amendment application is one of the factors to take into account, in ***Evershed v New Star Asset Management Holdings***
10 ***Ltd [2010] EWCA Civ 870.*** If the new claim is sufficiently similar to that originally pled, that supports the granting of the amendment where the "thrust of the complaints in both is essentially the same".

41. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time where a discrimination claim is otherwise outwith
15 the jurisdiction, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***), confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128***.

42. No single factor, such as the reason for delay, is determinative when
20 considering whether or not to allow an amendment and a Tribunal should still go on to consider any other potentially relevant factors beyond those identified in ***Selkent***, such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278***, and ***Gillett v Bridge 86 Ltd UKEAT/0051/17***.

25 43. Whether to allow amendment is accordingly a multi-factorial approach considering all material circumstances.*.* Whether the claim within the amendment is in time or not is a factor, but an amendment application made in time may not be allowed in some circumstances – ***Patka v BBC UKEAT/0190/17.*** In ***Vaughan v Modality Partnership [2021] IRLR***
30 ***97*** the EAT summarised matters and held that there was a balance of justice and hardship to be struck between the parties.

Time limits

44. Section 123 of the Equality Act 2010 provides as follows in regard to time limits for discrimination claims such as those under sections 13, 19, 26 or 27 of that Act

"**123 Time limits**

(1) Subject to [sections 140A and section 140B proceedings on a complaint within section 120 may not be brought after the end of—

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

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

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) For the purposes of this section—

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

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

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

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

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

45. This provides in summary that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced (firstly by early conciliation and then by presenting a claim form timeously thereafter) within three months of the act complained of, that being normally referred to as the primary period, but there are two qualifications to that, firstly where there are acts extending over a period when the time limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

46. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

> "There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it'."

47. In Abertawe ***Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

48. What is just and equitable involves a broad enquiry having regard in particular to the relative hardships parties may suffer.

49. The test in relation to a claim as to protected disclosures is within the Employment Rights Act 1996. Issues in respect of dismissal are addressed in section 111, and for detriment in section 48. In each case the test is that of reasonable practicability in the first instance, and if met that the claim has been presented within a reasonable period of time thereafter.

Sist of another party

50. Rule 34 allows the Tribunal, on application or its own initiative, to "add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings……"

51. In the present context, the fifth respondent was a Trustee of the first respondent. Section 206(1) of the Employment Rights Act 1996 provides

that where an employer has died Tribunal proceedings under provisions that are listed may be defended by personal representatives of the deceased employer. The list of proceedings includes unfair dismissal. There are provisions for the enforcement of awards where an employer has died, found in the Employment Tribunal Awards (Enforcement in Case of Death) Regulations 1976. There are no equivalent or other provisions in the Equality Act 2010 in relation to the death of a party.

52. In ***Executors of Soutar v James Murray and Co (Cupar) Ltd and another [2002] IRLR 22*** the EAT held that under the common law of Scotland the executors of a deceased's estate could pursue claims under the Disability Discrimination Act 1995, and for breach of contract, in the Tribunal. The Trust is a private trust under the common law, and as regulated by statute. Trustees have fiduciary duties under the terms of the Trust deed and statute. The position where one of the trustees ceases to be so was set out in ***Gloag and Henderson on the Law of Scotland*** paragraph 41.03 as follows "if one trustee ceases to hold office the remaining trustees become the new joint owners." The same point is made in the ***Stair Memorial Encyclopaedia*** on Trusts at paragraph 161 "Where one of several trustees, acting under a testamentary or *inter vivos* trust, dies, the trust estate automatically vests in the surviving trustee or trustees; the title of the deceased trustee to the trust estate becomes extinct and is in effect absorbed by the title to the trust estate subsisting in the remaining trustees."

Analysis

(i) Amendment

53. This aspect raises two questions, firstly are the claims that the claimant has identified in his email of 1 December 2022 already pled by him, and if not (ii) should an application for amendment to do so be allowed or not? There are some allegations found in relation to the fifth respondent in the claim form numbered 4114337/2019. They are related to emails regarding a grievance. The present issues focus on notes that the fifth respondent

wrote about the claimant's contract of employment, and comments on them which include a commentary as to alleged gross misconduct by the claimant. The claimant accepts that claims 2 – 4 of his email of 1 December 2022 are new matters, but argues that that in claim 1 is within that earlier claim, to summarise his position. It appears to me that there is little new in that claim other than the reference to the notes. They may be evidence for the claim already made, which includes a claim of direct discrimination, but may also be a fact on which direct discrimination, harassment or victimisation is said to have occurred. The notes have been held as admissible, and are potential evidence in the said 2019 claim accordingly. But in so far as there is an allegation that there was direct discrimination, harassment or victimisation arising out of those notes themselves that is a different factual matter, and if to be pursued I consider requires amendment. Claims 2 - 4 are new matters, and require amendment as is accepted.

54. I therefore turn to the issue of whether or not the amendment should be allowed. I consider firstly the ***Selkent*** factors, and then other issues.

Nature of amendment

55. I consider that arguments in relation to the said notes are different factual matters to those pled in the 2019 Claim Form referred to. There is some relationship between the two, but they are different. The emails are communications with the claimant. The notes however were made by the fifth respondent, and are different in context and detail. Although the overarching claims may be the same, such as for direct discrimination, harassment and victimisation, the detail is not.

Time Limits

56. It appears to me that the claims sought to be added by amendment are out of time. The claimant in his email of 1 December 2022 stated that the respondent informed him that the fifth respondent was the author of the emails on 7 June 2022, as well as on 11 August 2022. On the basis of the claimant's own submission therefore, he knew of the authorship on 7 June 2022. He was aware of the notes however in August 2021, a year earlier.

If he wished to pursue a claim in relation to them specifically, and to direct that to a party other than the first respondent, it was incumbent on him to make reasonable enquiry at that stage, or to seek an order for information under Rule 31. He did not do either. The claimant sought to argue that there were acts extending over a period which was to 27 September 2022, being when the decision on the admissibility of the notes was sent to him. That argument is I consider misconceived. Issues of admissibility were separate to the claims being made. What matters in my view is when the claimant knew, or ought if taking reasonable care and acting with reasonable diligence to have known, of facts on which a claim against the fifth respondent could be made on the basis he now pursues.

57. In all the circumstances the claims are out of time, unless it can be said that it is just and equitable to allow them to proceed. I do not consider that it can be. There is I consider no adequate reason given for the long delay. That is not conclusive, and in my judgment such delay alone does not lead to refusal of amendment, but it is a factor against what is just and equitable. Separately and importantly there is obvious and material prejudice to the fifth respondent, or his executors, given his decease. He is not now able to give evidence about the notes or other matters. Investigating that matter by his executors would inevitably be extremely difficult, if not almost impossible. There would likely be a material level of expense for them in doing so. For reasons I address further below in the context of the issue of a sist of the executors, the prejudice to the claimant is limited, and not likely to be financial in nature. It is not I consider just and equitable to extend time as sought by the claimant. In my judgment the claims are outwith the time-limits, and although that is not a conclusive factor it is one to weigh in the balance when considering the amendment application.

Timing and manner of application

58. The first issue in this regard is when the application for amendment was made. The claimant says it was on 1 December 2022, and that although not stated to be an application to amend it should be inferred from its terms. The respondent argues that the application was only made on the day of the hearing. In my judgment it is appropriate to consider the email

of 1 December 2022 as if an application to amend. That is firstly as that possibility was canvassed by me specifically in the Note from the Preliminary Hearing on 16 November 2022, and secondly as the contents are such that it may reasonably be inferred that claims not hitherto made, or allowed to proceed, are being sought.

59. The amendment application is however made late in the proceedings. The original claims date from 2019. Whilst there has been delay for a number of reasons, including an appeal by the claimant, but also the death of the fifth respondent and other matters, which include the respondents not initially providing the said notes, the delay is material on the part of the claimant. At the latest he knew of the authorship of the notes, on his own submission, on 7 June 2022. That being the date of knowledge, then at the very latest the application to amend should have been made within three months of that date, i.e. by 6 September 2022. But that is the latest date, and in my judgement the date by which a claim ought reasonably to have been made was much earlier. The claimant received the notes in August 2021, and sought to amend in December 2021, with that issue determined in February 2022. He ought in my view to have addressed issues when making that amendment, and indeed he did so in part as is referred to below.

60. I take into account the claimant's arguments including the position of the first respondent arguing that the notes were subject to legal privilege, that other documents were provided but with personal data redacted, and that the case was sisted after the death of the fifth respondent was intimated to the Tribunal. Those are not I consider good grounds for the delay. A sist can be recalled at any time, and that can include when an application to amend is to be made. Executors were appointed in July 2022. That is a public act. In all the circumstances I consider that the present application has been made substantially late without good reason for the delay that I have referred to.

61. I also consider that the claimant is seeking effectively to re-litigate at least to a large degree a point that has already been decided against him. EJ Eccles determined his application in relation to his complaint 2 by her decision only to allow one complaint, being complaint 10, and not the

others. In complaint 2 the fifth respondent was named as a proposed respondent. Whilst the factual matters alleged in complaint 2 are not identical to those in the application dated 1 December 2022, they are very similar, and the differences between them are not I consider significant. The claimant had not at the time of the December 2021 Further and Better Particulars of the true authorship of the notes, but he alleged involvement in the decisions in relation to matters arising from them that included the fifth respondent.

62. These are I consider important matters that weigh heavily against allowing the amendment.

Other factors

63. The claimant has already had two hearings at which he attempted to amend his claims, in both of which he has had partial success and partial failure. He has pursued the claims in a manner that has not meant identifying the claims made easy, as there were 10 Claim Forms initially, and there was a later one involving the now seventh respondent. The claimant's pleadings, and the emails submitted in support of his application to amend, are not as clear or succinct as one would wish, and the documentation before me included detail that was not always relevant solely to the position of the fifth respondent. The clamant is a party litigant, and proper account must be taken of that, although the claimant has clearly attempted to carry out a substantial amount of preparation, including research into matters.

64. The claimant has existing claims against other parties, in particular the first respondent. He may, subject to any contrary decision of the full Tribunal at the Final Hearing, seek to refer to the said notes and matters surrounding them at that hearing both in his evidence, and in cross examination of witnesses. The application to amend is to be seen in the context of the claimant making many allegations against several respondents which are able to proceed to the Final Hearing.

65. The notes as a document are evidence. What to make of them is a matter requiring further evidence. They do not contain in my judgment comments

that are on the face of them discriminatory on grounds of race, that is something that may or may not be inferred from all of the evidence. In ***Amnesty International v Ahmed [2009] IRLR 884*** the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council [1990] IRLR 288*** and (ii) in ***Nagaragan v London Regional Transport [1999] IRLR 572***. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did. The intention is irrelevant once unlawful discrimination is made out. That approach was endorsed in ***R (on the application of E) v Governing Body of the Jewish Free School and another [2009] UKSC 15***.

66. It appears to me that issues around the notes are in the ***Nagaragan*** category. There is an issue as to why the notes were prepared in the manner and with the terms that they were, but also what happened after they were prepared, and who did what, why.

67. The claimant is able to argue the points he wishes to in relation to the notes and the issues flowing from them at the Final Hearing. The respondents are able to argue their position in response. That is liable to include the evidence of the second and seventh respondents as the remaining Trustees of the first respondent, amongst the evidence. As the notes were not disclosed to the claimant at the time there is no detriment during employment from the notes themselves, any detriment, or any argument over the reason for dismissal, is an evidential issue of which the notes themselves are a part.

Conclusion

68. It is significant both that the claims are out of time, and that they are so by a substantial period. There has been a substantial amount of delay in the claimant presenting the application in my view. It is also in my view particularly significant that EJ Eccles refused to allow a very similar

amendment relating to the fifth respondent. I consider that it is not in the overriding objective to allow the amendment. Taking all of the circumstances into account, I consider that the application to amend should be refused.

5 **(ii) Sist**

69. The basic facts relevant to the issue in dispute are not themselves disputed. The parties agree that the claimant was employed by the first respondent. The fifth respondent was a trustee of the first respondent. He is now deceased. Executors have been appointed to his estate, and a
10 Certificate of Confirmation has been granted.

70. Section 206 of the 1996 Act on which the claimant sought to found is irrelevant as the fifth respondent was not the employer of the claimant. Section 206 is also not relevant as the claim against the fifth respondent is not one under the 1996 Act but the 2010 Act. The Law Reform
15 (Miscellaneous Provisions) Act 1934 on which the claimant also founded is not relevant as it does not apply to Scotland (as discussed in ***Soutar***). ***Harris v Lewisham And Guy's Mental Health Trust [2000] EWCA Civ 87*** on which the claimant founds is not relevant firstly as it is a case based on principles of English law, and the 1934 Act in particular, which are not
20 applicable in Scotland, and secondly as it concerns the pursuit of a claim, not the defence to a claim as in this case. It does not appear to me to follow from the fact that in both Scotland and England a claimant's claim can be commenced or continued after his or her death means that a claim against a party who has deceased after it was commenced should lead to
25 sisting of Executors in his place, as is contended for here.

71. It is competent to add Executors to that claim having regard to the terms of Rule 34. The claimant referred to Chapter 25 of the Sheriff Court Rules which entitle the sisting of a new party in place of one who is deceased. That provision does not assist, in my judgement. Those are different
30 Rules, although the import is much the same as Rule 34. Rule 34, construed in accordance with Rule 2, is what I require to apply.

72. The nature of the claim that remains against the fifth respondent is in reference to the emails as to whether he would consider withdrawing a grievance as referred to, and the award for injury to feelings for those emails in isolation is liable to be relatively limited. The claim is also directed against the first respondent both for that, and more generally. It is said by the first respondent that the first respondent has sufficient funds to pay any award for all the claims made, although that at present is an assertion as no evidence or undertaking has been provided.

73. The claimant argues that to deny him a remedy against the fifth respondent would be unjust, and that having a fair hearing is possible. The 2010 Act does have provisions as to personal liability, in sections 110 – 112 in particular. The fifth respondent is not however able to defend those allegations by giving evidence himself.

74. The claimant referred to an English Employment Tribunal decision being the case of ***Amponsah v Estate of Dr O'Connor 2203032/2019.*** I found a reported Judgment in relation to an application for strike out, which was refused. It appears that there was an earlier decision to the effect that the claim could continue against the estate of the deceased Dr O'Connor. In that case there were two respondents. The circumstances of that case appear to me entirely different to those of the present case, and of no assistance to me in the issues I required to determine. In any event, a decision of another Employment Judge is not binding on me.

75. It appears to me to be the case that the claimant does not have a right to have the Executors of the fifth respondent added, or sisted, to the proceedings in his place under Rule 34. That Rule makes clear, in my view, that there is a discretion to be exercised.

76. In exercising that discretion there are a number of matters to take into account. One is that, if any award for acts or omissions of the fifth respondent, it would also be made against the first respondent, and would in any event be (they undertake) paid by them. Another is the likely amount of such an award if made against the fifth respondent. That is not straightforward to identify at this stage, prior to evidence, but it is in my view likely to be within the lower band of the ***Vento*** bands. For the

avoidance of doubt, the level of award if made against the fifth respondent is a different matter on which I express no view.

77. It seems very unlikely to me that the fifth respondent's executors could themselves give evidence on the merits of any materiality, as it is not suggested that they were present or involved with it. Much of the evidence will be around the meaning to be attributed to documents written by the fifth respondent. Those documents will be before the Tribunal. The claimant can give his evidence on that, as can other witnesses, but the fifth respondent is not available to do so, or be cross examined or questioned by other parties or the Tribunal itself.

78. The effect of granting the application is likely to make winding up the estate of the deceased not possible pending resolution of the claims made. There would be an addition to expense by the sisting of the Executors.

79. The respondents argue that the claim made against the fifth respondent was one which had no reasonable prospects of success, that being the one of the tests for a strike out under Rule 37. The emails that are relied on by the claimant are now available to me, as are other documents including notes the fifth respondent made in relation to the claimant's contract and issues related to that. The claimant contends that the documents support his arguments, the respondents contend that they do not. It is of course both extremely difficult, and carries obvious dangers, of seeking to decide such a matter without hearing evidence. It does seem to me a difficult argument that the emails from the fifth respondent asking if the claimant would consider retracting his resignation should a complete and sincere apology be issued to him by the second respondent, but they are not the only evidence. The notes that were made on the contract appear on the face of them to consider issues in relation to the prospective dismissal of the claimant. That may have some evidential value, depending on all the evidence heard which will include the extent to which there was, or was not, sufficient reason to believe that the claimant had committed an act or acts of gross misconduct. The claimant also alleges other conduct on the part of or in relation to the fifth respondent, including not disclosing those notes when a subject access request was made. I do

not consider that I can say that there are no reasonable prospects of success for the claims directed to the fifth respondent. The test for that in a discrimination claim is a high one with a public interest in having such claims determined after evidence. There is an issue to determine.

80. Against that background there are some factors that point in favour of the arguments for the claimant and some in favour of those for the respondents. I have come to the conclusion that the balance strongly favours the latter, and that the application to sist executors should be refused. That is for the following reasons –

(i) To refuse the application would not involve material prejudice to the claimant. He is able to pursue his arguments on what the fifth respondent did or did not do, and if they prevail will succeed against the first respondent as the Trustee body of which the fifth respondent had been a member, but of which he ceased to be a member on death. The prejudice to the claimant is essentially in not having a remedy directly against the fifth respondent, should his claim succeed.

(ii) The award, if made purely against the fifth respondent for what he himself is said to have done, or omitted to do, is most likely to be one at a moderate level. The indication is very strongly that the award, if made, would be paid in full by the first respondent. The actual prejudice to the claimant is not at all likely to be financial.

(iii) There are many claims made which are pursued against a series of respondents, and those claims continue.

(iv) To grant the application would involve substantial prejudice to the fifth respondent's estate, as it would most likely involve significant expense, time, and lead to delay in the winding up of that estate. Whilst it is most unlikely to lead to delay in concluding the present claim at the Final Hearing that has been fixed for 12 – 20 June 2023 the executors would require to be served with the necessary documentation, which is voluminous, and would have an opportunity to defend the claim, and make whatever applications they considered appropriate. That would, if that happened, at least

add to expense, and to Tribunal time and resources. That is, in isolation, contrary to the overriding objective.

(v) The fifth respondent is now not able to give evidence, and seek to explain his actions or omissions. As an individual, he is not therefore in a position properly to defend the allegations against him. I am concerned that, solely so far as claim against the fifth respondent is concerned, it may not be possible to have a fair hearing. The fifth respondent is not able to explain the said notes, for example.

81. It does not appear to me to be in the interests of justice, or within the overriding objective, given all of the circumstances, to grant the application for a sist.

Consideration of strike out of claim against fifth respondent

82. I consider that it may be appropriate formally to strike out the Claim so far as directed against the fifth respondent under the terms of Rule 37, as it may be no longer possible to have a fair hearing of the claims made against him as an individual following his death, and having regard to the decision I have made not to sist executors. For the avoidance of doubt I consider that it remains possible to have a fair hearing of the claims against other respondents, including those relating to the emails sent by the fifth respondent referred to, and the said notes, as evidence on behalf of the first respondent, and from the second and seventh respondents in particular, can be given on the events that followed receipt of those notes, discussed above, as well as other evidence. I shall defer making any decision in that regard to allow the parties time to make any submissions on that for a period of 14 days from the date this Judgment is sent to them, under the terms of Rule 37(2).

83. Although there is no application for strike out of that claim as a result of my decision there is no representative party as Executors formally acting for the interests of the fifth respondent, and I may do so on my own initiative under that Rule. That shall be considered after receipt of any representations.

Employment Judge: A Kemp

Date of Judgment: 9th February 2023
Date sent to parties: 15th February 2023