EMPLOYMENT TRIBUNALS

Claimant: **Miss N C Momah**

Respondent: **Secretary of State for Justice**

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: **East London Hearing Centre (remotely in public by CVP)**

On: **14 February 2023**

Before: **Employment Judge Shore**

Appearances
For the claimant: No Appearance
For the respondent: Ms J Gray, Counsel

RESERVED JUDGMENT

1. The claimant's application to amend her claim to include 19 matters of direct discrimination because of the protected characteristic of race is refused.

2. The claimant's claim of direct race discrimination is therefore struck out.

REASONS

Brief history of the claim

1. The claimant has been employed by the respondent since 29 September 2014. She started early conciliation with ACAS on 26 July 2021 and obtained a conciliation certificate on 6 September 2021 [page 1 of the bundle]. She presented her claim to the Employment Tribunals on 3 October 2021.

2. The claimant's ET1 form [pages 2-13 of the bundle] indicated claims of race discrimination, disability discrimination and a claim for 'other payments' at paragraph 8.1 of the form [7]. The claimant also ticked the box in paragraph 8.1

that indicated that she was making another type of claim. The claimant wrote "Bullying & Harassment, Data Breach, False accusation, false grievance"

3. The claimant submitted a document titled "Claimant's Submissions" [14-18] with her ET1.

4. In its response to the claimant's ET1 dated 10 November 2021 [27-42], the respondent noted that (§60):

> *"The Claimant has failed to set out any detail in either her ET1 or accompanying Submissions document as to the allegations relied upon by her in support of her contention that she has been discriminated against on the grounds of her race; or as to the precise form of race discrimination she alleges she has been subjected to by the Respondent. In addition, the Claimant has failed to identify any actual and/or hypothetical comparator."*

5. A telephone private preliminary hearing was held by telephone before EJ Martin on 9 May 2022. The claimant did not attend. She had not indicated that she was not going to attend, nor did she apply for an adjournment. The case management order dated 7 June 2022 [48-51] required the claimant to provide medical evidence explaining her absence.

6. A further telephone private preliminary hearing was held before EJ Frazer on 6 July 2022. The claimant attended and represented herself. The respondent was represented by Ms Gray, as it was today. In the narrative of the case management order dated 6 July 2022 [52-57, EJ Frazer noted (§§2 and 4):

> *"I clarified with her as to whether she was bringing a race discrimination claim as she had ticked the box on the form. However, the way the allegations were worded made them appear as disability discrimination claims. She stated that she was bringing claims of both race and disability discrimination."*
>
> *"Ms Grey indicated that the Respondent may wish to assert that some or all of the further information provided would require an amendment application. I have therefore directed it to say so at the time of filing the amended response. Then I have given the Claimant an opportunity to object and/or to provide an amendment application before the next hearing. If there is an amendment issue that can be considered by the judge at the next hearing."*

7. EJ Frazer ordered the claimant to provide further information about her race discrimination claims; ordered the respondent to file an amended response; and listed the case for a public preliminary hearing to decide:

    1) *whether the complaint(s) of unlawful disability discrimination contrary to the Equality Act 2010 should be dismissed if the claimant is not entitled to bring it if she does not have a disability within the meaning of section 6 and schedule 1 of the Act;*

    2) *whether anything raised in the provision of further information submitted by the Claimant requires an amendment application to proceed and if so, to determine that application;*

3) to identify the claims and issues and

4) to list for a final hearing and make any directions for the case to proceed to a final hearing."

8. The claimant provided the further information in a document titled "Race Discrimination Claim" [130-132]. The respondent provided an amended response [60-87].

9. At an open preliminary hearing on 1 December 2022, EJ Brewer found that the claimant did not meet the definition of disability in section 6 of the Equality Act 2010 at the relevant time and struck out all her disability discrimination claims. The claimant's claim for 'other payments' was dismissed upon withdrawal [88-99].

10. EJ Brewer then converted the hearing to a private preliminary hearing to deal with the issue of amending the claimant's race discrimination claim and produced a case management order date 2 December 2022 [126-131] that listed the hearing that I have conducted; set out 19 allegations of direct race discrimination; drafted a List of Issues; and made orders for the preparation of today's hearing before me.

11. The respondent's representatives wrote to the Tribunal on 2 February 2023 [100-102] to oppose the claimant's application to amend and seek a strike out under Rule 37(1)(a)(b) and (c). Ms Gray added subsection (d) this morning.

12. On 13 February 2023, the requested a postponement because of ill health (but did not copy in the respondent). EJ Crosfill rejected the application in a letter emailed to the claimant and respondent on 13 February. The letter indicated that the fact that the claimant was unfit for work did not mean that she was unable to attend the hearing and that she would need to explain what the difficulties are if she renewed her application.

13. On 15 February 2023 at 06:52am, the claimant emailed the Tribunal. Her email said "Please find attached my sick note from my doctor, due to my health and mental health I cannot attend the hearing for the 16 Feb as I am unwell." The claimant attached a Form Med 3 (fit note) dated 14 February 2023 certifying that the claimant was unfit for work between 14 February 2023 and 15 March 2023 because of stress anxiety and depression.

14. EJ Crosfill refused the application by a letter dated 15 February 2023 that was emailed to the parties. The letter included a link to the Presidential Guidance – Seeking a Postponement of a Hearing dated 4 December 2023 and set out the reasons for refusal:

> *"If you want a postponement you need to do more than supply a fit note saying you are unfit for work. If you follow guidance (linked) then your application will be considered. You must copy in the respondent."*

15. The case remained listed for today.

The hearing

16. The claimant is unrepresented. If she had attended, I would have reminded her that the Tribunal operates on a set of Rules (I have set out the link to those Rules below). Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

> *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.*

17. The purpose of this hearing, as ordered by EJ Brewer, was for me to consider the following matters:

17.1 claimant's application to amend her claim to include the complaints of race discrimination set out in paragraph 2.2 of the List of Issues:

17.2 any applications made by the respondent consequent upon that application;

17.3 if the case is to proceed to a final hearing, to consider the listing; and

17.4 to make any necessary case management orders.

18. The respondent had produced a bundle of 125 pages with an index. The bundle did not have EJ Brewer's case management order of 1 December 2022, so I obtained a copy from the office and added it to the bundle at pages 126 to 131. Where I have made reference to any of the pages in the bundle in these reasons, I have put the page numbers in square brackets (e.g. [23-34]).

19. The claimant was not in the waiting room of the CVP hearing at 10:00am. I asked my clerk to ring the clamant and determine if there was an issue. I was advised that the claimant did not answer the call and that my clerk had left her a message.

20. I then asked my clerk to send the claimant an email in the following terns:

> *"Further to the telephone message I left for you earlier today, I have been asked to write to you by Employment Judge Shore, who is hearing your case today. EJ Shore has asked that you log in to the hearing as soon as possible. I have set out the joining details below.*
>
> *[log in details]*
>
> *If there is a reason why you cannot attend and wish to apply for an adjournment, then you should join the hearing and make the application, as your previous application to adjourn was refused on 13 February.*
>
> *If you have not responded to the telephone message or this email by 10:30am this morning, the Tribunal may proceed in your absence."*

21. At 10:25, I opened the hearing room and advised Ms Gray of what was happening. I also introduced EJ Comfort, who is a newly appointed Employment Judge, who is required to observe a number of hearings before his indication course. I explained that EJ Comfort was there as an observer only and would take no part in the decision-making process I had to undertake. I asked Ms Gray to log back in at 10:40am. At 10:40am, the Tribunal had heard nothing from the claimant and she was not logged into the CVP hearing.

22. I began the hearing by considering the claimant's applications for postponement. I find that the claimant had failed to comply with the Presidential Guidance, even though it had been specifically drawn to her attention. EJ Crosfill had correctly advised the claimant that submission of a fit note was insufficient to obtain a postponement – more details were needed.

23. I find that the claimant failed to provide sufficient details about her health and its impact on her ability to attend the hearing to warrant a postponement. The overriding objective of dealing with cases justly and fairly must be applied by a balancing the interest of the parties. This is the fourth preliminary hearing in this case and the respondent and taxpayer have been put to expense and time in dealing with the claimant's claims. I find that a further delay, whilst clearly disadvantaging the claimant, has not been shown by her to disadvantage her to a greater extent than the imperative not to waste time and costs. This is especially so when the Tribunal has tens of thousands of cases waiting to be heard.

24. I repeated the previous refusal of the application for postponement.

25. I find that the claimant knew of the hearing and the arrangements for joining it. She had known of the date and the matters to be considered since 1 December 2022. I find that she had made a conscious decision no to attend. I decided to proceed in the claimant's absence.

Application to amend claim

26. I heard Ms Gray's submissions on the claimant's application to amend her claim to include 19 allegations for direct race discrimination. I find that the claimant had made an application to amend because I read the words of EJ Brewer in his case management order of 1 December 2022 (§21) to mean that the 19 allegations set out in the order are the subject of applications to amend.

27. I find that there is a need for the claimant to make application to amend, as the 19 allegations set out by EJ Brewer are not cited as allegations of direct race discrimination in the claimant's ET1 and Claimant's Submissions [14-18]. I make the following findings in respect of the Claimant's Submissions:

    27.1 The claimant limits her claims to those incidents that started on 18 August 2020 (the document says 2021, but this must be a typo) (§3);

    27.2 The claimant makes 10 allegations (§§6.1 to 6.10);

    27.3 None of the 10 allegations are dated;

    27.4 There is no mention in the document of the phrase "race discrimination". The only term used that implies a race discrimination claim is "Since starting work with the Respondent there have been various incidents concerning my ethnic background, gender and disability." (§2);

    27.5 I find that the timescale of the claim as set out in paragraph 3 (starting on 18 August 2020), is different to the claim that there had been various incidents concerning the claimant's ethnic background "since starting work with the respondent" (which was in 2014);

    27.6 Allegation 2 (§6.2) refers to the claimant being shouted at and being addressed as "a stereotypical angry black woman";

    27.7 Allegation 8 (§6.8) refers to the claimant being denied an apprenticeship; and

    27.8 The claimant fully particularises her claim of disability discrimination.

28 I therefore find that, save for ticking the race discrimination box in paragraph 8.1 of her ET1, the claimant has not set out sufficient particulars of any claim of race discrimination in her ET1 or Claimant's Submissions documents. I find that the claimant must successfully apply for amendment of her claim to be able to pursue any claim of race discrimination.

29 I make the following findings on the 19 allegations listed in EJ Brewer's List of Issues dated 12 December 2022:

    29.1 None of the allegations in the List are contained in the ET1 and/or Claimant's Submissions;

29.2 Paragraph 6.8 of the Claimant's submissions alleges denying the claimant an apprenticeship. Paragraph 2.2.19 of the List of issues alleges that RD told SJC not to support the claimant's application for apprenticeship. Neither allegations are dated;

29.3 The allegations in paragraphs 2.2.3, 2.2.4, 2.2.5, 2.2.9, 2.2.13, .2.2.14, 2.2.15, 2.2.16, 2.2.17 and 2.2.18 are also undated;

29.4 The allegations in paragraphs 2.2.6, 2.2.7, 2.2.8 (all 2017), are dated, but predate 18 August 2020;

29.5 I find the allegations at 2.2.4, 2.2.14, 2.2.15, 2.2.15 and 2.2.16 to be vague and insufficiently particularised;

29.6 I find that the only claims that are particularised with sufficient clarity to enable the respondent and Tribunal to clearly determine the claims (i.e. who, what where and when) are 2.2.1, 2.2.2, 2.2.10, 2.2.12.

30 There is extensive jurisprudence on the question of amendments to Tribunal claims. The authorities regarding amendments are set out in a number of cases including **Cocking v Sandhurst** [1974] ICR 650, **British Newspaper Printing Corporation (North) Ltd v Kelly** [1989] IRLR 222, **Selkent Bus Co v Moore** [1996] IRLR 661, **Housing Corporation v Bryant** [1999] ICR 123, **Harvey v Port of Tilbury (London) Ltd** [1999] ICR 1030, **Ali v Office of National Stat*istics*** [2005] IRLR 201, **Abercrombie v Aga Rangemaster plc** [2013] EWCA 1148. It was most recently considered by the EAT in **Vaughan v Modality Partnership** [2021] IRLR 97.

31 Mr Justice Underhill considered the appropriate conditions for allowing an amendment in **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/009/07. In particular, he referred to the guidance of Mr Justice Mummery in **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 where he set out some guidance. That guidance included the following points:

> (4) *Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*
>
> > *(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of a minor matter 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 the 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, Section 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 in discovery. Whenever taking any factors into account, 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].".*

32 In the **Safeway** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in **Ali v Office of National Statistics** [2005] IRLR 201 where Lord Justice Waller referred to Mr Justice Mummery's guidance in **Selkent**, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued: "There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time." As Mummery J emphasised in *Selkent*:

> *'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'*.

33 In **Evershed v New Star Asset Management** UKEAT/0249/09, Underhill J stated that it was *'necessary to consider with some care the areas of factual inquiry raised by the proposed amendment and whether they were already raised in the previous pleading'*. He carried out this exercise himself and concluded that the new evidence would be substantially the same as would be given in respect of the original claim, and, accordingly, allowed the amendment. The Court of Appeal approved this approach and agreed that the amendment did not raise *'any materially new factual allegations'. '[T]he thrust of the complaints in both is essentially the same'*.

34 In **Chandhok v Tirkey** [2015] IRLR 195, the Langstaff J referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows:

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

I readily accept that Tribunals should provide straightforward, accessible and readily understandable for a in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

35 In **Abercrombie & Others –v- Aga Rangemaster Ltd** [2013] EWCA Civ 1148 Lord Justice Underhill pointed out that the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the caselaw to say that an amendment to substitute a new cause of action is impermissible. Further, at paragraphs 48 and 49 of the *Abercrombie* judgment, Lord Justice Underhill went to say:

> "*Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry 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. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.... We were referred by way of example to my decision in* **Transport and General Workers Union v Safeway Stores Ltd** *(UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as* **British Printing Corporation (North) Ltd v Kelly** *(above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)*
>
> *It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case."*

36 Most recently, in **Vaughan v Modality Partnership** [2021] IRLR 97 at [24], HHJ Tayler reviewed the authorities on amendment. The following principles emerged:

36.1 the fact that an amendment would introduce a complaint which is out of time is a factor to be taken into account in the balancing exercise, but is not decisive [§15];

36.2 the **Selkent** factors should not be treated as a checklist, but must be considered in the context of the fundamental consideration: the relative injustice and hardship in refusing or granting an amendment [§16];

36.3 the Tribunal may need to adopt a more inquisitorial approach when dealing with a litigant in person [§19];

36.4 that balancing exercise should be underpinned by consideration of the real, practical consequences of allowing or refusing an amendment [§21];

36.5 It is important to consider the **Selkent** factors in the context of the balance of justice [§24]

- a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing;

- an amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim;

- a late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

36.6 where the prejudice of allowing an amendment is additional expense, consideration should generally be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it [§27].

36.7 an amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice [§28].

37 I followed the jurisprudence set out above when making my decision, Particularly, I considered all the circumstances and the balance of justice. I make the following findings:

37.1 The claim of race discrimination was not set out by the claimant in her ET1 or Claimant's Submissions, other than by ticking the race discrimination box at paragraph 8.1.

37.2 In order to proceed with any claim of race discrimination, the claimant has to amend her claim.

37.3 I find that the claimant's application for amendment was, at the earliest, her response to the order of EJ Frazer [52-37] requiring her to provide further information. That order was dated 6 July. I was not told the exact date that the claimant's document "Race Discrimination Claims" was filed and served, so I will assume that it was filed and served on the first

possible date – 7 July 2022 – to give the claimant the greatest possible benefit of the doubt.

37.4 I find that the claimant stared early conciliation on 26 July 2021 and obtained a conciliation certificate on 6 September 2021. She presented her claim on 3 October 2010.

37.5 I find all the allegations of race discrimination first set out in the claimant's document "Race Discrimination Claims" to be out of time – the time limit set out in section 123 of the Equality Act 2010. I do not find it just and equitable to extend time to allow the claims.

37.6 On the **Selkent** points, I make the following findings:

37.6.1 I find that this is not a rebadging exercise.

37.6.2 I find that the race discrimination claims were not identified until July 2021, nearly 12 months after early conciliation started.

37.6.3 The timing and manner of the application – The application was only effectively made when the "Race Discrimination Claims" document was filed and served. The respondent had made it clear in its ET3, filed in November 2021 that it required further information about the claim.

37.6.4 I find that the claimant only actively sought to pursue the race discrimination claim after her disability discrimination claims had been dismissed

37.6.5 For the reasons set out below, I find the balance of injustice and hardship supports the respondent's position.

37.7 The claimant is not represented.

37.8 The real practical consequences of granting the application would be to save the claimant's case, as all but the race discrimination claim has now been dismissed or withdrawn. It is therefore of crucial importance to her. If the application is granted, it will require the respondent to proof witnesses from its employees. It will add to the documents required for the final hearing and extend the time required for the hearing.

37.9 Following the guidance of HHJ Tayler, I find that the amendment sought is not a minor amendment. Granting the application would 'correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing'.

37.10 The amendment sought is late and would cause the respondent more cost and expend more time.

37.11 The amendment may result in the respondent suffering prejudice because it may have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

37.12 I find that the prejudice cannot be ameliorated by an award of costs, or other sanction as the entire case now rests on granting or refusing the application.

37.13 I find that this amendment would have been avoided had more care been taken when the claim was pleaded or defined. That is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost. However, the key point is the balance of justice and hardship and I find that the injustice and the hardship is greater on the respondent than the claimant.

38 The application for amendment is refused. That means that the claimant's claim of race discrimination is struck out, as it does not exist as a claim as set out in the ET1 alone.

39 I would add that had I allowed the amendment, I would have been minded to strike out the claimant's claims for failure to actively pursue them.

Employment Judge Shore
Dated: 16 February 2023