EMPLOYMENT TRIBUNALS

Claimant: **Yew Sun Soo**

Respondents: **PricewaterhouseCoopers LLP (1)**
Pricewaterhouse Coopers Services Ltd (2)

RECORD OF A PRELIMINARY HEARING

Heard at: Southampton **On:** 26 and 27th of June 2023

Before: Employment Judge Dawson

Appearances
For the claimant: In person
For the respondent: Mr Anderson, counsel

CASE MANAGEMENT ORDERS AND JUDGMENT

1) By consent, the claimant's application to amend his claim form to add a claim of harassment on the grounds that the respondent failed to sign off 200 days PWE/TWE, or failed to do so quickly enough, is granted.
2) Save as aforesaid, the claimant's application to amend his claim form to add claims of harassment, victimisation and failure to make reasonable adjustments is dismissed.
3) The claimant's claims pursued under the Equality Act 2010 are dismissed on the basis that they were not presented within three months starting with the date of the act to which they relate or such other period as the tribunal considers just and equitable.

REASONS

1. References to a respondent below should be taken as a reference to both respondents.

2. By a claim form issued on 20 May 2022 the claimant presented claims to the employment tribunal of unfair dismissal and discrimination on the grounds of race, disability, sexual orientation and religion or belief. He also claimed a redundancy payment and other payments and damages for psychiatric injury.

3. The matter came before a judge at a preliminary hearing which was held by telephone on 23 February 2023. Following the hearing a document headed "Record of a Preliminary Hearing" was sent to the parties as well as a withdrawal judgment. The withdrawal judgment recorded that the claims for race discrimination, sexual orientation discrimination and religion or belief discrimination were dismissed on withdrawal by the claimant.

4. The Record of the Preliminary Hearing helpfully set out a summary of the claim as follows:

> 14 After much discussion the claim can be succinctly set out thus:
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> 14.1 The Claimant joined in 2010 as an Associate. He was training to become qualified under ICEAW, as a Senior Associate.
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> 14.2 To do so he needed to pass exams, and to do 450 approved days of work. These have to be signed off by someone senior.
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> 14.3 Although he had some issues, the Claimant eventually passed the exams.
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> 14.4 He had much sickness absence. In 2013, 2016 and in 2019 he made requests for days to be approved. This was not done in 2013 or 2016, but in 2019 Anna Blackwell said she would sign off 200 days.
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> 14.5 She failed to do so.
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> 14.6 Eventually the 200 days were signed off, on or about 25 November 2022 by Trevor Smith, a "people manager". He does not say that he was due any more days than that and had not accumulated any more days in the two years since 2019 because of illness absence.
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> 14.7 He went off sick and was called to disciplinary meetings, and on 14 February 2022 he resigned saying that this was a breach of mutual trust and confidence.
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> 14.8 He says that the way the signing off of his training days was handled was disability discrimination. He says that not signing off the days from 2019 on was a continuing act, as he says the Respondents knew that he continued to want to have them signed off.
>
> 14.9 He does not say that he was due more days than were actually signed off.

5. The 200 days which the claimant wanted to be signed off, and were signed off eventually, are referred to as days of Practical Work Experience (PWE) or Technical Work Experience (TWE). The claimant used the abbreviation TWE in his claim form and I will do likewise.

6. The claim was listed for hearing today in order to deal with the following

    a. whether all or part of the disability discrimination claim is out of time;

    b. if so whether it is just and equitable to extend time;

    c. if there remains an issue about whether the Claimant is disabled as claimed, from when, and if so when the Respondent knew or should have known of it the Tribunal will decide that issue also.

7. In respect of issue a) and b) above, the Record of the Preliminary Hearing does not expressly state whether the question of time is to be determined as a trial of a preliminary issue or an application to strike out the claim, but counsel for the respondent submits that it is most naturally to be read as listing the matter as a trial of a preliminary issue. I agree with counsel in that respect and the claimant did not suggest otherwise.

8. By email dated 9 June 2023, the respondent wrote to the tribunal accepting that the claimant was disabled at all material times by reason of the five conditions he relies upon, either singly or cumulatively. Counsel for the respondent confirmed at this hearing that its position remained the same.

9. By letter to the tribunal dated 9 May 2023, the claimant applied to amend his claim. He sought to add three allegations of harassment, two allegations of victimisation and an allegation of failing to make reasonable adjustments.

10. It was agreed with the parties that it was necessary to decide the application to amend the claim form before determining the question of whether the claim was out of time. Although the decision about amendment is a case management order, I have included it within the judgment set out above (and decided it at the same time as the question of whether the disability claim was presented in time) since the question of amendment overlaps with the question of whether the claim should be dismissed out because it was not presented within time.

11. I heard from the claimant and from Ms Thayil for the respondent and treated their evidence as being relevant to both decisions I had to make.

12. The claimant told me that he did not need any adjustments making to the hearing process but I invited him, and anyone else in the room, to let me know if they needed a break or if they did not understand anything.

13. Approximately four questions into cross examination, the claimant stated that he felt victimised and would not answer any more questions. When I asked him why he was feeling victimised he told me that an email (which was in his bundle) about which he was being questioned might not be true. I advised the claimant that if he did not wish to answer any more questions then I would not force him to do so but in my judgment there was nothing wrong with the questions which he had been asked. I explained to him the nature of an adversarial process and that the respondent was entitled to test his evidence just as he would be entitled to test the evidence of Ms Thayil when she gave evidence. I explained to the claimant that if he did not answer questions I would take that into account in forming my view on the evidence. The claimant then said that Mr Anderson was causing him distress but I explained that I did not consider that Mr Anderson had done nothing

wrong. I explained to the claimant that if he objected to any particular question, he could ask me to make a ruling on it. I asked the claimant if he wanted a break but he confirmed that he did not.

14. Cross examination then continued and the claimant answered further questions. During Mr Anderson's closing submissions the claimant sought to interrupt and behaved in a somewhat distracting manner by shaking his head and sighing loudly. I explained to the claimant that he would have the last word but it was important for everyone to listen to the closing submissions in silence. The claimant continued to shake his head.

15. I record this behaviour mainly in order to make clear that I have not taken account of the claimant's behaviour in the way I have resolved the issues. For people representing themselves litigation is difficult, perhaps all the more so if they are disabled. People react to stressful situations in different ways and in reaching my conclusions I have sought to focus only on the legal and factual issues which arise for determination and the contemporaneous documents that shed light on those issues.

16. The claimant's evidence included the following matters:

    a. He agreed that he believed he had proof that he was being discriminated against since April 2019 (having regard to page 4 of his bundle) and said that in April 2019 he believed that the failure to sign off the 200 days was an act of discrimination. He said that he had sent the letter dated 22 April 2019 (which starts at page 2 of the claimant's bundle) to make the respondent aware of the discrimination but, he said, matters stayed the same.

    b. That claimant agreed that the letter of 22 April 2019 showed that he had been doing his own legal research; it referred to Court of Appeal decisions, amongst other things.

    c. The claimant said that he first spoke to lawyers in 2019 when he was drafting his case but he was "waiting for the right moment to strike".

    d. The claimant said that he did not bring a claim in April 2019 because he thought that things would work out fine; the respondent had agreed in April 2019 to sign off the hours. He also said that he did not want to rock the boat because he was a trainee.

17. The claimant also told me during the course of the hearing that he was making the application to amend now in cases other claims were struck out.

18. In her evidence Ms Thayil, Senior Employee Relations Manager within the respondent stated that the respondent had a policy of destroying records after seven years. She also told me that she began employment with the respondent following the resignation of the claimant and there are no longer any Employee Relations staff member within her team who had previous interactions with the claimant in connection with the matters forming part of his claim. She told me that there were no employee relations staff within her team who could give an account of the period prior to 2020. Ms Blackman, who the claimant says agreed to sign off 200 days in April 2019, retired from the firm in April 2021.

19. Ms Thayil also told me that there had been no thorough search to identify which (if any) relevant documents were missing and no contact had been made with Ms

Blackman to establish whether she would be willing to give evidence on behalf of the respondent and to what extent she remembered the relevant events.

The Application to Amend

The law

20. In considering the application to amend the starting point is the overriding objective which requires:

> 2. 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—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
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> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
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> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
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> (e) saving expense.
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> 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.

21. It is also important to note the Presidential Guidance on General Case Management and in particular Guidance Note 1. The guidance note requires that tribunals must carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the application.

22. In *Chandhok v Tirkey* [2015] IRLR 195, the Employment Appeal Tribunal held "I do not think that the case should have been presented to him in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. 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."

23. In *McLeary v One Housing Group Ltd* UKEAT/0124/18/LA, HHJ Auerbach said:-

> "I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management hearing, was simply to clarify the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgment, it shouts out from the contents of the Particulars of Claim

that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining or trust and confidence that has driven an employee to resign, and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought."

24. I have considered *Selkent v Moore [1996] ICR 836, 843F* in which the EAT stated "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 for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

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

    (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 Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

25. The effect of *Selkent* has been considered in *Vaughan v Modality Partnership* UKEAT/0147/20/BA, where HHJ Tayler stated:

    20. In *Abercrombie* Underhill LJ went on to state this important consideration, at paragraph 48: "Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal 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 inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions

26. In *Galilee v The Commissioner of Police of the Metropolis* UKEAT/0207/16/RN HHJ Hand QC held:

> [109] From the above, my conclusions are:
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> a. amendments to pleadings in the ET, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the ET;
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> b. in so far as the reasoning in the cases of Rawson, Newsquest and Amey Services must be based on the "relation back" doctrine, I regard them as wrongly decided (on that point) and do not feel obliged to follow them;
>
> c. although EJ Foxwell had considered other factors as well, I regard his refusal of permission to amend as having turned on the doctrine of "relation back", which was a critical error of law and not simply just one of a number of factors considered in "the generous ambit within which reasonable disagreement is possible";
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> d. the guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered;
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> e. in so far as Rawson, Newsquest and Amey Services state the contrary I regard them as overstating the position and as being wrongly decided and do not feel obliged to follow them;
>
> f. the Opinion of the Inner House of the Court of Session in *Kaur* should be applied to cases involving consideration of whether it would be "'just and equitable" to grant an extension;
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> g. whilst in some cases it may be possible without hearing evidence to conclude that no "prima facie" case of a "continuing act" or for an extension on "just and equitable" grounds can arise from the pleadings, in many cases, often, but not necessarily confined to, discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation;
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> h. as indicated in the Opinion in *Kaur* sometimes it may be necessary to hear a significant amount of evidence and sometimes it may not be possible or sensible to deal with the matter at a

> Preliminary Hearing and decisions may need to be postponed until all the evidence has been heard;
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> i. in such cases permission to amend can precede decisions as to whether any new claim raised by the amendment is out of time; in other cases a decision on whether to grant permission to amend can be postponed;
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> j. here EJ Foxwell had refused permission to amend without hearing any evidence on his evaluation of the likelihood of any subsequent extension of time on the grounds that it was "'just and equitable" and without resolving the issue as to whether or not there was a "continuing act" (save that if the doctrine of judicial immunity applied that would eliminate the in time acts from consideration and then there could be no series of acts, the last of which was in time) and he erred in law in both respects.

27. In *Gillett v Bridge 86 Limited* UKEAT/0051/17/DM Soole J held

> [26] In addition, those statements were not already referred to at para 15 of the existing ET3. Nor do I accept his submission that an Employment Judge considering an application to amend can only take account of the merits if she considers that the proposed new claim is bound to fail as a matter of law. Whether at the initial paper stage or at a hearing with representation from the parties, I consider that the Employment Tribunal must be entitled to consider whether the proposed claim has reasonable prospects of success. If a presented claim could be struck out on that basis, it would be inconsistent and anomalous if an application to amend could not be refused on the same basis. Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. *Selkent* refers to "*all the circumstances*", and *Olayemi* is an example where the prospects of success "*did not appear good*" and were taken into account.
>
> [27] Furthermore, and consistent with the Employment Tribunal's powers under r 39, I can see no reason why the Tribunal could not require a Deposit Order as a condition of permission to add a claim that it considers to have "little reasonable prospects of success". If and to the extent that HHJ McMullen QC's observations in *Woodhouse* support a bar against the consideration of merits, save where the proposed new claim is "obviously hopeless", I respectfully disagree.
>
> [28] All that said, I find it difficult to concede a case where a pessimistic view on merits falling short of "no reasonable prospects of success" could provide support for the refusal of an amendment application that has been brought in time, for if the Claimant had taken the alternative course of issuing a fresh claim within the relevant time limit the Employment Tribunal would not be entitled to strike out the claim. At most there could be a Deposit Order under r 39. If the practice on amendment were otherwise, a Claimant would have to take the alternative course - inconvenient and costly for the parties

and the Tribunal - of issuing a fresh claim and applying to have it managed and heard with the existing claim.

28. In *Herry v Dudley* UKEAT/0170/17/LA Slade J stated "In my judgment if a proposed claim is in the words of HH Judge McMullen QC "obviously hopeless" that is a consideration which affects the assessment of the injustice caused to a Claimant by not being able to pursue it. Nothing is lost by being unable to pursue a claim which cannot succeed"

The Claim that has Been Presented

29. The starting point for considering any application to amend the claim form must be to understand what claim has been presented within the claim form.

30. The respondent argues that it was made clear at the last case management hearing that the only claim of disability discrimination which was being brought was a disability discrimination claim that the failure to sign off 200 training days from 2019 was an act of direct discrimination.

31. A separate claim of constructive unfair dismissal was identified based on the claimant being brought to a disciplinary hearing for unauthorised absence.

32. This point caused me a certain amount of concern. If one looks to box 8.2 of the claim form under the subheading, Discrimination, the claim form refers to constructive dismissal. I raised with the parties, therefore, whether the claimant was, in reality, saying that the repudiatory breaches of contract which he relies upon for his constructive dismissal claim include the discriminatory act of not signing off his training days. If so, the claimant's case might be that the constructive dismissal amounted to an act of discrimination.

33. Counsel for the respondent argued that is not the way the claim had been put at the last hearing when the issues were identified and points out that had the claimant been arguing that, the matter would never have been listed for a determination of whether the discrimination claim was out of time. There is no dispute that the constructive dismissal claim was in time.

34. I asked the claimant for his understanding. He confirmed that at the end of the hearing on the last occasion he understood that the only disability discrimination claim that he was relying upon was the failure to deal with the signing off and that his resignation was because he had been called to disciplinary meetings about unauthorised absence. He was not saying that being called to a meeting about unauthorised absence was connected with his disability.

35. However he also confirmed (when the matter was raised by me) that in his witness statement his case is that he resigned because he was refused retrospective leave to raise a grievance. I asked him whether he was saying that a refusal to grant retrospective leave was an act of disability discrimination and he said that he thought it was because he required leave because he had been upset when, previously, a without prejudice meeting had taken place with him in respect of his disability. That is not a claim which is pleaded in the claim form, nor does it appear in the application to amend. That is not a case which the claimant has presented to the tribunal.

36. Thus, upon analysis, both the claimant and the respondent agree that when the claims were identified at the last case management hearing, the only disability discrimination claim which the claimant was pursuing was that the respondent

had not signed off his 200 days' TWE since 2019. Not only is that the parties' view but it is consistent with the fact that the matter had been listed for trial as a preliminary issue in relation to the disability discrimination claim and also the way in which the judge recorded the respondent's submission at paragraph 15 when he stated "the claimant complains of nothing after the 200 days were signed off, so they say that the whole disability discrimination claim is out of time…"

37. Thus, applying the guidance in *McLeary*, the tribunal did clarify what disability discrimination claim the claimant was bringing. The claimant clarified that he was only bringing a claim based on the failure to sign off the 200 days and was not bringing an allegation that his claim of constructive dismissal was an act of disability discrimination. I do not think I should encourage the claimant go behind that, or indeed go behind it of my own motion. The tribunal system would be unworkable if every subsequent judge could unpick the work of a previous judge who has identified the claims.

38. Moreover, upon reflection, it might well be said that there is a logical inconsistency in the argument which I raised, namely whether it might be said that the repudiatory breaches of contract which the claimant relies upon for his constructive dismissal claim include the discriminatory act of not signing off his training days. By the time the claimant resigned in February 2022 the respondent *had* signed off the 200 days TWE and had done so the previous November (or December as argued by the claimant in the course of his evidence).

39. Against that background I determine the application for amendment. I discussed the application with the claimant in some detail to ensure I understood the applications he was seeking to make.

Harassment

40. The first allegation of harassment is the failure to address the request for sign off of TWE days. The respondent accepts that this is a case of relabelling and does not object to the amendment in this respect and it is allowed, although it will still be necessary to consider whether the claim was presented in time.

41. The second allegation is that it was an act of harassment to involve occupational health in the claimant's case, which the claimant says, amounted to blaming the victim.

42. The respondent objects to the amendment in respect of occupational health because, it says, the allegation is wholly unparticularised, it has no reasonable prospect of success because the respondent would be failing to fulfil its duty if it did not refer somebody who had a disability to occupational health, there is no valid explanation as to why the claim was not advanced before today when the claimant has had lawyers since 2019 and the explanation which is given (in case other claims are struck out) is insufficient.

43. I consider that all of those submissions are well-founded.

44. The amendment which the claimant is seeking to make is of entirely new factual allegations which considerably change the basis of the existing claim.

45. Given that the doctrine of relation back does not apply in the employment tribunal, the claim is significantly out of time.

46. The claimant has given no satisfactory explanation as to why he has not sought to make this claim until May 2023. It is necessary to take into account that the

trial is listed for November 2023, this claim is already somewhat old and the respondent has already been required to attend a case management hearing where the claimant was asked to identify his claims. Rather than identifying this claim at that case management hearing, the claimant did not set out this application to amend until 9 May 2023.

47. Even now the claim is not clear and the lack of particularisation is bound to cause prejudice to the respondent. If the application to amend is allowed it will be necessary to spend a considerable amount of time particularising the claim, undoubtedly the respondent will need to amend its response and carry out further enquiry which it has not been on notice of until relatively shortly before the trial. Although disclosure and exchange of witness statements has not yet taken place, those will have to take place shortly given the hearing date and the respondent will suddenly be faced with a case which is significantly different to the one it has anticipated dealing with for the last year.

48. In addition to those matters, I note that when I asked the claimant why it was to his detriment to be referred to occupational health, he said that was because the process was made longer and there was bureaucracy. However it is not clear that the process was made longer, the claimant was off work due to illness; on the face of matters, it would be reasonable for an employer to want to understand the circumstances of an employee's illness. Given that this is a claim of harassment it is difficult to see, without a clear explanation, why a referral to occupational health would have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This is not a factor I place much reliance upon since I cannot say that (leaving aside the question of time) the claim has no reasonable prospect of success, but it is certainly not a strong claim.

49. I consider there to be no real prejudice to the claimant if the amendment is not allowed because the claimant could have bought the claim within time if he had wanted to, I repeat that he has had the benefit of legal advice since 2019.

50. I consider that the prejudice to the respondent in having to meet this claim would outweigh any prejudice to the claimant and in all the circumstances it is not appropriate for the claimant to be given permission to amend his claim form to add this claim.

51. The next application is to amend the claim form to add, as an allegation of harassment, that the claimant was not given a stable support network after returning to work in the various "spurs 2016, 2019, 2020, and 2021".

52. Most of the points which I have set out above apply equally to this application. Given that the claimant says that the respondent should have put in a stable support network in 2016, the claim is very significantly out of time. Again there is no good explanation as to why the claim was not brought within time. Again the claim is not particularised, which will prejudice the respondent, it is not clear what support network should have been put in place for the claimant or even whether he ever asked for one. If this application is to be permitted the respondent will have to go back to 2016 and it is inevitable that over that period recollections will have dimmed.

53. For the same reasons which I have given in respect of the application arising out of the involvement of Occupational Health, it is not appropriate for the claimant to be given permission to amend his claim form in respect of this claim.

Victimisation

54. In respect of the claim of victimisation the claimant was unable to point to any protected act which he said he had done. I asked about his statement that he raised an ethical issue in the workplace in 2016 but the claimant told me that was that was nothing to do with discrimination or the Equality Act 2010. The claimant was unable to say whether the ethical concern he raised related to any kind of illegality at all and he did not tell me what the ethical concern that he had raised was. The allegation of unfavourable treatment in this respect is that there was not much follow-up after he had raised his ethical concern.

55. Again the allegation is vague and without a protected act it is bound to fail.

56. Again, the same reasons apply as to why the application should not be permitted as I have already given in relation to previous applications. In addition, however, it can be said that this claim is truly hopeless because the claimant did not do a protected act.

57. The respondent should not be put to the prejudice of having to deal with matters from 2016 when the allegation is only raised in May 2023 and could have been raised much earlier.

58. It is not in the interests of justice to allow this amendment.

Reasonable adjustments

59. The final application to amend is in relation to an allegation of failing to make reasonable adjustments. It is not clear what the provision criteria or practice is that the claimant says put him at a disadvantage because of his disability. He talks about not being provided with adequate emotional and mental health support but links that to the failure to sign off the 200 day's TWE. It is said that the respondent should have been more responsive to the claimant's request for TWE sign off but did nothing till November 2021.

60. It is difficult to ascertain any provision, criterion or practice in respect of this claim. There is no suggestion that the respondent had a policy of delaying the sign off of TWE days, and although the respondent almost certainly had a policy of requiring employees to do TWE days before they would be signed off, the claimant is not suggesting that policy put him at a disadvantage. The claimant's complaint is about the failure to sign off the TWE days before November 2021.

61. The claimant is able to advance his claim in this respect as a direct discrimination claim and, subject to the question of time, I consider that, without requiring amendment of the pleadings, it could also be put on the basis of a claim of discrimination because of something arising from disability.

62. I accept that this claim is largely a matter of relabelling, but the claimant still needs to plead additional facts such as the provision, criterion or practice which he is relying upon. His failure to do so, means that even now the respondent cannot know the case it has to meet. In those circumstances to allow the amendment would be prejudicial to the respondent and that prejudice outweighs any prejudice to the claimant, who could have presented the claim in time and more clearly.

63. Thus the application for amendment is refused.

Determination of the Preliminary Issue of Whether the Claim was Presented in Time

64. Section 123 Equality Act 2010 provides as follows

> (1) [Subject to [sections 140A and 140B],] proceedings on a complaint within section 120 may not be brought after the end of—
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> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
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> (b) such other period as the employment tribunal thinks just and equitable.
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> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

65. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* UKEAT/0305/13 (18 February 2014, unreported), the EAT stated "Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was." (para 52).

66. In *Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2010] IRLR 327, Sedley LJ stated : 'there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised' (para 31). In commenting on the case of *Robertson v Bexley Community Centre* [2003] IRLR 434, Wall LJ stated "it is, in essence, an elegant repetition of well-established principles relating to the exercise of a judicial discretion. What the case does, in my judgment, is to emphasise the wide discretion which the ET has - see the dictum of Gibson LJ cited above - and articulate the limited basis upon which the EAT and the court can interfere. Similarly, *DCA v Jones* [2008] IRLR

128 approves the Keeble guidelines, but emphasises that they are fact/case specific - see per Pill LJ at paragraph 50" (para 25).

67. In *Olufunso Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 , Underhill LJ stated "It will be seen, therefore, that Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy. Of course the two discretions are, in Holland J's phrase, "not dissimilar", so it is unsurprising that most of the factors mentioned in section 33 may be relevant also, though to varying degrees, in the context of a discrimination claim; and I do not doubt that many tribunals over the years have found Keeble helpful. But rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may also occur where a tribunal refers to a genuinely relevant factor but uses inappropriate Keeble-derived language (as occurred in the present case - see para. 31 above). The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

68. Laing J drew attention in *Miller v Ministry of Justice* [2016] UKEAT 0003/15/LA, to the two types of prejudice which a respondent may suffer if the limitation period is extended. The first is the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the second is the 'forensic prejudice' which may be suffered if the limitation period is extended by many months or years, caused by such things as fading memories, loss of documents and losing touch with witnesses (para 12). If there is forensic prejudice, this will be 'crucially relevant' in the exercise of the discretion, telling against an extension of time, and it may well be decisive. However, the converse does not follow. If there is no forensic prejudice to the respondent, that is (a) not decisive in favour of an extension, and (b) depending on the tribunal's assessment of the facts, may well not be relevant at all; it will depend on the way the tribunal sees the facts (para 13).

When did Time start to Run

69. Before I can determine whether the claim was out of time it is necessary to be clear as to when the cause of action arose. The claimant says that despite there being an agreement in April 2019 that his 200 days' work would be signed off, that was not actioned until December 2021.

70. This is not a case of conduct extending over a period. This is a case where the respondent has omitted to do what, on the claimant's case, it ought to have done. It omitted to do that in April 2019 or shortly thereafter. That is the claimant's case.

71. It is right to say, however, that although the respondent failed to do what the claimant says it should have done in April 2019, it did not do any act inconsistent with signing the days off. It did not tell ICAEW that it refused to sign off the claimant, nor did it tell the claimant that it would not do so. It did not commence any internal proceedings based on the failure by the claimant to be signed off.

72. Thus, the question for the tribunal is when the respondent might reasonably have been expected to do the act of signing off. The answer to this is given by the claimant himself. It is April 2019. That is the time when the respondent said it would sign off the dates but, for whatever reason, did not do so. It would be reasonable to give the respondent a period of time to get round to doing that which it had promised, but in the circumstances that period would not have exceeded three months. Thus by the end of July 2019 at the latest the respondent would have reasonably been expected to sign off the 200 day's TWE.

73. Whether the claim is brought as a claim of harassment, or direct disability discrimination or something arising from disability, time started to run from the end of July 2019.

Expiration of the primary time-limit

74. Thus I consider that the primary three month time limit for the bringing of proceedings would have expired by the end of November 2019 at the latest (allowing any extra days for early conciliation).

75. In fact, the claim form was not presented until 20 May 2022 - a very considerable period out of time when one considers the deliberately short period which Parliament has allowed for presenting discrimination claims.

Was the Claimant presented within Such Period as the Tribunal thinks Just and Equitable

76. The claimant gave slightly contradictory explanations for the delay. He said that he thought things would be fine that the respondent would sign the days off. He also said that he was working under protest but still trusted his employers at that point. I accept that evidence as being true but the end of July 2019, at the latest, the claimant should have realised that his trust was being misplaced. The respondent had not signed off the days.

77. The claimant also indicated that he did not want to rock the boat because he was a trainee. Whilst that is understandable, many employees wish to preserve their working relationship with their employer but that, of itself, is not a reason for failing to issue proceedings.

78. The claimant also said that a draft case had been made with his lawyers since 2019 and he was waiting for the right moment to strike. I am willing to accept that evidence as being honest but it does not give rise to a good reason for failing to issue proceedings.

79. Thus I do not consider that the claimant has advanced a satisfactory reason for the delay, especially in circumstances where the delay is very long.

80. I accept, to some extent, the respondent's submission that it is likely that if it has to go back to 2019 in order to defend the claim, witness recollections will be dimmed and it is not unlikely that some documents will be lost. However, the respondent's evidence in this respect is not particularly compelling in

circumstances where no enquiry has been made of Ms Blackman and no search has been made for documents.

81. Although there is obviously prejudice to the claimant in this case if time is not extended, that prejudice is mitigated by the fact that the claimant could easily have brought the claim within time and had the relevant knowledge to do so. The claimant chose to wait until he had resigned from the respondent to bring these proceedings. Although that was a course open to him, the consequence is that some claims might be out of time.

82. My primary reason for considering that the claim was not presented within such time as is just and equitable, is the combination of the length of the delay and the fact that the claimant has no good reason for the delay given that he had legal advice as far back as 2019. The prejudice to the respondent is also a factor I take into account, although I am not persuaded that prejudice is particularly substantial.

83. For those reasons I do not consider the claim was presented within three months or such period as I consider equitable and the claim of discrimination is dismissed.

84. I observe that had the claimant's application to amend his claim form to assert that there was a failure to make reasonable adjustments in respect of signing off the TWE days been successful, such a claim would also have been out of time since time would have started to run at the same point.

85. The claim of unfair dismissal will go forward.

Post script

86. After this decision had been delivered and the hearing moved on to case manage the claim of unfair dismissal, the claimant sought to amend his claim of unfair dismissal to assert that there was an act of repudiatory breach of contract when the respondent delayed in signing off the TWE days. That application was dealt with separately and the decision in that respect is set out in a separate case management order.

Employment Judge Dawson
Date 7 June 2023

Judgment sent to the Parties: 18 July 2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.