EMPLOYMENT TRIBUNALS

Claimant: Mr MA Ghani

Respondent: NHS South, Central and West Commissioning Support Unit

Heard at: **Bristol (by video – CVP)** **On:** **31 July 2023**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Mr B Randle, counsel

JUDGMENT

The allegations contained within the Case Summary of 8 October 2022 at paragraphs 2.2.11 and 3.1.11 are dismissed as relating to discussions which took place on a without prejudice basis and all associated evidence will be inadmissible at the final hearing of the matter.

REASONS

1. Background

1.1 This hearing had been listed at the Case Management Preliminary Hearing which took place on 18 July 2023. It was listed to consider;

1.1.1 The admissibility of certain documents and/or evidence which the Respondent asserted was covered by the without prejudice principle;

1.1.2 Any amendment application which the Claimant might have wished to pursue.

1.2 In relation to the matter in paragraph 1.1.1, the Respondent had applied for a Preliminary Hearing to be listed to determine the status of certain communications relevant to the 11th allegation of discrimination and/or harassment. The issue was to have been heard on 18 July but, due to the absence of the Respondent's witness, Mr Aulman, it was postponed to today.

1.3 In relation to the issue in paragraph 1.1.2, the Claimant made an application on 27 July 2023 to amend his claim. He enclosed a 9 page document entitled 'Variation to the claim'.

2. Facts relevant to the 'without prejudice' issue

2.1 The following witnesses gave evidence;

2.1.1 The Claimant;

2.1.2 Mr Mitchell; then an HR Business Partner;

2.1.3 Mr Aulman; Director of Business Management and Governance (Core Analytics & Planning).

2.2 The following documents were produced;

2.2.1 A bundle of documents from the Respondent, R1;

2.2.2 The Claimant produced a witness statement ('Offered to leave the organisation - Personal Statement') and a supplementary statement ('Supplementary Evidence and statement explaining the events') and some further documentary evidence ('Further Evidence').

2.3 The following factual findings were made on the balance of probabilities. Any page references provided below have been cited in square brackets and refer to pages within the bundle R1 unless otherwise stated.

2.4 The eleventh allegation of direct discrimination on the grounds of race and/or religion or belief and/or harassment was as follows; (see Employment Judge Bax's Case Summary of 8 October 2022, paragraph 2.2.11);

> "*In about June 2016, the Claimant raised a grievance about Ms Woolley and he had been made to take unpaid leave and his increment had been stopped. The person dealing with the grievance (Steve Aulman and Ashmita and Catherine) said if he was not happy they could give him 4 months' notice and he could leave immediately or they could give him a lot of work.*"

2.5 The Claimant had issued a grievance against his line manager, Ms Woolley, on 4 July 2016 regarding the application of the Respondent's attendance management process, unpaid leave, flexibility and in respect of carrying over annual leave [159] and [168-170]. The grievance contained references to inequality of treatment and, although race or religion were not mentioned expressly, his association with a disabled dependent was [169-170].

2.6 On 13 July 2016, Mr Aulman, who had been appointed to deal with the grievance, met with the Claimant and Ms Stanley (HR) and explored his appetite to stay with the organisation, amongst other things. The Claimant indicated a willingness to at least explore the option of leaving and Mr Aulman's follow up email therefore indicated the possibility of 'taking those conversations forward' [157].

2.7 In the Claimant's witness statement (paragraphs 9 and 10), he asserted that he was made an offer of 2 months' salary in order for him to leave his employment at that meeting. It was never suggested in cross examination to Mr Aulman that such offers were made. His evidence was that no offers were made a further meeting on 30 September meeting.

2.8 On 30 September 2016, at that further meeting, Mr Aulman, Mr Mitchell and the Claimant were present. Mr Mitchell kept a note of the meeting which the

Claimant saw for the first time this year. He had kept notes of the meeting himself [175-9]. Although he said that the notes lacked some of the detail of the discussion, he did not assert that what was recorded was wrong in any material respect.

2.9 The notes were clearly headed 'without prejudice' [175-9] and, according to Mr Aulman, he had asked the Claimant whether he had wanted to engage in such a conversation and it was explained to him what that meant; that, if he agreed, the content of the discussion would have been inadmissible in any future legal proceedings. The Claimant agreed to proceed on that basis. Mr Aulman's evidence was not challenged in that respect and, although the detail of that advice was not set out in the handwritten notes, I had no reason to doubt what had been said in that regard. Even the Claimant remembered that he had been told that it was a 'private meeting' and that "*things will not leave the room*" (see his supplementary witness statement at paragraph 4).

2.10 At the start of the meeting the Claimant's absence, his performance and his grievance were discussed. It was noted that it did not "*feel like this employment is working*". Later on, an offer was then put to him by Mr Mitchell; the payment of a sum in exchange for which he would have left his employment on mutually agreed terms. The offer that was made was rejected. Once it became clear that the Claimant and Respondent were not going to achieve a mutually agreeable way forward in that respect, those conversations ended. That exchange was limited to page [178].

2.11 The Claimant did ask Mr Aulman whether he had been put under pressure; whether, for example, he was told that he would have been put under greater work pressure if had not taken the offer. Mr Aulman denied that that had been the case, but the Claimant had not asserted that such things had been said in his own evidence in such clear terms. The closest he came was in paragraph 11 of his statement. When cross-examined, the height of his evidence was that he said that he was told that the future (the ongoing management of his perceived under performance) 'might not have been easy for him, but he could leave', at which point the offer was made. It was not so much that he was threatened at the meeting with the imposition of further, specific work if he did *not* accept the offer. Rather, he asserted that Ms Woolley, Ms Chandra and Mr Aulman were imposing unrealistic deadlines in order to force him to leave, but his contemporaneous emails did not establish to existence of such express threats (for example [174]).

2.12 Mr Aulman followed up the meeting with an email on 4 October 2016 [180-1]. The email started; "*we agreed that the meeting was 'without prejudice' i.e. we could speak freely and this can't be disclosed at a later date.*" The offer and its rejection were set out. The email then went onto discuss the management issues and the Claimant's grievance.

3. Relevant legal principles (the 'without prejudice' issue)

3.1 The common law principles relating to 'without prejudice' communications existed as a matter of public policy to enable parties to conduct negotiations openly and in a manner which might not affect their positions if litigation ultimately resulted.

3.2 The general rule was that evidence which was covered by the 'without prejudice' principle was not admissible before the tribunal unless both parties agreed, or where its non-disclosure would have led to the concealment of 'unambiguous impropriety' on the party seeking to exclude the document. The principle could have applied whether or not the 'without prejudice' label had been attached, but there must have been a genuine attempt to settle a dispute.

3.3 That meant that there must have *been* a dispute; the parties must have contemplated that, if not resolved, the potential for litigation was present, although it was not necessary that one or other of them actually threatened litigation. The dividing line was not always clear.

3.4 In the well-known case of *BNP Paribas-v-Mezzotero* [2004] IRLR 508, the EAT had upheld a tribunal's decision to admit evidence concerning the employer's offer of a severance package at a grievance meeting. In that case, it was held that the act of raising a grievance itself did not mean that the parties were necessarily in dispute. However, in *Woodward-v-Santander plc* [2010] IRLR 834, the EAT made it clear that its earlier decision in *Mezzotero* had not created any new exception to the 'without prejudice' rule. The decision, it was said, was better understood as having been one to which the exception of 'unambiguous impropriety' had been applied. That was because the Respondent had attempted to exclude the evidence to hide discriminatory conduct which had occurred at the grievance meeting. When pressed at the start of the case, Mr Tibbitts stated that he was not making such an allegation in this case.

3.5 In *Portnykh-v-Nomura International plc* [2014] IRLR 251, the employer intended to dismiss the Claimant for misconduct but discussions were then held about framing the termination as a redundancy. Negotiations which followed eventually breakdown and the Claimant sought to rely upon the in consistent reasons for dismissal which had been set out by the employer. The Respondent sought to refer to the 'without prejudice' communications to explain the inconsistency. The Tribunal admitted the evidence, but the EAT reversed the decision; they had clearly been an extant dispute which the parties had been attempting to settle and the communications were properly to have been regarded as having been 'without prejudice'.

3.6 As to the exception of unambiguous impropriety, the EAT stated in the *Woodward* case that the exception applied only in the very clearest of cases (paragraph 62) and that the exception should be applied strictly to avoid rendering it valueless (paragraph 54). In *Portnykh*, the EAT suggested an example of a situation in which a blackmailing threat of perjury was made.

4. Discussion and conclusions (the 'without prejudice' issue)

4.1 The Claimant's grievance created the existence of a dispute between the parties. There was a very real prospect of litigation following if the issues were not resolved which, of course, was precisely what happened, albeit not for some further time.

4.2 The meeting of 30 September was introduced as a 'without prejudice' meeting and the parties' discussions clearly encompassed the possibility of resolving their differences on agreed terms. Further, on the Claimant's

evidence, although denied by the Respondent, the discussions on 13 July had also included the making of an offer in similar terms. Even though the 'without prejudice' label had not been attached then, if such a conversation had occurred, it would have been covered by the same principles.

4.3 The only real question was whether there was evidence of unambiguous impropriety here. On the basis of the evidence given and discussed above, however, I could not be satisfied that that test was passed and the Respondent had been guilty of such conduct.

4.4 It was, accordingly, entitled to rely upon the without prejudice principles as it had attempted to engage in a confidential discussion in a genuine attempt to consider an alternative method of resolving a dispute to the mutual satisfaction of both sides. The consequences were therefore that;

4.4.1 The notes of the meeting of 30 September ought to be admitted into evidence in redacted form only; the words 'without prejudice' [175] and the section starting 'explain 4 months…' to '…not vindictive' [178] should be redated;

4.4.2 The email of 4 October 2016 should be similarly redacted; from 'We agreed that the meeting….' to '…in your role.' [180];

4.4.3 Any oral evidence at the hearing should not extend to or include evidence of offers which may have been made at the meetings of 13 July and/or 30 September 2016;

4.4.4 The allegations at paragraphs 2.2.11 and 3.1.11 of the Case Summary of 8 October 2022 are dismissed since the treatment complained of was the making of the offers referred to above.

5. Amendment application

5.1 The Claimant's grounds for making the amendment were set out in his application;

(i) "The New incidents have happened after the claim and these are continuous act of victimisation and discrimination so raising a new claim will not be good idea;

(ii) Some of the incidents were raised in the email on 24th March 2023 as amendment request but I did not know I need to formally apply for claim variation;

(iii) Some of the incidents were in my original claim but looking at CMO I am not sure if all are included;

(iv) This is my last opportunity to resolve issues and not dealing with all the matters or incidents will not be just."

5.2 The amendments were poorly pleaded in the sense that there was no understanding what type of claim was being advanced, some were not dated and/or the alleged perpetrators were not identified.

6. Legal principles (amendment)

6.1 An Employment Tribunal only had jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of *Chapman-v-Simon* [1994] IRLR 124). If a case was not before the Tribunal, an application to amend was needed to include it.

6.2 Langstaff P made the following observations in *Chandhok-v-Turkey* [2015] IRLR 195 EAT from paragraphs 16-8:

"*The claim, as set out in the ET1, is not something 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 … the claim as set out in the ET1.*

… If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", *and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute.*

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

6.3 In *Cocking-v-Sandhurst (Stationers) Ltd and anor* [1974] ICR 650 NIRC, Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changes to the basis of the claim or adding or substituting respondents. The key principle was that, in exercising their discretion, Tribunals ought to have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. The test was approved in subsequent cases and restated by the EAT in *Selkent Bus Company Ltd-v-Moore* [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in *Ali-v-Office of National Statistics* [2005] IRLR 201 CA.

6.4 The EAT held in *Selkent* that, in determining whether to grant an application to amend, the Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing

the amendment. That balancing exercise is at the heart of the determination of such applications an "*there are no permissible shortcuts*" (HHJ Tucker in *LQP-v-City of York Council* [2022] EAT 196). In *Selkent* Mummery J, as he then was, explained that relevant factors would include:

(i) The nature of the proposed amendment; applications to amend can range, on the one hand, from the correction of minor clerical and typing errors to, on the other, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

Mummery J in *Selkent* suggested that this aspect ought to be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment seeks to adduce a new complaint, as distinct from "relabelling" an existing one. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not (see *Foxtons Ltd-v-Ruwiel* UKEAT/0056/08).

The fact that there is a new cause of action does not of prevent an amendment from being made. The Court of Appeal stressed in *Abercrombie and ors-v-Aga Rangemaster Ltd* [2013] IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "*not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted*". Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

Any mislabelling of the relief sought is not usually fatal to a claim;

(ii) The applicability of time limits; if a new claim or cause of action is proposed to be added by way of amendment, whether or not it arises out of the same facts as the original claim, it is "*essential*" (per Mummery J in *Selkent*) for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended. Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation (see, for example, *Foxtons Ltd-v-Ruwiel* UKEAT/0056/08 per Elias P at para 13).

It was crucial to remember that it has been held that the doctrine of 'relation back' has been held to no longer apply to Employment Tribunal proceedings following *Galilee-v-Commissioner of Police for the Metropolis* UKEAT 0207/16/RN. Accordingly, the date of that the new claim is brought is the date of the amendment application, not the date of the claim form is the amendment is permitted.

The use of the word "*essential*" should, however, not be taken in an absolute 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. The judgments in both *Transport and General Workers' Union v Safeway Stores Limited* UKEAT 009207 and *Abercrombie-v-AGA Rangemaster Limited* [2014] ICR 209 CA emphasised that the discretion to permit amendment was not necessarily constrained by limitation. See also *Reuters Ltd-v-Cole* UKEAT/0258/17/BA in which HHJ Soole said, at paragraph 31:

> "*In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach.*"

The fact that an application to amend is made *in* time is, also not determinative of the application being granted. All factors have to be considered. It is no trump card (see paragraph 44 of *Marrufo-v-Bournemouth, Christchurch and Poole Council* UKEAT/0103/20/BA).

(iii) The timing and manner of the application; an application should not be refused solely because there has been a delay in making it. Amendments may, in theory at least, be made at any stage of the proceedings. 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. Delay may count against the applicant because the overriding objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives.

The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment (*Martin-v-Microgen Wealth Management Systems Ltd* EAT 0505/06). However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the *Presidential Guidance on General Case Management for England and Wales (2018).*

The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in *Ladbrokes Racing Ltd-v-Traynor* EATS 0067/06: a Tribunal will need to consider (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

6.5 These factors were not exhaustive and there may be additional factors to consider.

6.6 For example, it may have been appropriate to consider whether the claim, as amended, had reasonable prospects of success. The EAT observed in *Woodhouse-v-Hampshire Hospitals NHS Trust* EAT 0132/12 that there was no point in allowing an amendment to add an utterly hopeless case, but otherwise it should have been assumed that the case was arguable. In *Cooper-v-Chief Constable of West Yorkshire Police and anor* EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to have been investigated "*if this new and implausible case was to get off the ground*". However, Tribunals had to proceed with caution because it may not have been clear from the pleadings what the merits of the new claim truly were. Clearly identifiable factors of weakness needed to be found before such a point could have been taken against a proposed amendment (*Kumari-v-Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132).

6.7 In *Vaughan-v-Modality* [2021] IRLR 97, the EAT (HHJ Tayler), following the spirit of Underhill LJ in *Abercrombie and others-v-Aga Rangemaster Ltd* [2014] ICR 209, urged Tribunals to focus upon the practical consequences of allowing an amendment;

"*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.*"

6.8 Assumptions should not be made about prejudice;

"*Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice.*"

6.9 An application to amend had to be properly set out, as if it was part of the original claim. A failure to do so is 'fatal' (see *Ladbrokes* above and *Scottish Opera-v-Winnings* EATS 0047/09). A party cannot be given permission to

amend a claim on a carte blanche basis on the basis that some details or grounds might be provided subsequently.

7. Discussion and conclusions (amendment)

7.1 I addressed each of the proposed amendments in turn;

1. *Increment stopped*;
   This was an allegation dating back to some point in 2016, potentially seven years ago. Not only was the allegation significantly out of time, but there was no indication as to what type of discrimination was being alleged. In oral submissions, the Claimant asserted that all allegations were of direct discrimination and/or harassment and, for those which occurred after July 2016, of victimisation too;

2. *Pressurised to leave: toxic environment*;
   No date was placed on the allegation and, again, there was no indication as to what type of discrimination was being alleged;

3. *Taking my job away from me for extended period of time… Also, deliberately effecting my development so I get bored and leave;*
   The comments in 2. above applied equally here. To highlight the latter point, the proposed amendment even acknowledged the fact that the Claimant did not know what case he was putting forward; "*I do not know most of legal aspects but whatever was done to me was not right"*. In oral submissions, the Claimant asserted that the events occurred from April 2016 to 2017, after his return to work from sick leave;

4. *B8b Programme Manager - Digital Transformation*:
   This was an application for a role which the Claimant made in March 2022. As such, it postdated the issue of the Claim Form, but the application to amend was still made over a year after the event complained of. Again, there was no indication as to what type of discrimination was being alleged;

5. *Time off stress;*
   This was an allegation dating back to 2019, four years earlier. The allegation itself turned upon a comment attributed to Ms Woolley. There was no indication within the allegation that it arose from any protected characteristic, although the Claimant complained to HR that he was being '*targeted due to my race and origin*';

6. *Accused of being off on holidays outside the country well off sick*;
   The complaint here appears to have been that he was accused of having been in Paris was, in fact, he was off sick. No date for the allegation was provided, although the Claimant pinned the event to September 2018 in oral submissions. The person who made the accusation was not identified and the type of discrimination was not indicated;

7. *Bullying/victimisation/discrimination*:
   This allegation dated from September 2022 and, therefore, significantly postdated the Claim Form, but it was nevertheless an allegation which occurred nearly a year ago;

8. *Problem with my personality*;
   This complaint relates to an alleged comment made in an email sent by Mr James to Mr Henderson. No date for the email was provided, although he said that it had been dated sometime in September 2022, and it has not been made clear why the comment, if made, have been made on the grounds of the Claimant's race or religion;

9. [Unnamed allegation];
   This appears to be an allegation that the Claimant was only seconded it into Mr James's team in an attempt to curtail his litigation. However, it was also asserted that the secondment was ended when it was realised that he was in litigation with the Respondent. The secondment ended in July 2022, a year ago;

10. *Stress and anxiety*;
    Another undated and vague allegation in which no individual has been identified as a perpetrator;
    Incident happened in 2019…Ms Woolley

11. *No interest in my development and violation of contract*;
    The time window for this allegation was between 2015 and 2021, the end point therefore being two years ago;

12. *No written reasons were given for refusing my flexitime;*
    Another undated, vague and unspecified allegation. The Claimant asserted orally that the allegation was dated to a window of 2015 to 2017.

7.2 The final hearing in this case is listed to start on 4 September and is expected to last for 6 days. On 18 July, amendments were made to the Case Management directions timetable to enable that listing to have been maintained. That had been the parties' firm wish. Under those amended directions, the bundle was to have been finalised on Tuesday of last week (25 July) and witness statements are to be exchanged in three weeks (22 August). There was no suggestion that that readjusted case management timetable had slipped.

7.3 It was inconceivable, however, that the hearing could still take place if the amendments that were sought were granted. Any new allegations would have to be explored, further witness statements taken and disclosure revisited. I asked the Claimant on several occasions how the evidence could cater for such new allegations at such a late stage. He suggested that the hearing be 'put back a couple of weeks' for that to happen. I then attempted to explain how unrealistic a suggestion that was.

7.4 Apart from the allegations in paragraph Nos. 4, 7 and 9 in the amendment document, they were significantly out of time. Some of them were clearly already either in the Claim Form or the Case Summary's list of issues. For example, the contents of paragraph 9 of the amendment document appeared to be reflected in paragraphs 2.2.21, 3.1.21 and 4.2.1 and paragraph 12 was seemingly captured, at least to some extent, in paragraphs 2.2.11 and 3.1.1.

7.5 Paragraph 14 of the Order of 8 October 2022 clearly indicated that, if the list of issues was considered to have been incomplete, despite the discussions at the hearing, the parties should have written in by 23 December 2022 or the list would have been taken to have been final. Finality and certainty around the issues was necessary to enable the parties to prepare their evidence around them. Even if factual allegations had been made within the Claim Form which did not appear within the list of issues, now was not the time to change and/or expand them.

7.6 In summary, therefore, to the extent that any of the amendments sought raised matters which were new allegations in the sense that they had not appeared in the Claim Form, the amendments were not permitted; the allegations were extremely old and the application was made at too late a stage in the proceedings to enable new evidence to be gathered before the hearing started. To the extent that the amendments raised issues which were covered in the list of issues already (as discussed above), no application was necessary and, finally, to the extent that the application covered issues which had been raised in the Claim Form but had not found their way to the list of issues, whilst they could not be accommodated as allegations within the current hearing, the Claimant was free to revisit the list with the Tribunal at the conclusion of the hearing and seek further guidance on matters which he claims that he is entitled to have determined.

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Employment Judge Livesey
Date 31 July 2023

Judgment & reasons sent to the parties on 16 August 2023

For the Tribunal Office