EMPLOYMENT TRIBUNALS

Claimant: **Ms Giovanna Marino**

Respondent: **Guys and St Thomas NHS Foundation Trust**

Held at: **Watford Hearing Centre (via CVP)** **On:** **29 March 2023**

Before: **Employment Judge Havard (sitting alone)**

Appearances:
For the Claimant: In person
For the Respondent: Mr J Cook, Counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

1. The Claimant's belief that the Coronavirus pandemic did not pose a risk to the public, and the Claimant's belief that the preventative measures in respect of COVID-19, namely PCR tests and wearing masks were both unnecessary and presented a risk do not amount to a philosophical belief for the purposes of section 10(2) Equality Act 2010.

2. The Claimant's application to amend her claim to include a whistleblowing complaint is refused.

REASONS

Introduction

1. This matter came before me following the direction of Employment Judge Tobin on 1 December 2022.

2. The hearing was listed to take place via CVP. At the outset, it became apparent that, due to technical difficulties, the camera on the Claimant's device was not operating. However, both Mr Cook and I were able to hear the Claimant clearly and she was able to hear us. Both the Claimant and Mr Cook were anxious to continue even though we would not be able to see the Claimant and she would also be giving evidence. On balance, I concluded that it was consistent with the overriding objective to continue but that it would be kept under review in the course of the hearing. In the event, it transpired that it was possible to complete the hearing and I was satisfied that neither the Claimant nor the Respondent had been disadvantaged.

3. I had been provided with a bundle prepared by the Respondent for the purposes of this hearing. There had been exchanges of emails with the Claimant regarding the documentation to be included and the Respondent had endeavoured to incorporate all those documents provided by the Claimant into one bundle. This bundle runs to 258 pages. There is a discrepancy between the page numbers on the actual pages of the document and the pdf shown on the screen. The page numbers to which I refer in this judgment are the pdf numbers. Those to which I refer from the Respondent's Bundle are prefixed with the letter "R". The Claimant had also submitted a bundle running to 256 pages. This bundle had not been paginated but, in the event that I make reference to a document from that bundle, the pdf number is prefixed with the letter "C". I had also been provided with a skeleton argument by Mr Cook on behalf of the Respondent. I listened to the Claimant give oral evidence. Finally, I listened to oral submissions from Mr Cook and the Claimant.

4. In the order of 1 December 2022, Judge Tobin had identified two questions to be determined at this preliminary hearing.

   (i) whether or not the Claimant's opposition to the widespread belief in the Coronavirus pandemic and the ensuing need for COVID-19 preventative measures derived from a philosophical belief as recognised by the EqA.

   (ii) the Claimant's application to amend her claim to provide for a whistleblowing complaint (if appropriate).

ISSUE 1

Philosophical belief

5. The Claimant had been employed at Harefield Hospital as a Senior Healthcare Assistant for just over five years until the date of her dismissal on 22 January 2021.

6. By a claim form dated 22 March 2021, the Claimant claimed unfair dismissal, discrimination on the grounds of religion or belief, arrears of pay and other payments.

7. Initially, the particulars of claim attached to the claim form ran to just one page but the Claimant maintained that she had submitted a longer document (R36-43) and Judge Tobin had agreed to accept the longer version.

8. By an order dated 9 August 2021, the Tribunal required the Claimant to state the religion or belief on which she based her discrimination claim.

9. In her email of 9 August 2021, the Claimant referred to an email received from the Respondent's solicitor. The Claimant stated that her discrimination claim, *"has nothing to do with the Coronavirus pandemic disbelief argued by the Respondent's solicitor"* and that it related to her philosophical beliefs in respect of nutrition and veganism. Later in that email, the Claimant says that the Coronavirus pandemic is not a belief *"because "science" is not a religion, not a belief, not a cult and shouldn't be used as if it was, in order to justify a dismissal."*

10. In her email of 26 August 2021, the Claimant again stated that her original discrimination claim was based on veganism but then refers again to the email from the Respondent's solicitor stating that her alleged belief that COVID-19 did not exist is not a protected belief. The Claimant maintained that a lack of belief was also regulated although the Claimant did not specify that she did not believe in the Coronavirus

pandemic. However, in the agenda filed in advance of the Case Management Hearing on 1 December 2022, the Claimant indicated that she intended to apply for an amendment to her claim to include direct discrimination based on her lack of belief in the Coronavirus pandemic.

11. In the Particulars of Claim (R36-43) at no stage does the Claimant explicitly say that she did not believe that the Coronavirus existed. It related more to the Claimant's belief that the risk presented by the Coronavirus was overstated, causing patients to be unnecessarily in fear and alarmed.

12. For example, the Claimant stated (R37) "*As of 19 March 2020 COVID-19 is officially no longer considered to be a High Consequence Infectious Disease in the UK"*

13. Further down the page, the Claimant stated, "*Since COVID happened, de facto though, isolating patients for months, continuing an unreasonable and unjustified withdrawing of services or support networks, and emotional abuse of sick people carried out by wrong policies have created an hysterical environment for many*."

14. As for PCR tests, in her Particulars of Claim, the Claimant maintained the PCR test was not a diagnostic tool and did not consider that the PCR test was mandatory. The Claimant stated that the test cannot detect a specific virus, confirming that "*A positive cases do not mean that people are sick with Covid-19, it actually may well mean the opposite: that people are immune): There are many treatments available if ever the doctors want to use them in time to avoid people go to hospital, as COVID is curable at home:…* ".(sic)

15. As for wearing a mask, when the policy in respect of the wearing of masks changed in April 2020, the Claimant notified the Matron that she had a breathing problem due to an underlying condition.

16. In the same document, the Claimant stated "*Note the whole staff and I, have gone through the pick of the pandemic (February and March) without mandatory mask, having had COVID patients in the ward among any other type of patients, immunodeficient patients included, cardiology day cases not previously assessed. I have never got ill*".

17. It was later in the document that the Claimant suggested that it has been *"scientifically proven that surgical masks do lose fibres, are detrimental for health of the wearer, reduce oxygen intake which leads to hypoxia and overall do not provide any protection against airborne viruses."*

18. At the hearing on 1 December 2022. Judge Tobin stated that, even on the basis of the extended particulars of claim, it was difficult to discern the claims that the Claimant was making. Judge Tobin therefore required the Claimant to review her extended Particulars of Claim and, for each allegation of discrimination, indicated that the Tribunal will want to know:

    (a) a brief summary of each exchange stating precisely what was alleged to have been said or done;

    (b) when this occurred;

    (c) the individual(s) who said the comment or committed the act; and

    (d) where this was said to occur.

19. Judge Tobin instructed the Claimant that she must not write an essay and he set out very clearly what was expected of the Claimant.

20. Unfortunately, in the document entitled "Claimant's philosophical belief witness statement" dated 15 December 2022 (R130-144), the Claimant provided exactly what Judge Tobin instructed her not to provide, namely an essay. I do not doubt that the Claimant was endeavouring to be helpful and it must have taken her considerable time and trouble to prepare the document but, regrettably, it did not assist me at all in reaching my decision. Indeed, having read the document carefully, it was striking that it made no mention whatsoever of the Coronavirus, the Coronavirus pandemic, COVID-19, the PCR tests, or masks.

21. The first ten pages comprised of a discourse by the Claimant under the headings "The science of truth" and "The truth of science".

22. Under the heading "Philosophical belief to be protected under the Act" (R142-144), the Claimant set out the criteria found in the statutory code of practice which, in turn, was taken from the EAT decision in *Grainger Plc v Nicholson [2010] ICR 360*. However, whilst the Claimant provides her analysis in respect of each of the criteria, unfortunately her analysis in respect of each of the criteria makes no reference to the nature of her beliefs nor how the criteria apply to support her contention that such beliefs are philosophical beliefs protected under the Act.

23. Having failed to clarify her claims in the document dated 15 December 2022, I then listened carefully to the Claimant give her evidence. With regard to the existence or otherwise of the Coronavirus pandemic, the Claimant stated that, as at 19 March 2020, whilst the Government had said previously that the Coronavirus was considered a High Consequence Infectious Disease, it was no longer so.

24. The Claimant said that, at a press conference on 18 May 2020, the Government had indicated that the Coronavirus was *"not that alarming"* and that *"Chris Whitty was saying that it was nothing to worry about."*

25. When it was put to the Claimant that she did not have a lack of belief in coronavirus, just strong positive views on it and the reaction to it, the Claimant accepted that she had a series of very strong positive views regarding Coronavirus but this did not represent a lack of belief. She also confirmed that, as at 9 August 2021, when she sent an email to the Tribunal and the Respondent's solicitors:

> *"My discrimination claim has nothing to do with the Coronavirus pandemic disbelief agued by the Respondent's solicitor, …, in the above mentioned attachment.*
>
> *My discrimination claim has to do with the fact that while I was working, I have been bullied into not speaking about nutrition and veganism with the patients despite I had the duty and the right to do so."*

26. Subsequently, in her oral evidence, the Claimant stated

> "The *Coronavirus pandemic is a scientific fact*." and
>
> *"There has been an event called Coronavirus pandemic caused by virus SARS 2 provoked a disease called Covid-19."*

What I am saying is scientific facts need to be discussed because many times they are not what they claim to be." and

"*Most people died but some found to have completely different disease by the end of March 2020. Hospital cases resolved and most people were not dying anymore*."

27. Finally, the Claimant said in respect of the COVID pandemic, *"I agree there has been something that had caused a lot of people to die and I don't agree with it being called the Coronavirus pandemic."*

28. The Claimant also said that she accepted that peoples' views regarding the coronavirus were not protected under the Equality Act but that the Respondent had used her views on coronavirus to dismiss her. The Claimant stated, *"So my position is that my positive beliefs in respect of coronavirus are not protected. Scientific facts are not beliefs of mine"*

29. As for PCR tests, the Claimant maintained that such tests were not a diagnostic tool although she accepted it was a tool to detect a molecule but it had "*no golden standard"*. She said that PCR tests were issued to detect three molecules out of an alleged 40,000 molecules which are the components of SARS 2 Coronavirus. She maintained that testing patients amounted to an abuse.

30. Regarding masks, the Claimant maintained that wearing masks was harmful and ineffective and that this was based on scientific fact. She maintained that such documents assert that surgical masks do not provide any protection for airborne pathogens and that this was recognised all over the world and that masks do not block aerosols.

Applicable Law

31. Section 10 EQA states:

"(1) Religion means and religion and a reference to religion includes a reference to a lack of religion.
(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to lack of belief.
(3) In relation to the protected characteristic of religion or belief:-
(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
(b) A reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief."

32. In *Gray v Mulberry Co (Design) Ltd 2020 ICR 715* the Court of Appeal held that it is essential, before considering whether a belief amounts to a "philosophical belief", to define exactly what the belief is. This does not include a detailed treatise, but more an identification of the core elements of the belief so as to determine whether it falls within s10 EqA.

33. In **Granger plc v. Nicholson [2010] IRLR 4** ("**Grainger"),** the limitations or criteria placed on the definition of philosophical belief are set out in that judgment at paragraph 24:

"(i) The belief must be genuinely held.
(ii) It must be a belief and not, as in McClintock, an opinion or viewpoint based on the present state of information available.

(iii) It must be a belief as to a weighty and substantial aspect of human life and behaviour.
(iv) It must attain a certain level of cogency, seriousness, cohesion and importance.
(v) It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others (paragraph 36 of Campbell and paragraph 23 of Williamson).

34. In **Williamson v. Secretary of State for Education and Employment [2005] 2 AC 246,** a decision relating to article 9 of the European Convention on Human Rights, paragraph 23 of the judgment states as follows:

23 Everyone, therefore, is entitled to hold whatever beliefs he wishes. But when questions of "manifestation" arise, as they usually do in this type of case, a belief must satisfy some modest, objective minimum requirements. These threshold requirements are implicit in article 9 of the European Convention and comparable guarantees in other human rights instruments. The belief must be consistent with basic standards of human dignity or integrity. Manifestation of a religious belief, for instance, which involved subjecting others to torture or inhuman punishment would not qualify for protection. The belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification. The language used is often the language of allegory, symbol and metaphor. Depending on the subject matter, individuals cannot always be expected to express themselves with cogency or precision. Nor are an individual's beliefs fixed and static. The beliefs of every individual are prone to change over his lifetime. Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the Convention.

35. In **McClintock v. Department of Constitutional Affairs [2008] IRLR 29,** the following criterion was identified at paragraph 45:

"*As the Tribunal in our view correctly observed, to constitute a belief there must be a religious or philosophical viewpoint in which one actually believes, it is not enough 'to have an opinion based on some real or perceived logic or based on information or lack of information available."*

36. As for a "lack of belief" as distinct from cases where a positive belief is relied upon, Mr Cook referred me to the guidance provided by the EAT in **Forstater v CDG Europe** [2022] ICR 1. At paragraph106 the EAT said:

11.1 "In our judgment, the flaw in this analysis is that it assumes that the lack of belief necessarily denotes holding a positive view that is opposed to the belief in question. However, a lack of belief under section 10 of the EqA is merely the absence of belief: see Grainger [2010] ICR 360 at para 31 . A lack of belief may arise from simply not having any view on the issue at all, either because of indifference, indecision or otherwise. It would also include a person who has some views on the issue but would not claim to have a developed philosophical belief to that effect. Thus, in the example postulated by the tribunal of a person having a belief that murder is wrong, the protection conferred on those who lack that belief would not mean that persons who positively believed that murder was not wrong would be protected under the EqA . Those who held a positive belief to that effect would be deemed to have a belief, not a

lack of belief. Those who had a lack of belief that murder is wrong would include those who had never given the matter any thought and those who think that there might be some situations in which murder is acceptable. That lack of belief is protected under section 10(2) of the EqA irrespective of whether the Grainger criteria could be applied to it. Indeed, it is difficult to see how the Grainger criteria could be applied to a person who held no view on an issue at all."

Conclusions

37. It was accepted by the Claimant that the burden was on her to establish the nature of her philosophical beliefs and that such philosophical beliefs were protected under section 10(2) EqA.

38. The extended Particulars of Claim did not provide any clarity regarding the nature of the beliefs that the Claimant asserted were protected in respect of the coronavirus and the pandemic.

39. This was confirmed at the hearing on 1 December 2022, when Judge Tobin indicated that it was not possible to discern the nature of the Claimant's claims from her extended Particulars of Claim. Judge Tobin therefore directed the Claimant to prepare a document containing a review of what she had said in her extended Particulars of Claim, instructing her not to write an essay but provide specific information to support her claims.

40. In the document dated 15 December 2022 headed "Claimant's philosophical belief witness statement", the Claimant proceeded to provide a document which failed to comply with Judge Tobin's direction. Furthermore, the document made no reference at all to the Coronavirus pandemic, PCR tests or masks, let alone set out what the Claimant asserted to be her philosophical beliefs which were entitled to the protection of the EqA.

41. In her oral evidence, I consider that the Claimant's case became even more unclear and inconsistent. The Claimant had failed to define exactly what the belief was. Whilst there had been a reference to a lack of belief in the coronavirus pandemic, I concluded that the Claimant was not stating that she simply did not believe in the existence of the coronavirus or the coronavirus pandemic. She accepted that the Coronavirus pandemic was a scientific fact and that this had been caused by the virus SARS 2 which led to a disease called COVID-19 but she was then asserting that such scientific facts needed to be discussed because many times scientific facts did not stand up to scrutiny.

42. On what I have read and heard, I accept Mr Cook's submission and conclude that, on a proper analysis, the Claimant does not have a lack of belief but rather a series of strongly held positive views with regard to the Coronavirus pandemic and that such views related to the level of risk posed by the coronavirus as opposed to a lack of belief in the existence of the coronavirus. As stated above, there were a number of occasions, both in the extended Particulars of Claim and in her oral evidence, when the Claimant made reference to the Coronavirus or COVID-19 but then, for example, disputes the number of deaths that can be attributed to it.

43. Whilst the Claimant's written and oral evidence lack clarity and consistency and a clearly defined belief, I have applied my findings to the five-stage test set out in *Grainger*. Indeed, it was apparent that the Claimant was aware of the five-stage test. The Claimant made reference to them in her written statement of 15 December 2022 even though, unfortunately, the analysis that she provided in respect of each criterion

makes no mention of the coronavirus pandemic and completely fails to comply with the focus required by the direction of Judge Tobin.

44. In applying the *Grainger* criteria, I took fully into account the submissions made by both the Claimant and Mr Cook.

The belief must be genuinely held

45. Even though the definition of the Claimant's beliefs with regard to the Coronavirus pandemic lacked specificity and clarity, I am satisfied that the views that she has expressed in both the written material and her oral evidence were genuinely expressed to include what she had to say in respect of PCR tests and the wearing of masks. In fairness to Mr Cook, he did not dispute that the Claimant genuinely believed in the views and opinions she expressed.

It must be a belief and not just opinion or viewpoint based on the present state of information available

46. In deciding whether or not the Claimant satisfies this test, I have taken account of the guidance of Mr Justice Elias in *McClintock* and I have also taken account of what was said by Mr Justice Burton in *Grainger*. Finally, whilst not bound by the decision, I have considered the analysis of this criterion in *X v* Y ET Case number 2413947/20.

47. Again, in her statement of 15 December 2022, the Claimant does not provide the necessary level of focus and clarity to support her contention that it is her belief as opposed to an opinion or viewpoint based on information available or the lack of such information.

48. As for expressing a view or opinion based on the present state of information available, as an example, in her extended particulars of claim, the claimant stated, "*As of 18 March 2020 COVID-19 is officially no longer considered to be a High Consequence Infections Disease in the UK*" and provides a link to Government guidance. However, whilst that was what was initially stated, the guidance went on to say:

> "*The World Health Organization (WHO) continues to consider COVID-19 as a public health emergency of international concerns (PHEIC), therefore the need to have a national, coordinated response remains and this is being met by the Government COVID-19 response. Cases of COVID-19 are no longer managed by HCID treatment centres only. Healthcare workers managing possible and confirmed cases should follow the national infection and control manual for England (…) which includes instructions about different personal protective equipment (PPE) ensembles that are appropriate for different clinical scenarios.*"

49. The Claimant also made statements which did not appear to be supported by any scientific evidence, such as *"Protocols have been implemented since February last year and there are thousands of doctors curing hundreds of thousands of patients at home and had no deaths."*

50. On balance, I find that the Claimant expresses opinions and strong views in respect of the Coronavirus pandemic (even though such views are, in my view, inconsistent and unclear) as well as PCR tests and the wearing of masks. Such views and opinions are based on the Claimant's reliance on certain evidence which she asserts leads to them being science-based facts. However, whilst I do not doubt that the Claimant considers

that the opinions and views that she expressed were correct, the fact that she asserts that they are facts does not necessarily make them so.

51. I therefore find that the Claimant expresses strongly-held opinions and strongly-held views as opposed to an identifiable philosophical belief.

It must be a belief as to a weighty and substantial aspect of human life and behaviour

52. As I have indicated, I have not found that the Claimant's assertions with regard to the Coronavirus pandemic, PCR tests and the wearing of masks to amount to a philosophical belief.

53. There is no doubt that the Coronavirus pandemic was of huge significance and possessed "*an adequate degree of seriousness and importance*" (*Williamson*). It was submitted by Mr Cook that this criterion is not met as the Coronavirus pandemic was a *"transient phenomenon."* It was also suggested that the Claimant's views referred to herself and her objection to being subjected to a PCR test and wearing a mask.

54. However, I am satisfied that, had I found that the Claimant held a philosophical belief as opposed to strongly held opinions and views, the Coronavirus pandemic and the measures taken to control that pandemic were weighty and substantial aspects of human life and behaviour.

It must attain a certain level of cogency, seriousness, cohesion and importance

55. I consider that the Claimant has expressed her views and opinions in an incoherent way in that she has presented them in an inconsistent fashion. Further, with regard to PCR tests and the wearing of masks, it related more to the objection that the Claimant had to take the test and, in the case of wearing the mask, the medical reasons particular to the Claimant why this was not possible.

56. I am satisfied that issues relating to the Coronavirus pandemic and the need for preventative measures in respect of COVID-19 are both sufficiently serious and important to satisfy this part of the test.

57. However, I am entirely satisfied that the bases on which the Claimant has expressed her strong views and opinions lack cogency and cohesion.

58. The requirement for the review as directed by Judge Tobin at the Case Management Hearing on 1 December 2022 was as a result of the difficulty in identifying the bases on which the Claimant was pursuing her claims.

59. Having considered the extended Particulars of Claim, such a direction was entirely appropriate. However, rather than taking advantage of the opportunity presented to her to clarify her claims, and rather than complying with the direction of Judge Tobin, the Claimant had presented a document the content of which was neither cogent nor cohesive. It makes no reference at all to the Coronavirus pandemic nor PCR tests nor the wearing of facemasks. To that extent, the Claimant has expressed herself in a way which is not intelligible or capable of being understood.

60. As for her oral evidence, the Claimant failed to articulate a consistent theme or structure to the views and opinions she expressed in relation to the coronavirus pandemic.

61. Referring to the guidance provided by Mr Justice Burton in Grainger, for beliefs to qualify as philosophical beliefs, they must possess consistent internal logic and structure to satisfy the test of cogency. As for coherence, Lord Nicholls stated in Williamson that, "*The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard".*

62. Even taking account of the guidance that, *"too much should not be demanded in this regard",* I accept Mr Cooks submission that the Claimant has failed to identify a thread binding conclusions in a coherent thought process amounting to a belief that should be protected.

63. The Claimant's evidence, therefore, does not meet the requirements of cogency and cohesion.

It must be worthy of respect in a democratic society, be not incompatible with human dignity and not conflict with the fundamental rights of others

64. Mr Cook made submissions that some of the views expressed by the Claimant may be found to be offensive, for example, to those who suffered badly from COVID-19 or families who lost loved ones and that the views expressed by the Claimant were not worthy of respect.

65. I have not found that, in expressing her views and opinions, the Claimant has set out to deliberately offend or be disrespectful to anyone and therefore I make no further findings under this heading.

66. In conclusion, I have found that the Claimant has failed to establish that, in respect of the coronavirus pandemic and matters related to it, she held philosophical beliefs within section 10(2) EqA.

ISSUE 2

Application to Amend

67. In accordance with the direction made by Judge Tobin on 1 December 2022, the Claimant had served a document dated 15 December 2022 entitled, "Claimant's protected disclosure witness statement" (R145 - 148).

68. It was confirmed by the Claimant, on further discussion, that she was relying on section 43B(1)(a), (b), (d) and (f).

69. Again, after some discussion, and on considering the schedule on the first page of her protected disclosure witness statement, the Claimant confirmed that the documents which she claimed to amount to a protected disclosure were the email of 3 August 2020 (R151) and the Datix report (R156).

70. The email of 3 August 2020 related to her being required to take a PCR test. By way of clarification, the Claimant stated that the date included in the first line of that email, namely 31 August 2020, was a typing error and that it was referring to events on 31 July 2020.

71. The Claimant stated that, in the Datix report (R156), she raised concerns about facemasks having loose synthetic fibres coming off them whilst wearing them.

72. The Claimant suggested that the Respondent became aware of these issues during the appeal hearing following her dismissal.

73. However, it was accepted by the Claimant that the document entitled *"Raise a Whistleblowing Concern"* (R166) was sent on December 2020 but this was only sent to the Respondent after the Claimant's dismissal.

74. As for forwarding notification of the whistleblowing claim to a regulator, this was sent in March 2021 once the ET1 had been lodged.

75. The application was resisted by Mr Cook. He stated that he understood the Claimant was saying the disclosures were the reason for her dismissal and was claiming automatic dismissal under section 103A of the Employment Rights Act 1996.

76. Mr Cook referred me to the test set out in *Selkent Bus Company Limited v Moore [1996] ICR 836*.

77. I also remind myself of the direction provided by the case of *Cocking v Sandhurst (Stationers) Limited [1974] ICR 650*. The key principle when considering the exercise of the discretion to allow an amendment is to have regard to all the circumstances, and in particular any injustice or hardship which would result from the amendment or refusal to amend.

78. I have also considered the Presidential Guidance on Case Management relating to applications to amend.

79. I considered what was described as a non-exhaustive list of relevant factors to be taken into account, namely: the nature of the amendment; the applicability of time limits; the timing and manner of the application, and the balance of hardship and injustice.

The nature of the amendment

80. Whilst in her witness statement, the Claimant states that she refers in her ET1 to the fact that she had completed a whistleblowing application on 28 December 2020, and whilst there is reference to some exchanges of emails with the Tribunal staff, there is no reference in the extended Particulars Of Claim to an intention on the part of the Claimant to pursue such a claim, let alone the basis on which such a claim was being made.

81. I was referred by Mr Cook to paragraph 28 of the Judgment of HHJ Richardson in the decision of *Mechkarov v Citibank UKEAT/0119/17/DM*, and, in particular, paragraph 28.

> *"A complaint of public interest disclosure must to my mind state, so that it can be discerned on a generous reading, that the worker concerned made one or more public interest disclosures and that he was subject to detriment for doing so. An essential element of a complaint of public interest disclosure detriment is that the Claimant should be complaining that he has suffered detriment on the grounds of the public interest disclosure. The claim form, read generously, must therefore identify the detriment complained of, the public interest disclosure alleged and the linkage between the two. If it does this, even in very broad terms, further detail may be given by Particulars; if it does not, amendment will be required."*

82. I therefore find that the inclusion of a whistleblowing claim will amount to a new cause of action in that I do not consider that this amounts to a "relabelling" of the claim based on the content of the particulars of claim. It would substantially increase the scope of what the Tribunal will have to consider. Consequently, an amendment was required.

Time limits

83. Following the hearing on 1 December 2022, and providing a generous interpretation to the witness statement, the Claimant's application to amend her claim to include one of whistleblowing is dated 15 December 2022.

84. The Claimant was dismissed on 22 January 2021 and the claim form was filed on 22 March 2021.

85. I find, therefore, that this application to amend the claim to include one of whistleblowing is being made very substantially out of time.

86. I have been referred to the case of *Galilee v Metropolitan Police Commissioner [2018] ICR631* where the EAT said that the Claimant must show a prima facie case for an extension of time at the point that the application for an extension is considered or alternatively that issues relating to jurisdiction and time limit should be considered at the full hearing.

87. I remind myself that under section 111(2) of the Employment Rights Act 1996, a Tribunal shall not consider a complaint under this section unless it is presented to the Tribunal

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

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

88. There are therefore two questions to be answered: first, what was the substantial cause of the Claimant's failure to comply with the initial time limit and secondly, in light of that finding, was it reasonably practicable to present the claim in time.

89. In assessing whether the Claimant as shown a prima facie case for an extension of time, I have taken account of the fact that no claim amounting to a whistleblowing complaint is included in the extended Particulars of Claim. This was also remarked upon by Judge Tobin at the hearing on 1 December 2022. I have also taken account of the fact that no explanation has been provided either in the Claimant's witness statement of 15 December 2022 or in her oral submissions why the detail of such a claim was not included.

90. I refer to the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1WLR1129* at paragraphs 1141D-F.

91. I conclude that it was reasonably feasible, and thereby reasonably practicable, for the Claimant to present her complaint of whistleblowing within the claim form submitted within the relevant three-month period. I have taken account of the fact that the Claimant was sufficiently well-informed to present her claims for unfair dismissal, discrimination and loss of wages within the necessary time limit.

92. Furthermore, looking at stage 2, and the period of time that has elapsed between the initial limitation period and the Claimant's application to amend on 15 December 2022 i.e. a period of over 18 months, even had I found that it was not reasonably practicable for the complaint to be presented before the end of the period of three months, I consider that it is unreasonable to extend that period for such a substantial amount of time. In reaching this conclusion, I accept the submission of Mr Cook that the inclusion of a whistleblowing claim at this stage will require the Respondent to take statements from members of staff regarding events in July and August 2020 and will increase the scope of disclosure.

Timing and manner of application

93. The Claimant is clearly a person of intelligence and has illustrated a preparedness to familiarise herself with the legal framework in which she has endeavoured to argue and present the claims that will continue irrespective of this application, namely in respect of unfair dismissal, discrimination and unpaid wages.

94. As has been made very clear on many occasions, notably by the Court of Appeal in *Bexley Community Centre v Robertson [2003] EWCA Civ 576*, albeit in the context of a just and equitable extension, employment tribunal limits are there to be complied with. Having listened carefully to the Claimant's submissions, I am not satisfied that a cogent rationale was advanced as to why the Claimant had not brought this claim at an earlier stage.

Balance of hardship

95. Bearing in mind that the Claimant has included significant detail relating to various claims of unfair dismissal and discrimination and then delayed by a further 18 months before asserting this claim, I did not consider that this amendment should be accepted. I understand that some prejudice may be caused to the Claimant in refusing the amendment. However, as stated, her claims in respect of unfair dismissal and discrimination will continue as will her claim for unpaid wages.

96. Taking account of what has been said in her email of 3 August 2021 and the Datix form, it will require considerable investigation on the part of the Respondent, to include interviewing further witnesses regarding circumstances that occurred back in July and August 2020. It will expand disclosure and also the length of any final hearing.

97. I have also taken account of the fact that the content of the email of 3 August 2020 and the Datix form in September 2020 centre very largely on the effects of the PCR test and the wearing of the mask on the Claimant herself and therefore I am satisfied that the Claimant would have substantial difficulty in satisfying the public interest test.

98. Consequently, in my judgement, any hardship to the Claimant in refusing the application is outweighed by the hardship caused to the Respondent if I were to grant it.

99. For all these reasons, the application to amend the Claimant's claim to include a whistleblowing complaint is refused.

Employment Judge Havard
Dated: 25 April 2023

JUDGMENT SENT TO THE PARTIES ON

27.4.2023

GDJ
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS