



EMPLOYMENT TRIBUNALS

Claimant: Miss Collins

Respondent: Boots Management Services Ltd

PUBLIC PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (by video)

On: 19 June 2023

Before: Employment Judge H. Mason

Appearances

For the Claimant: In person represented (lay) by Ms. Barbara Collins (mother)

For the Respondent: Ms. Bowen, counsel

RESERVED JUDGMENT

The Claimant is allowed to amend her claim to add a claim of unfair dismissal.

REASONS

Background

1. The Claimant was employed by the Respondent from 2009 until her dismissal with immediate effect on 13 August 2021. She presented this claim on 11 November 2021. The complaint presented is disability discrimination which is defended by the Respondent.
2. At a Case Management Preliminary Hearing on 23 January 2023, EJ Lewis KC listed the final hearing (12-16 August 2024) and made various orders which were sent to the parties on 5 February 2023.
3. EJ Lewis also listed this Public Preliminary Hearing to consider:
 - 3.1 whether all or any of the Claimant's claims are out of time, or whether in relation to all or any of them, the issues should instead be determined at the final hearing; and
 - 3.2 any application by the Claimant to amend to add a claim of unfair dismissal.

Procedure at the hearing

4. The Claimant attended and was represented by her mother, Ms. Barbara Collins; Ms. Collins was acting in a lay capacity. The Claimant's Aunt was also in attendance as an observer. I will refer to the Claimant as "the Claimant" and to Ms. Barbara Collins as "Ms. Collins".
5. At the start of the hearing, I agreed with the parties the issues to be determined today (para 3 above). I stressed to Ms. Collins that if the Claimant needed a break at any time, that would be accommodated. I also advised Ms. Collins (as a lay representative) that I was happy to repeat or explain anything.
6. The Respondent provided a bundle of documents [181 pages]. Any reference to a page number in this decision is to a page number in the bundle. Ms. Bowen also provided at the hearing written submissions. Ms. Collins confirmed she had received these documents and had access to them at the hearing. Both sides told me there were no further documents they wished to produce for the hearing today.
7. I adjourned to read the documents having asked both parties which documents in the bundle they wished me to read (pages 1—100 ; 108-111; 156,157,159,167, -171; 174-180). Some of these documents are without prejudice or privileged but by including these documents in the bundle the Claimant has waived privilege.
8. The first issue was determined first. Ms. Bowen, having taken instructions from her instructing solicitor, submitted that this was a matter that should be left to the Tribunal at the final hearing rather than determined today. The Claimant agreed. EJ Lewis's order was drafted in such a way as to leave this as an option and having read the papers, I was also in agreement; reasons for my decision are set out below (para. 64).
9. The Claimant's application to add a claim of unfair dismissal is in the bundle [pages 70-72 and 78-83]. The Claimant provided an undated witness statement [pages 174-180] but this did not deal with the issues to be determined at the preliminary hearing. Both the Claimant and Ms. Collins gave evidence on oath and adopted as their evidence-in-chief the contents of a letter dated 10 March 2023 [pages 77-79]. Ms. Bowen cross-examined the Claimant and Ms. Collins.
- 9.3 Ms. Bowen relied on her written submissions and made further verbal submissions. Ms. Collins made verbal submissions.
- 9.4 Due to lack of time, I reserved my decision which I now give with full written reasons.

Findings of Fact

10. I am mindful that this is a Preliminary Hearing and I have not had the benefit of all the evidence. The following findings of fact are limited to the preliminary issues to be determined and are based on the pleadings (ET1 and ET3), the other papers in the Bundle to which I have been referred and the evidence given at the hearing before me.

11. The Claimant was employed by the Respondent from 2009 (the Claimant says 1 October 2009 and the Respondent says 1 November 2009). Her role was Accuracy Checking Pharmacy Technician (“ACPT”).
12. The Claimant relies on the following disabilities: (1) epilepsy and (2) left side paralysis (or hemiplegia). The Respondent admits that be reason of those conditions the Claimant is (and was at all relevant times) a disabled person.
13. The Claimant was originally employed at the Respondent’s Beccles store. On or around January 2020 she was transferred to a store in Lowestoft as a reasonable adjustment by reason of her restricted mobility and on the basis that Lowestoft was a “fire safe” store”.
14. In December 2020, the Claimant says there was a fire in the Lowestoft store and she was forced to exit via the stairs on her bottom (the Respondent does not accept this).
15. In April 2021, the Claimant’s grandfather died. Her grandmother required residential care as a result of dementia.
16. On 7 May 2021, the Claimant attended an investigation meeting with Owen Sephton in response to allegations of misconduct in relation to signing the “clinically checked” box on various prescriptions. The Claimant was suspended and says that following her suspension her mental and physical health deteriorated significantly and she required complete care and was dependant on her mother.
17. On or about 23 June 2021, the Claimant raised a grievance which the Respondent says was linked to issues being considered as part of the disciplinary proceedings. Around this time, the Claimant was receiving assistance from her trade union, Unison.
18. In or about early July 2021, Ms. Collins contacted Leathes Prior, solicitors, on behalf of the Claimant. A meeting took place via video link with Ms. Harriet Howes, an employment law specialist; both the Claimant and Ms. Collins attended. The Claimant confirmed on cross-examination that she discussed with Ms. Howes a discrimination claim and also a possible unfair dismissal claim in the event that she was dismissed; I accept Ms. Collins evidence that the latter was not discussed in detail as the Claimant had not been dismissed at that point and “*time is money*” with solicitors.
19. On 13 July 2021, Leathes Prior wrote to the Respondent [pages 108-111]. At this point the Claimant had still not been dismissed but had been suspended. However, in this letter Ms. Howes raised not only allegations of disability discrimination but also the prospect of an unfair dismissal claim if the Claimant were to be dismissed. The Claimant confirmed she had seen this letter but was unclear at what point. The letter is marked without prejudice but the Claimant has waived privilege.

20. The Respondent declined to negotiate with the Claimant's solicitors. The Claimant said she felt there was therefore no point retaining them given the cost of doing so.
21. On 20 July 2021, a grievance hearing was held conducted by Sanjay Patel, Area Manager [pages 112-119]. The Respondent says the "large part" of her grievance was not upheld [ET3]. A disciplinary hearing took place on the same day, also conducted by Mr. Patel [pages 120-134]; it was reconvened on 13 August 2021. I have not been taken to the notes of these meetings and therefore not read them.
22. On 13 August 2021, the Claimant was dismissed without notice for gross misconduct for clinically checking and initialling prescriptions herself rather than handing them over to a registered pharmacist, handing out/over those prescriptions to patients that had been checked by her and not by a registered pharmacist and breaching regulatory standards [dismissal letter page 135].
23. The Claimant did not appeal her dismissal but on 19 August 2021 she appealed the outcome of the grievance [pages 140-144]. A grievance appeal hearing took place on 7 September 2021 conducted by Veronica Horne [pages 145-155]. On 20 September 2021, the Claimant was told that her appeal was unsuccessful.
24. On 23 September 2021, on behalf of the Claimant, Ms. Collins first notified Acas for the purposes of early conciliation. An Early Conciliation Certificate was issued on 24 September 2021. The Claimant confirmed that an unfair dismissal claim was discussed with Acas.
25. On 30 September 2021, Acas emailed the Respondent [page 156] and stated that *"...the potential jurisdictions are Disability Discrimination ... and possibly unfair dismissal"* Ms. Collins again confirmed on cross-examination that she had discussed the possibility of an unfair dismissal claim with Acas.
26. This claim (ET1) was presented on 11 November 2021. The only claim presented was disability discrimination. The types of disability discrimination identified in the List of Issues are: direct (s13 Equality Act 2010 (EqA)); discrimination "arising from" (s15 EqA); and failure to make reasonable adjustments (ss20 and 21 EqA)..
 - 26.1 In section 8.1 of the claim form (ET1) the Claimant has ticked only disability discrimination; in part of that section under the heading *"I am making another type of claim which the Employment Tribunal can deal with"* the Claimant wrote: *"Injury to feelings/defamation of character"*.
 - 26.2 In section 9.2 of the ET1, under the heading *"What compensation or remedy are you seeking?"* the Claimant wrote:
*"In an original letter from our solicitor dated 13th July 202, we asked for the following:
A payment of £1546.43 in lieu of one month notice.
An ex gratia payment of £4639.28 equating to 3 months pay to compensate loss of earnings and injury to feelings.
However I would wish for many hours spent completing forms, seeking advice etc and also disability discrimination to be considered in this claim. I am currently self-employed and have no other income should my health change"*.
 - 26.3 In section 15 under the heading *"Additional Information"*, the Claimant focussed on the impact on her of the Respondent's treatment of her as opposed to rehearsing factual allegations. However, there is reference to the disciplinary process as follows:

"I have found some individual statements made by colleagues as offensive and a massive slur on me personally in particular the first statement made by Alex Taylor that was so damning that it impacted on me being dismissed from my job. I felt throughout this process that I have had to fight to clear my name and many of the initial allegations have either been dropped or unfounded in nature. The degree of collusion throughout the process among staff and groundless accusations have driven me to pursue this Despite being exhausted I will continue to challenge these statements from Boots employers ..."

- 26.4 The Claimant attached an addendum to the ET1 [pages 17-21]. In this Addendum she refers to the grounds for her disability discrimination claim but also refers to (and takes issue with) what was said at the disciplinary investigatory meeting with Owen Sephton and statements made by Alex Taylor and Owen Sephton.
27. As set out in the List of Issues, the Claimant has raised a number of complaints in relation to her alleged treatment following her move to the Lowestoft store specifically (in chronological order):
- 27.1 Requiring her to re-apply for her role as ACPT following her move to the Lowestoft store and not re-appointing her until June 2020;
- 27.2 Failing to provide:
- (i) a safe means of evacuation from the Lowestoft store;
 - (ii) a perching stool;
 - (iii) lower shelves;
 - (iv) an adequate fire evacuation plan and/or ensuring that there was a means of access to the Evac chair on the fourth floor;
 - (v) sufficient and scheduled breaks;
 - (vi) help in response to requests for assistance from the ACT at the store.
- 27.3 Allegations made by Alex Taylor in an investigatory interview dated 7 May 2021 questioning the Claimant's ability to carry out her CPT role in a manner which indicated that the Claimant was not fit to do her job and struggling because of her disability;
- 27.4 Statements made by Alex Taylor on 7 May 2021 concerning how her work may be affected by matters such as "*compulsive lying*" and "*serious neurological issues*";
- 27.5 Discussions between Alex Taylor and Lisa Knights regarding the Claimant's health issues/medications;
- 27.6 Owen Sephton questioning her about her health in the course of a disciplinary investigation in May 2021, in a manner which indicated that the Claimant was not fit to do her job and struggling because of her disability;
- 27.7 Failing to return to the Claimant - and then destroying - the Claimant's VNS device
28. The Claimant told me that the alleged failings set out in paras 27.2 above were ongoing at the date of termination of her employment on 13 August 2021 with the exception of 27.2(iii) (lower shelves) . This was not challenged by Ms. Bowen. I accept the Claimant's evidence mindful that this is a preliminary hearing and I must take the Claimant's evidence at its highest. However, this does not preclude the Respondent from challenging this at the final hearing.
29. Ms. Collins said on cross-examination that the reason she did not present a claim of unfair dismissal was because of the Claimant's poor physical and mental health at that time. She said she [Ms. Collins] could cope with preparing and presenting the discrimination claim but needed the Claimant to be "*on board*" and give her all the details in order to bring an unfair dismissal claim. She also said the

Respondent was “*not giving answers*” and they had been told of staff collaboration and that they would never find the truth. She accepted that it was not by reason of ACAS advice that she did not put in a claim of unfair dismissal and acknowledged that she should have “*ticked the box*” for unfair dismissal as well as disability discrimination.

30. Ms Collins told me that in December 2021, Joanne at Acas told her she had missed the deadline for adding a claim of unfair dismissal. I accept that this was Ms. Collins understanding.
31. On 15 December 2021 (according to the Tribunal’s digital system) the Respondent submitted a response (ET3). Ms. Collins says the Tribunal then delayed 9 months before providing her with a copy; I accept this and therefore also accept that she did not have sight of the ET3 until around October 2022.
32. On 12 January 2022, Ms. Collins emailed Ms. Howes of Leathes Prior [page 159]. She writes in response to an email from Ms. Howes (which is not in the bundle). Ms. Collins attached to her email a copy of the ET1. Relevant parts of the email with regard to an unfair dismissal claim are as follows:
“I was told by ACAS that the only things I could pursue Boots for was “injury to feelings” and the discrimination under the Equality Act. We didn’t include the unfair dismissal because we were told by Shazma Khira (Area Manager) in the disciplinary interview that because of the way in which the original interviews were carried out that all staff involved would have collaborated together and that we would never get to the truth”
“In hindsight, we should have gone for unfair dismissal, but Boots were also trying to discredit Jennie by saying she had forged signatures and had an agreement with a pharmacist called “Kate”. However, we were not able to contact her until the investigation was over by which time Jennie was dismissed. “
33. On 9 June 2022, the Claimant emailed Acas [page 169] asking for advice in light of the lack of progress regarding the Tribunal claim.
34. On 3 October 2022, the Tribunal wrote (very belatedly) to the Respondent (copy to the Claimant) to advise that the response (submitted 15 December 2021) had been accepted and enclosed a copy of the ET3 for the Claimant [page 39].
35. On 17 October 2022, the Tribunal wrote to the Claimant [page 41] asking her to confirm whether she was proceeding with her claim or withdrawing. On 18 October 2022, the Claimant confirmed she was continuing with her claim [page 47].
36. On 3 November 2022, the Respondent wrote to the Tribunal asking for a Preliminary Hearing to be listed [page 46].
37. On 6 November 2022, the Claimant provided further information (as requested) [pages 49-50]. In addition to alleged failures to make reasonable adjustments, the Claimant refers to alleged failings by the Respondent in respect of the investigation and the grievance process and the accusations made against her that she had made an agreement with a pharmacist (KS) and falsified Owen Sephton’s signature.

38. On 23 January 2023, EJ Lewis KC conducted a Preliminary Hearing for the purposes of Case Management [pages 51-69]. Ms. Collins attended but not the Claimant. Ms. Batten (in-house solicitor) represented the Respondent.
- 38.1 EJ Lewis records in the Case Summary:
“8. *There is at present no complaint of unfair dismissal. ... In the course of clarifying the Claimant’s claim, Ms Collins stated that the claimant did wish to bring a claim of unfair dismissal. Indeed a large number of the matters the Claimant relies upon were said to be relevant only to an unfair dismissal claim and not to disability discrimination.. Ms Collins explained that when she realised what the Claimant had been dismissed for, and went through the case notes seeing what the Claimant was accused of, she wanted to go for unfair dismissal but was advised it was too late as the three months had passed but clarified that she now wished to pursue this. On its face that is a surprising explanation as the claim was put in within three months of the dismissal and did raise complaints relating to the allegations and process upon which the Claimant now seeks to rely to make that claim. I was also told that the Claimant had had a solicitor also retaining her subsequently became too expensive.”*
- 38.2 EJ Lewis made various orders including an order that any application to amend to add a claim of unfair dismissal must be made by 27 February 2023 and should set out :
- (i) the grounds on which it is contended that the Claimant was unfairly dismissed; and
 - (ii) why it is considered that the amendment should be considered.
- 38.3 Also in the case summary, EJ Lewis KC summarised at para 13 [page 60] further clarification provided at the hearing in respect of the Claimant’s complaints. There is reference to allegations that the investigation, disciplinary and grievance process were flawed (paras. 13.3, 13.4 and 13.5).
39. On 22 February 2023 [pages 70-72] the Claimant submitted an application to add a claim of unfair dismissal. The reasons for the delay and the grounds for a potential claim are conflated but below is a reasonable summary:
- 39.1 The reasons for the delay:
- (i) The Respondent declined to communicate with Leathes Prior (solicitors);
 - (ii) Acas advised that the time limit for an unfair dismissal claim had expired;
 - (iii) The Claimant’s grandfather died in April 2021;
 - (iv) The Claimant’s grandmother required residential care due to dementia;
 - (v) Following her suspension, and dismissal, the Claimant’s mental and physical health deteriorated significantly and she was dependant on her mother.
- 39.2. With regard to the substance (or grounds) of a potential unfair dismissal claim, the Claimant appears to rely on the following:
- (i) Sanjay Patel concluded during a grievance meeting, that the original investigatory interviews had not been conducted in accordance with the Respondent’s policy;
 - (ii) There were delays caused by the Respondent sending correspondence to the wrong address and omitting to send to Unison required statements;
 - (iii) There was collaboration amongst the Respondent’s team to conspire with the ultimate objective of her dismissal;
 - (iv) Serious fraudulent accusations were made influencing the disciplinary process;
 - (v) Disproportionate action was taken by the Respondent when she followed instructions from the pharmacist in charge;
 - (vi) Covid restrictions means that she was unsupported throughout the disciplinary and appeal processes; despite being told that she was allowed a “work place colleague” the Respondent refused to allow her to communicate with any members of staff working for them at that time.

40. On 28 February 2023, EJ Lewis KC wrote to the parties [73-75]. The final paragraphs of that letter refer to the Claimant's application to amend to add a claim of unfair dismissal. He said that the application did not explain why the unfair dismissal claim was not made earlier and the Claimant was directed to provide an explanation by 13 March 2023.
41. On 10 March 2023 [page 76-83] the Claimant provided an amended/amplified version of the application submitted on 22 February 2023.
- 41.1 With regard to the reasons for the delay the Claimant adds the following;
Acas advice: *"In hindsight, we feel that had we have been advised that we could have applied for unfair dismissal earlier, then this would have been more favourable"*
- 41..2. With regard to the substance or grounds of a potential unfair dismissal claim, the Claimant adds the following:
- (i) destruction of documents by the Respondent during an investigation; and
 - (ii) alterations made to original statements following the disciplinary hearing.
42. Attached to the email of 10 March 2023 is a lengthy addendum [pages 79-83]. This is frankly difficult to follow but essentially the Claimant takes issue with the investigation and disciplinary process and the decision to dismiss.
43. On 27 March 2023, the Respondent wrote to the Tribunal objecting to the application to amend [pages 87-88]. In summary, the Respondent objects on the following grounds:
- 43.1 The Claim is substantially out of time. The Effective Date of Termination was 13 August 2021 and the first time it was raised as a potential claim was at the Preliminary Hearing on 23 January 2023.
- 43.2 The Claimant had adequate opportunity to present her claim within the statutory time limits:
- (i) The Claimant was legally represented during the disciplinary process and when her employment was terminated. In the letter from her solicitor date 13 July 221, it clearly sets out that an unfair dismissal claim was being considered. There is no reason why this was not included;
 - (ii) The Claimant also had advice/guidance from Acas;
 - (iii) The Claimant's personal circumstances did not prevent a claim being filed; notably, she was still able to pursue a claim for disability discrimination.
- 43.3 The grounds the Claimant is relying upon to support a claim of unfair dismissal are *"still not entirely clear"*
- 43.4 If allowed, it will extend the evidence that would be required and, given the passage of time, the Respondent would be placed at a significant disadvantage
- 43.5 The Claimant's claims for disability discrimination do not relate to the disciplinary/appeal process, only the investigatory meeting.
44. Also on 27 March 2023 the Respondent submitted an amended response [pages 89-95].

The law

Time Limits: discrimination claims- continuing act

45. S123(10)(a) Equality Act 2010 (“EqA”) provides that a discrimination claim must be presented to the Employment Tribunal within three months from the date of the act complained of subject to an extension for Acas early conciliation. A Tribunal can extend the time limit if it is “just and equitable” to do so (s123(1)(b) EqA).
46. S123(3) EqA provides that conduct extending over a period is to be treated as done at the end of that period and a failure to do something is to be treated as occurring when the person in question decided on it. S123(4) provides that in the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it.
47. The relevant case law is summarised in the EAT’s decision in **E v 1)X 2) L and 3) Z** UKEAT0079 and 0080/20. At para 13, the EAT said:
“13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue”

Amendments

48. The Tribunal has a general discretion to allow applications to amend,
49. In determining whether to allow an application to amend the claim, a Tribunal should bear in mind the Presidential Guidance General Case Management and the primary case authority of **Selkent Bus Company Ltd v Moore** [1996] ICR 836. Both the Presidential Guidance and the **Selkent** case direct that regard should be had to all the circumstances and, in particular, any injustice or hardship which would result from the amendment or the refusal to amend. Further guidance was given by HHJ Tayler in **Chaudry v Cerberus Security & Monitoring Services Ltd** [2022] EAT 172
50. The primary consideration is the balance of hardship that each party would suffer having regard to all the circumstances of the case, with particular factors being: the length of - and reasons for - the delay; the extent to which the cogency of the evidence is likely to be affected; the extent to which the opposing party has cooperated with any request for information; the promptness with which the Claimant acted when they knew of the facts giving rise to the cause of action; and the steps taken by the Claimant to obtain appropriate advice when they knew of the possibility of taking action.

51. It is only necessary to consider the question of time limits where the proposed amendment seeks to adduce a new complaint, as opposed to relabelling the existing claim (**Selkent and Foxtons Ltd v Ruwiel** EAT 0056/08). However, the Tribunal must still review all the circumstances including the relative balance of injustice, in deciding whether or not to allow the amendment.

Submissions

Time Limits: discrimination claims continuing act

52. Ms. Bowen provided written submissions but I will not rehearse these as she submitted early on in proceedings that that it should be left to the Tribunal at the final hearing to determine whether there was a continuing act and the Claimant agreed.

Claimant's application to add a claim of unfair dismissal

Respondent

53. Ms. Bowen made verbal submissions in addition to her written submissions; her submissions can be summarised as follows.
54. This is not a relabelling exercise as the Claimant is seeking to bring a fresh and entirely new unpleaded claim for unfair dismissal.
- 54.1 In **Chandhok v Tirkey** [2015] ICR 527, the EAT said:
"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with 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."
- 54.2 There is no causal link to the existing complaints and a claim of ordinary unfair dismissal under the Employment Rights Act 1996. Looking at the current list of issues [pages 96-100] there is no overlap in the decision to dismiss. Any complaints in relation to the disciplinary investigation are isolated and do not include a dismissal claim. There is no claim of a discriminatory dismissal on the list of issues.
55. The Claimant actively decided not to bring a claim for unfair dismissal on the ET1:
- 55.1 The Claimant engaged Leathes Prior Solicitors as early as July 2021 (if not before) and prior to that, TU representatives (UNISON) had been engaged. On 13 July 2021, Leathes Prior told the Respondent that the Claimant was considering an unfair dismissal claim (if subsequently dismissed). The Claimant was dismissed just one month later and at that time was on notice of - and in receipt of advice about - the potential for bringing an unfair dismissal claim. Thereafter in meetings dealing with her grievance (there was no appeal against dismissal) she referred to solicitors dealing with matters for her [pages 145 and 155].
- 55.2 ACAS mentioned unfair dismissal on 30 September 2021 [page 156]. Therefore it was clearly on the Claimant's radar and under consideration in September 2021.

- 55.3 The Claimant decided not to appeal the decision to dismiss and this is supportive of an active decision not to pursue the issue.
- 55.4 Ms. Collins informed Leathes Prior Solicitors on 12 January 2022 that she had actively decided not to bring an unfair dismissal claim [page159])but was doubting her decision, *“In hindsight, we should have gone for unfair dismissal...”*. However, even then an application was not made for over 13 months.
- 55.5 A positive decision was made not to bring this claim in time and that must actively support the submission that it is not pleaded in the ET1; this is not re-labelling and is a new claim, it will involve consideration of fresh factual and legal issues and is out of time. The amendment application itself also illustrates the extent of the significant change of basis of claim and the extensive nature of the issues and evidence that the Claimant now seeks to add to these proceedings [pages 71-2 and 77-83].
56. An unfair dismissal claim could and ought to have been brought in time and it is averred that this should weigh heavily against granting the amendment.
- 56.1 The explanation given by Ms. Collins in her email to Leathes Prior on 12 January 2022 is not consistent with ACAS telling the Claimant that she could not bring such a claim. Before EJ Lewis Ms. Collins stated that she was advised it was too late to bring a claim in the Employment Tribunal when she issued the claim [page 59, para 8]. EJ Lewis observed, *“On its face that is a surprising explanation as the claim was put in within three months of the dismissal...”* [page 59, para 8].
- 56.2 In the written application the Claimant states Acas gave that advice but it is unclear in the application when that advice was given. At the hearing today, Ms. Collins clarified that Acas did not in fact advise a claim was out of time at the time the claim was presented.
- 56.3 The Claimant had access to specialist legal advice prior to and after issue.
- 56.4 No medical evidence has been provided to corroborate the Claimant’s health issues.
- 56.5 On the Claimant’s own case, she was aware on 12 January 2022 that with hindsight she should have made a claim of unfair dismissal but then waited 13 months to do so.
57. If the Claimant is allowed to add a claim of unfair dismissal, this will be highly prejudicial to the Respondent:
- 57.1 The Respondent has already had to present two defences and has experienced delay and the cost of this additional preliminary hearing. Adding an unfair dismissal claim is likely to result in a postponement of the final merits hearing given the wide ranging changes to the existing basis of claim.
- 57.2 In verbal submissions, Ms. Bowen added that if an unfair dismissal is added, the final hearing (listed in August 2024) will probably need to be relisted which will lengthen the time between the date of dismissal and the date the witnesses give evidence. Memories will fade; some of the complaints go back to 2021.
- 57.3 Further witnesses will be required.
- 57.4 There will be more paperwork.
- 57.5 The application is still unclear despite the Claimant having had multiple opportunities to set out her claim and it would be a breach of Rule 2 to grant the application.

Claimant

58. Ms Collins made brief verbal submissions on behalf of the Claimant as follows.
59. She accepts that the dismissal and presentation of the claim was a long time ago but points out that 11 months of the delay was down to the Tribunal and during that period she believed that the Respondent had not filed a response and that was the end of the matter.
60. She did not write to the Tribunal to add a claim of unfair dismissal because Acas told her they were out of time. She accepts that this was not correct and says this was ignorance on her part.
61. With regard to the additional evidence that will be required, she says the Respondent already has original statements from people involved and this should be enough to remind them of what was said at the time. All of the Respondent's witnesses work for them and under one roof.
62. She says the Claimant did not have legal representation throughout and Unison provided little assistance because the Respondent sent documents to the wrong address.

Conclusions

63. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.

Time Limits: discrimination claims- continuing act

64. Having considered the pleadings, the documents in the bundle to which I was referred and the submissions of the parties, I have concluded that determination of whether all or any of the Claimant's claim are out of time is a matter that should be left to determined by the full tribunal at the final hearing.
- 64.1 I have accepted (for the purposes of this Preliminary Hearing) that the Claimant's complaints regarding alleged failure to make reasonable adjustments continued until her dismissal (with the exception of providing lower shelves). This is sufficient to establish the possibility that there was a course of conduct, or continuing state of affairs up to the date of dismissal.
- 64.2 This is a case where there may be no appreciable saving of preparation or hearing time if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints.
- 64.3 The discrimination claims are acutely fact-sensitivity and should only be definitively determined in light of all the evidence.

Amendment application: add claim of unfair dismissal

65. At the Preliminary Hearing before me, Ms. Collins said the basis of the application was to relabel the existing pleaded facts in the ET1 and addendum, rather than rely on facts and allegations subsequently provided. It is open to the Claimant to effectively amend the ambit of the application in this way and I have considered the application on this basis and therefore limited my consideration of the factual allegations to those referred to in the ET1 and addendum. Whilst this is a departure

from the original amendment application, it is permissible particularly as it reduces rather than expands the application.

66. I have concluded that this a relabelling exercise in the sense that it is the addition of a label of “unfair dismissal” to facts already described:
- 66.1 In section 15 of the ET1 under the heading “*Additional Information*”, there is reference to the disciplinary process and It is clear from this that the Claimant was unhappy with the disciplinary process (particularly the investigation) and the outcome (her dismissal); the obvious and possibly only way for her to “*continue to challenge these statements*” (given that the time for an internal appeal had passed) was to make a claim for unfair dismissal.
- 66.2 In the addendum to the ET1 the Claimant refers to (and takes issue with) what was said at the disciplinary investigatory meeting with Owen Sephton and statements made by Alex Taylor and Owen Sephton. Again, this demonstrates that the Claimant was unhappy with the disciplinary process.
- 66.3 There is therefore a link between the facts described in the claim form and the Addendum and a complaint of unfair dismissal. The facts set out in the claim form and Addendum are sufficient to found complaints of both disability discrimination and unfair dismissal.
67. As this is a relabelling exercise it is not necessary to consider whether the complaint is out of time. However I have considered the timing of the amendment application itself:
- 67.1 A deliberate and conscious decision was made not to bring a claim for unfair dismissal at the outset, despite advice and assistance from solicitors as early as July 2021 (if not before) and prior to that, UNISON. However, although this was an arguably unwise decision, it does not of itself preclude the Claimant from seeking to make an application to amend and is just one factor to be taken into account in determining the merits of the application to amend.
- 67.2 The claim was presented on 11 November 2021 and it is regrettable that Ms. Collins and the Claimant did not make this application to amend until 22 February 2023. Whilst there was significant delay on the part of the Tribunal in sending the response to the Claimant this does not entirely excuse the delay. However, I have accepted Ms. Collins evidence that she received advice from Acas that led her to believe that it was too late to make an application to amend to add a claim for unfair dismissal and that it was only at the Preliminary Hearing on 23 January 2023 that she became aware that it was possible to make such an application. This application was then made within the time specified by EJ Lewis.
- 67.3 Any prejudice suffered by the Respondent a result of the delay in making this application can be addressed by way of a costs application (if so advised) at the final hearing.
68. I have concluded that the Claimant would suffer the greater prejudice and hardship if not allowed to amend her claim:
- 68.1 I accept that the Respondent has incurred the cost of this additional preliminary hearing but this would have occurred in any event to consider whether some or all of the Claimant’s claims are out of time.
- 68.2 I also accept that the Respondent may incur further costs in responding to an unfair dismissal claim, that further witnesses will be required and more paperwork. But

again this can potentially be addressed by way of a costs application (if so advised) at the final hearing.

- 68.3 Ms. Bowen submits that by adding an unfair dismissal claim, the final merits hearing may be postponed. which will lengthen the time between the date of dismissal and the date the witnesses give evidence. However, I have liaised with listing and two extra days have now been added, 8th and 9th August 2024. Therefore the cogency of evidence will not be affected.
- 68.4 The prejudice the Claimant will suffer if not allowed to amend her claim is perhaps obvious: she will not be denied the opportunity to pursue such a claim and possibly obtain a remedy.
69. For all these reasons, I have allowed the Claimant to amend her claim to add a claim of unfair dismissal.
70. A further case management hearing will take place on 28 July 2023 at 10.00am for 3 hours; to be conducted by video (CVP). The purposes of that hearing will be to amend the List of Issues in light of the unfair dismissal claim; consider whether and to what extent further particulars are required from the Claimant in respect of her unfair dismissal claim; consideration of the length/timing of the final hearing; leave for the Respondent to submit an amended response; and general case management. With regard to any further particulars of claim, the Claimant is reminded that she has only been given leave to relabel the facts and allegations set out in the ET1 and Addendum; therefore any particulars she may be ordered to provide must only be by reference to these documents. This will be discussed at the next hearing.

Employment Judge H. Mason

Date: 26 June 2023

Sent to the parties on:

27 June 2023

For the Tribunal Office: