EMPLOYMENT TRIBUNALS

Claimant: Mr D McKenzie

Respondent: London United Busways Ltd

Heard at: Watford (by CVP) **On:** 5 October 2023

Before: Employment Judge Maxwell

Appearances
For the claimant: in person
For the respondent: Ms I Cernis, Solicitor

JUDGMENT

1. The Claimant's claims with respect to **Events 1 & 2** are **struck out** because they were presented outwith the primary limitation period, it is not just and equitable to extend time and he has no reasonable prospect of showing a continuing act.

2. Permission for the Claimant to amend his claim to bring discrimination or victimisation claims with respect to **Events 3, 4, 5, 6, 7, 8, 9, 10 & 12** is **refused** as it is not in the interests of justice to grant this.

3. The Claimant's claim with respect to **Event 11** is not struck out or made subject to a deposit order and **will be determined at a final hearing**.

REASONS

Procedural History

1. The Claimant contacted ACAS on 22 September 2022, a certificate was issued on 3 November 2022 and his claim presented on 10 November 2022. He complained of race discrimination and victimisation.

2. By a case management order of 29 January 2023, the Claimant was ordered to provide further information with respect to his complaint of harassment related to race, including what was said or done, by whom, when and where. On 24

February 2023, Claimant provided further information with respect to 6 "incidents".

3. There was then a telephone case management hearing on 9 May 2023 before EJ Lewis. The Judge on that occasion spent a considerable amount of time discussing the complaints the Claimant wished to bring. From this he identified 12 "events", each of which was said to be either a detriment or a protected act (for the purposes of victimisation). The order noted whether these events were included in the original claim form particulars, the Claimant's further information or had been raised the first time at the case management hearing. EJ Lewis expressed some concerns about the information provided:

> **23. The tribunal is familiar with the problems faced by members of the public who present their own claims, against an employer which is legally represented. As the claimant will have some months to prepare and reflect before the next hearing, and as he is a member of Unite, which may perhaps help him with presentation of this case, I here summarise my concerns about his approach. I put forward these comments, not to criticise the claimant, but as pointers which may assist him and any adviser whom he instructs.**
>
> **24. The claimant has, I fear, not understood some of the fundamentals of the task of the tribunal. In particular, as often happens in cases of discrimination, he has not analysed whether he would be able to demonstrate some causal link between the protected characteristic of race, and the detriments of which he complains. That may be difficult in any case. It is particularly so in this case, where some of the events complained of may be no more than routine interactions.**
>
> **25. The claimant has not understood that the role of the tribunal is not to decide on his sense of grievance. The tribunal may well agree with the claimant that a respondent has not conducted itself well, or it may agree that criticisms are to be made of a manager, but that does not of itself give rise to an inference of race discrimination.**
>
> **26. The claimant may not have been aware that a claim for discrimination must be brought not mor than three months after the event complained about, unless it is shown that past events are part of a continuing sequence, and / or that it is just and equitable to extend time. I note, in the chronology, two long periods during which there is no event of which the claimant complains. They were the gaps of time between May 2018 and November 2019; and then between November 2019 and June 2020. The tribunal will have to consider whether those gaps of time break any alleged continuity of time.**

4. Whilst the question of whether the Claimant should have permission to amend his claim (the application was implied rather than express) was not decided on this occasion, nonetheless the Respondent was ordered to present amended grounds of resistance.

5. EJ Lewis decided it was appropriate to list this matter for a preliminary hearing in public to determine preliminary issues:

> **2.4 The agenda is to consider whether any part or parts of the claim should be struck out on grounds of being presented out of time, and not**

> **forming part of a continuing act and / or that it is not just and equitable to extend time; and if applied for also to consider whether any part or parts of the claim should be struck out on grounds of having no reasonable prospect of success; or if deposit order(s) should be issued, on grounds that part or parts of the claim have little reasonable prospect of success.**

6. By email of 17 July 2023, the Respondent's solicitor wrote to the Tribunal referring to what he believed were mistakes or omissions with respect to the order made by EJ Lewis. On 8 September 2023, a correction to the order of EJ Lewis was made:

> **[…] there are two important mistakes in his order of 9 May, which this letter corrects. They are (1) there is currently no claim of protective disclosure; and (2) the claimant does not have permission to amend his claim and the hearing on 5 October will consider any application to amend.**

7. By an email of 15 September 2023, the Respondent applied for strikeout and deposit orders. It also opposed permission to amend, which it maintained was necessary in order for the Claimant to rely upon 10 of the 12 events.

Preliminary Issues

8. The question of striking out claims at a preliminary hearing before a judge sitting alone because they were presented late, do not form part of a continuing act and it is not just and equitable to extend time, engages rule 37, namely whether the Claimant has a reasonable prospect of establishing jurisdiction. Whilst I can make findings about whether the claims were presented within the primary 3-month limitation period and if not whether it is just and equitable to extend time, the existence of a continuing act could only be decided by a Judge sitting with members, having heard the evidence about the contested events. An Employment Tribunal would need to find that discrimination occurred on more than one occasion before it could then go on to decide if that amounted to conduct extending over a period, within section 123(3)(a) of the **Equality Act 2010**,

9. Accordingly, the questions for determination at this preliminary hearing are:

<u>Amendment</u>

9.1 the scope of the Claimant's existing claim and whether the Claimant should have permission to amend in order to pursue complaints that are not already within it;

<u>Time</u>

9.2 whether the Claimant's claims or any of them should be struck out because:

9.2.1 they were not presented within the primary limitation period;

9.2.2 it is not just and equitable to extend time;

9.2.3 the Claimant has no reasonable prospect of establishing they were part of an in-time continuing act.

Merits

9.3 whether the Claimant's claims or any of them should be struck out because they have no reasonable prospects of success;

9.4 whether the Claimant's claims or any of them should be subject to a deposit order because they have little reasonable prospects of success.

10. Whilst, logically, the amendment issue must be determined first, there is a substantial overlap in the factors relevant to this question and those which must be considered for the time and merits points.

11. Where a proposed amendment would introduce a new claim, then whether or not that claim would be in time is a material consideration. Where a claim is otherwise out of time and the Tribunal is considering the just and equitable discretion, the balance of prejudice must be taken into account. This same factor is also of crucial importance on an amendment application. The balance of prejudice can also engage the apparent merits of a proposed claim. Where a claim proposed to be added by amendment or for which a just and equitable extension of time is necessary appears to lack merit, this may be relevant to balancing exercise. A claimant will suffer little prejudice if prevented from pursuing a claim that appears weak and likely to fail.

Law

Amendment

12. In **Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] UKEAT/151/96** the EAT provided helpful guidance on the consideration of applications to amend, per Mummery J:

> **(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:**
>
> **(a) The nature of the amendment**
>
> **Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions 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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.**
>
> **(c) <u>The timing and manner of the application</u>**
>
> **An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed 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.**

13. Whilst the **Selkent** factors will often be highly relevant to whether an amendment application is granted or not, this will not always be so. The determination of permission to amend is not a tick-box exercise; see **Abercrombie v Aga Rangemaster Ltd [2014] ICR 209 CA** . Notably, even when an amendment would involve adding an out of time claim, this will not necessarily be decisive agent allowing the same; see **Transport and General Workers Union v Safeway Stores Ltd (2007) UKEAT/0092/07**. Ultimately, the interests of justice require a balancing exercise.

14. The body of case law which has developed in connection with amendment applications was recently considered by the EAT in **Vaughan v Modality Partnership [2021] IRLR 97**, per HHJ Tayler:

> **20. In Abercrombie Underhill LJ went on to state this important consideration, at para [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 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.'**
>
> **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. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have**

records relevant to the matters raised in the proposed amendment. 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. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

[…]

24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

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

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

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

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

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

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

15. The granting of permission to amend requires the exercise of a judicial discretion and a party many not otherwise seek to add to their claim; see **Chandhok v Tirkey [2015] ICR 527 EAT**, per Langstaff P:

> **16 […] 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 on 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 Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1.**
>
> **17 I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.**
>
> **18 In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for**

> **both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.**

Strike Out

16. Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 provides:

> **(1) At any stage of the proceedings, either on its own initiative or on the application of a party a Tribunal may strike out all or any part of a claim or response on any of the following grounds-**
>
> > **(a) that it is scandalous or vexatious or has no reasonable prospect of success[…].**

17. The test of "no reasonable prospect of success" was considered in **North Glamorgan NHS Trust v Ezsias [2007] IRLR 603 CA**, per Maurice Kay LJ:

> **4. To state the obvious, an employment tribunal should be alert to provide protection in the face of an application that has little or no reasonable prospect of success but it must also exercise appropriate caution before making an order that will prevent an employee from proceeding to trial in a case which on the face of the papers involves serious and sensitive issues.**
>
> **26. […] what is now in issue is whether an application has a realistic as opposed to a merely fanciful prospect of success. […]**
>
> **29. […] It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation.[…]**

18. When assessing prospect of success, the Claimant's case should be taken at its highest; see **Ukegheson v Haringey London Borough Council [2015] ICR 1285 EAT**.

19. The greatest caution should be exercised before striking out discrimination cases as having no reasonable prospect of success; see **Anyanwu v South Bank Students' Union [2001] IRLR 305 HL** per Lord Steyn:

> **24. In the result this is now the fourth occasion on which the preliminary question of the legal sustainability of the appellants' claim against the university is being considered. For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field**

> **perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest. Against this background it is necessary to explain why on the allegations made by the appellants it would be wrong to strike out their claims against the university.**

20. There is, however, no prohibition on strike-out in discrimination cases; see **Ahir v British Airways PLC [2017] EWCA Civ 1392**, per Underhill LJ:

> **8. […] Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the necessary test is met in a particular case depends on an exercise of judgment, and I am not sure that that exercise is assisted by attempting to gloss the well-understood language of the rule by reference to other phrases or adjectives or by debating the difference in the abstract between 'exceptional' and 'most exceptional' circumstances or other such phrases as may be found in the authorities. Nevertheless, it remains the case that the hurdle is high, and specifically that it is higher than the test for the making of a deposit order, which is that there should be '*little* reasonable prospect of success'**

Deposit Order

21. Rule 39(1) provides:

> **Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.**

22. In **Van Rensburg v Royal Borough of Kingston upon Thames [2007] UKEAT/0096/07**, Elias P addressed the lesser threshold of "little reasonable prospect of success":

> **26. Ezsias then demonstrates that disputes over matters of fact, including a provisional assessment of credibility, can in an exceptional case be taken into consideration even when a strike out is considered pursuant to rule 18(7). It would be very surprising if the power of the Tribunal to order the very much more limited sanction of a small deposit did not allow for a similar assessment, particularly since in each case the tribunal is assessing the prospects of success, albeit to different standards.**
>
> **27. Moreover, the test of little prospect of success in rule 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in rule 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.**

Conclusion

Scope of Original Claim

23. The Claimant's original claim form particulars were:

> **On I 1/08/202 1 I had an accident at work. I was not to blame for the accident.**
>
> **On my return in March 2022, I was subjected to a disciplinary**
>
> **I hearing was held on 08/06/2022. The result was a final written warning on my file lasting 2 years.**
>
> **I appealed the decision which was heard on the 01/09/2022. The appeal was based on company disciplinary procedure not followed and differential treatment compared to one of my colleagues. I stated the fact that company procedure on absence due to accidents at work were not followed. I further highlighted the fact the a colleague who also had an accident at work after me and was off work for a period of the same time as me was not disciplined.**
>
> **I am of black Caribbean. My colleague is white. The comparison is that my white colleague was treated more favourably than I was for the same incident. I believe I have been discriminated against on the grounds of my race.**
>
> **Furthermore I believe my treatment is based on the fact that I made a complaint against a white colleague who made a racist comment aimed at one my black colleagues in July 2018.**
>
> **I have ever since been subjected to a number of harassment and bullying incidents throughout that period to September 2022**

24. Read in a fair and non-technical way, the Claimant's original claim form included complaints of direct race discrimination, harassment and victimisation:

    24.1 a racist comment made in July 2018 [his complaint about which was a protected act];

    24.2 being subject to disciplinary proceedings in March 2022;

    24.3 receiving a final written warning in June 2022;

    24.4 the outcome of his appeal against this warning [unspecified date].

25. Whilst the claim included a complaint of bullying in the period from July 2018 September 2022, this was wholly unparticularised. Almost inevitably, therefore, to the extent the Claimant later provided details of dates and events, these would be new facts amounting to claims for which permission to amend would be required.

Primary Limitation Period

26. with respect to the primary limitation. I note:

    26.1 Day A was 22 September 2022;

    26.2 Day B was, 3 November 2022;

    26.3 the ET1 was presented on 10 November 2022.

27. The claim having been presented within one month of Day B, any complaint about events which occurred on or after 23 June 2022 would be in time, without the need for a continuing act or just and equitable discretion.

Reason for Lateness of Claims

28. The Claimant says his original claim was a summary and he thought he would be able to provide the detail behind that in a "bundle" for a final hearing. Whilst this might illuminate why the matters raised in his further information or during the hearing before EJ Lewis were not included in the ET1, it does not explain the very substantial delay before the commencement of proceedings, given the Claimant now seeks to pursue allegations dating back as far as 2018. He has put forward no reason, good or otherwise, for not bringing complaints to the Tribunal in 2018 or in the many years between then and 2023. The Respondent recognises Unite and the Claimant is a member. He had access to advice and support if he needed that.

Events 1 to 4

29. Per EJ Lewis:

> **9. The first event (Event 1) was that on or about 27 April 2018 the claimant and a number of other colleagues, including Eunice, a driver of African descent, were present in the tea room when Mr Haynes said, 'I do not want any monkey food being eaten in here'. This is referred to in AI.**
>
> **10. The second event (Event 2) is referred to in the ET1, and is dated there as July 2018. It is made up of the claimant's complaints about Event 1. At this hearing the claimant said that he had complained about the monkey food incident immediately to Mr Haynes, and confirmed by email some weeks later. (The claimant said that he still has the email). Either or both of those (the immediate complaint and / or the email) may have been a protected act.**
>
> **11. The next event (Event 3), which is found in AI, was that on or around 11 May 2018 Mr Haynes made false allegations about the claimant's work, by speaking to Mr Shade at the garage. The claimant's case is that Mr Haynes made the allegations in retaliation for the claimant's objections to the monkey food remark.**
>
> **12. The next event, Event 4, was raised for the first time in this hearing. It was an allegation that in retaliation for having complained about Mr Haynes' language, the claimant was demoted and threatened with being instructed to return to shift work. He said at this hearing that he raised a grievance about these events on 16 May 2018, which was not addressed.**

30. Events 1 and 2 are within scope of the Claimant's original claim, he does not require permission to amend. The Claimant has simply provided better particularisation of his existing claim about a racist comment being made, which he then complained of.

31. Events 3 and 4 are not within the original claim, they are complaints based on new facts, namely that false allegations were made, the Claimant was threatened with demotion and a grievance about these events was not upheld. This would represent a substantial amendment to the claim and the Claimant requires permission.

32. Events 1, 2 & 3 are all allegations against Mr Haynes, to the effect that he carried out various detriments because of race.

33. With respect to allegation 4, I was referred to the grievance outcome letter sent to the Claimant on 24 September 2018. Quite plainly, his grievance was addressed. His complaints were investigated and a decision made on this by Mr Ranson, Fleet Engineer. The letter described the background to a change in the Claimant's duties, as a result of MOT performance. The decision in this regard was not, however, made by Mr Haynes, rather it was Mr Shade, the engineering manager. With respect to the comments attributed to Mr Haynes, Mr Ranson explained he had been unable to investigate this because Mr Haynes had since left the Respondent's employment.

34. It is not just and equitable to extend time for these claims. The Claimants' complaints about Events 1 and 4 were made or have been sought by way of amendment, circa 4 years late and without any good reason for the enormous delay. The Respondent would, inevitably, be severely prejudiced in contesting these allegations. With respect to Events 1, 2 and 3, the alleged perpetrator is no longer an employee of the Respondent or available to it as a witness, having left its employ many years ago (not long after the disputed events). Whilst the Respondent may be somewhat better placed to address a complaint about the failure to address his grievance, by reason of at least having the grievance outcome letter available, it would seem most unlikely Mr Ranson would now have any independent recollection, if asked in 2023 about his response to a grievance in 2018. Mr Shade, who was involved in reassigning the Claimant's duties in 2018 has also left the Respondent's employ (in his case in June 2020). The relatively short limitation period for employment claims under the **Equality Act 2010** is intended to avoid just this sort of problem. It will be difficult to have a fair hearing about workplace events where witnesses are no longer available and / or the recollection of those still contactable will have faded.

35. The Claimant has no reasonable prospect of showing a continuing act. As far as the Claimant's later allegations are concerned, there is then a very substantial gap before Event 5, in November 2019. This is a 16-months on the Claimant's reckoning (from July 2018) or 14 months if we count from the grievance outcome letter. There is no suggestion of any untoward behaviour during this period. Mr Haynes is not named by the Claimant in any subsequent allegation. Nor is it suggested that Mr Shade or Mr Rason were responsible for any of the later conduct of which the Claimant complains. There is no ongoing process or application of a policy which bridges time. I have been pointed to nothing which

might provide the necessary thread linking events in 2018, with later matters about which the Claimant wishes to complain.

36. In these circumstances, the Claimant's claims with Respect to Events 1 and 2 are struck out because they were presented outwith the primary limitation period, it is not just and equitable to extend time and he has no reasonable prospect of showing a continuing act.

37. As far as claims 3 and 4 are concerned, it is not in the interests of justice to give the Claimant permission to amend. This is because the balance of prejudice and hardship weighs more heavily against the Respondent, for the reasons already given. I also recognise that allowing the Claimant to proceed with unconnected historic claims going back many years would result in a much longer and somewhat disjointed hearing, as there would be no meaningful link between the various things about which he was complaining. Furthermore, there can be no prejudice to the Claimant in refusing an amendment with respect to claims that then stood to be struck out because they were out of time.

38. Separately, had it been necessary, I would have struck out Event 4 on the basis it had no reasonable prospect of success on the merits. The Claimant's factual proposition that his grievance was not addressed is untrue. This was investigated and responded to. The Claimant may not have been satisfied with the outcome but that is a different matter. Nothing has been put forward to demonstrate a link between the way this was dealt with and race.

Event 5

39. Per EJ Lewis:

> **13. The next event, Event 5, was about 18 months after Event 4, in November 2019. It was raised in the claimant's written agenda for today. The claimant's case is that he was on annual leave and his name was shown as such on the workshop board. Beside his name however someone had written, or stuck a piece of paper saying, the word, 'tired'. The claimant did not know who was responsible. He struggled at this hearing when asked to explain how this could be shown to be related to race or to any protected act. It may be an event about which the claimant has a legitimate sense of grievance, but not necessarily a legal claim.**

40. The Claimant would require permission to amend, this was not in his original claim.

41. It is not in the interests of justice to grant permission to amend.

42. The complaint is circa 3 ½ years late.

43. It is not just and equitable to extend time. The Claimant does not identify any alleged perpetrator and nor does he say complained at the time. The Respondent would be hopelessly prejudiced in seeking to address such a vague complaint at this far remove. The Claimant on the other hand, would face little or no prejudice if he were not allowed to proceed with this. He has not advanced any basis upon which it is connected with race

44. The Claimant has no reasonable prospect of showing that was part of a continuing act. No personnel have been named. This was not part of a process or the application of a policy. There is nothing to show a connection between this event and that which came before or after.

Event 6

45. Per EJ Lewis:

> **14. The next event, Event 6, was 8 months after Event 5, in June 2020. It is referred to in AI. A complaint was made that the claimant had caused irreparable damage to a vehicle. The claimant does not know who made the complaint. However, he says that the allegation was false. The General Manager, Mr Southgate, authorised an investigation into the allegation, and the suspension of the claimant. The claimant says that both of those decisions were made on grounds of race. His complaints about Mr Southgate's decisions were raised for the first time at this hearing. The claimant referred at this hearing to Anthony Bayne, a white colleague, as a comparator who, the claimant said, had caused serious damage to a vehicle, but who was not investigated or suspended.**

46. The Claimant would require permission to amend, this was not in his original claim.

47. It is not in the interests of justice to grant permission to amend.

48. The complaint is circa 3 years late.

49. It is not just and equitable to extend time. The Respondent is likely to be substantially prejudiced if required to defend itself against this old complaint. Whilst there was a documented process, it is unrealistic to suppose that relevant witnesses would have much by way of an independent recollection of this matter. If the Claimant were not able to pursue this allegation, I am not persuaded he would suffer any significant prejudice as the merits appear to be poor.

50. I have been shown a written report dated 17 June 2020 from Mr Mierwiski in the following terms:

> **On 16 June 2020, Engineer Don McKenzie was allocated and performed an inspection (C6) on ADE40421, he did not complete the inspection but did not leave any information about the work that he did before he went home.**
>
> **On 17 June 2020, Engineer Andrian Rotaru wanted to take the bus out of the workshop. When he started the engine, he saw that the low oil pressure light in the engine came on. He quickly turned off the engine and checked the oil level in the engine. Andrian came to me and showed me a dry scoop of oil. I told him to add oil and check how many litres he added.**
>
> **I checked the rota sheet and everything had been signed by Don that the oil change was done. After topping up the oil in the engine it showed there was not any oil, 15 litres were added.**

> **A few hours earlier Chris Woods (CCTV) wanted to change the hard drive. He started the engine unaware of anything, there was not an unfit sticker and no steering wheel cover was on the bus. He left the bus running for 12 minutes**

51. There is nothing in this document to suggest any impropriety in the report made, nor any connection with race. On the face of it, the Claimant failed to complete a important piece of work or leave any instructions for others, with the result that damage was done or risked to the engine of a vehicle through being run whilst short of oil. Plainly, this was a serious matter going to the heart of the Claimant's responsibilities as an engineer. It is, therefore, wholly unsurprising that Mr Francis decided to suspend him whilst the matter was investigated, which decision was explained in a letter of 19 June 2020. Once again, it appears those making relevant decisions are not those accused by the Claimant. Furthermore, even if when the matter was fully investigated it turned out the Claimant was not at fault, it is difficult to see why the decision to suspend and investigate would be improper.

52. The Claimant seeks to make the link to race in this case by referring to the treatment of a comparator, Mr Baine, who he says was not suspended in similar circumstances. I was shown an accident report form for Mr Bain dated 24 January 2021. Mr Baine self-reported scraping the moulding on the offside of his vehicle whilst passing through a narrow gap width restriction. These two events are not remotely comparable. Mr Baine had a minor mishap on the road following a momentary lapse. The Claimant appeared to have neglected one of his core duties.

53. Given the apparent weakness of this claim, the Claimant loses little in not being able to pursue it. As such the balance of prejudice in allowing an amendment or extending time, weighs more heavily against the Respondent.

54. The Claimant has no reasonable prospect of showing a continuing act. No perpetrator is identified for the false allegation and Mr Southgate, who is criticised for the investigation and suspension, was not involved in any later Event. There is a circa 1 year gap between these matters and Event 7. The Claimant has not identified any thread running between the various events about which he complains or the personnel involved. No basis for a continuing act has been shown.

<u>Event 7</u>

55. Per EJ Lewis:

> **15. In June 2021 the claimant submitted what he considered to be a grievance, which he said included a further protected act, to which he had never received a reply. This point, Event 7, was raised in today's written agenda.**

56. The Claimant would require permission to amend, this was not in his original claim.

57. It is not in the interests of justice to grant permission to amend.

58. The complaint is circa 18 months late.

59. It is not just and equitable to extend time.

60. The Respondent has searched and found no evidence or record of any grievance being raised by the Claimant in June 2021. The Claimant has not himself produced any evidence to show he did this (e.g. email or letter). Notably, the Respondent did retain and has produced evidence relating to other grievances the Claimant raised. Indeed, whilst there is no sign of a June 2021 grievance, it is agreed he did raise a grievance in August 2021. This was replied to and addressed. The complaint was wide-ranging and appears to have grown during the period leading up to its adjudication. There was also some delay for practical reasons. The outcome was provided by a letter of 4 May 2022 from Ms Gill. She began by referring, briefly, to the procedural history, which included the first manager due to hear the case, Leroy McKenzie (no relation), having to step down for personal reasons. Another grievance meeting had to be rearranged because of the Claimant's non-attendance. Ms Gill set out detailed reasons over 3 pages for not upholding the Claimant's grievance.

61. Coming back to Event 7, the Claimant's complaint is exceedingly vague. He Claimant does not say what he complained about or to whom. The Respondent kind no trace of any such grievance and would, therefore, be severely prejudice if it had to mount a defence. No witness could do anything beyond say they knew nothing of this themselves and could find no record. The Claimant on the other hand, would lose little if not allowed to proceed with this complaint, which would seem to be very difficult to prove.

62. There is no reasonable prospect of the Claimant establishing a continuing act. Whilst a series of grievances being presented and not responded to is the sort of pattern which might suggest a continuing act, even where different managers have been involved, there is nothing to suggest such a pattern in the present case. On the contrary, his grievances were addressed, albeit he disagreed with the outcomes.

Event 8

63. Per EJ Lewis:

> **16. In July 2021 the claimant was on 3 occasions called Ben, the name of another black person, by Mr Taverner. Although they were three occasions, I designate them together as Event 8. He complains that those were acts of discrimination.**

64. The Claimant would require permission to amend, this was not in his original claim.

65. It is not in the interests of justice to grant permission to amend.

66. The complaint is circa 18 months late.

67. It is not just and equitable to extend time. Whilst the passage of time is not as great for this proposed claim as some others, the Claimant is relying upon fleeting occurrences, some two years ago. It is likely to be exceedingly difficult

for Mr Taverner now to recall the surrounding circumstances. He would then be limited to repeating what he told Ms Gill, namely that he mixed up the engineers. Once again, in considering the prejudice to the Claimant if he is not allowed to pursue this, it would seem he would not be losing the benefit of a strong claim.

68. I note this was one of the matters considered by Ms Gill in the Claimant's grievance. Her finding was in the following terms:

> **I have discussed this in detail with Paul Tavener and it would appear that he does mix up names of all engineers however going forward he understands that he will make a conscious effort to ensure he takes time to learn all the engineers names at Park Royal garage.**

69. The way the Claimant explained this claim today was to say that Mr Taverner acted in this way deliberately. The Claimant characterised it as a micro aggression. Whilst the Claimant's perception of this as being deliberate is understandable, it will be difficult for him to show facts from which in the absence of an explanation discrimination could be found. The Claimant is not in a position to contradict Mr Tavener having got the names of other engineers wrong. The Claimant saying he did not hear this is unlikely to take him very far. Furthermore, given the complaints in this regard are limited to July 2021, it would appear that Mr Taverner was getting the Claimant's name right long before Ms Gill (the second grievance hearing manager) spoke to him.

70. There is no reasonable prospect of showing a continuing act. Whilst there is another allegation against Mr Taverner (Event 10) it arises at the same point in time, namely July 2021. There is no later allegation against him which might support a continuing act, nor any other link made with later events.

<u>Event 9</u>

71. Per EJ Lewis:

> **On 22 July 2021 Mr Cuffy, a supervisor, spoke to the claimant in what the claimant wrote was 'an unruly demeaning manner.' This was Event 9, found in AI. When I asked the claimant to explain what Mr Cuffy had said or done, he said that Mr Cuffy said to him, 'Why don't you get fucking get back to work?' The claimant, in reply to my question, said that he had never heard Mr Cuffy use the word 'fucking' (or a variant) to a white colleague. I have explained to the claimant that the question for the tribunal will not be whether that was appropriate language for a supervisor to use, but whether it was used on grounds of race or a protected act.**

72. The Claimant would require permission to amend, this was not in his original claim.

73. It is not in the interests of justice to grant permission to amend.

74. The complaint is circa 18 months late.

75. It is not just and equitable to extend time.

76. Mr Cuffy is another of those who has now left the business and it may be difficult or impossible for the Respondent to obtain him as a witness. Not having the material witness would severely prejudice the Respondent. This complaint is a good illustration of a case where a more timely complaint would have shifted the balance of prejudice considerably. Mr Cuffy is a more recent leaver. Had the Claimant presented an in time complaint he would still have been an employee. A statement could have been taken and even if he had left by the date of a final hearing, the Respondent would have been aware of the need to remain in contact with him.

77. I do also have considerable doubts about the apparent merits of this proposed claim. EJ Lewis' observations appear well-founded. Rudeness and coarse language is not unknown in many workplaces. There appears nothing to link this with race. Whilst the Claimant may say he does not recall Mr Cuffy swearing toward others that is scarcely likely to be found conclusive.

78. The balance of prejudice weighs very heavily against the Respondent in this instance. The Claimant will face very little prejudice if unable to pursue a weak claim.

79. There is no reasonable prospect of the Claimant showing a continuing act. Mr Cuffy is not involved in any of the other matters the Claimant raises. This is an isolated allegation. No thread or link has been advanced.

Event 10

80. Per EJ Lewis:

> **On 29 July 2021 was what the claimant in AI has the called the sixth incident; in my designation it is Event 10. The claimant clarified a little further. Mr Taverner asked the claimant what he was working on, and the claimant told him. Mr Taverner then spoke to Mr Busz, a supervisor. The claimant alleges that Mr Taverner encouraged Mr Busz to find fault with the claimant's work. Mr Busz later told the claimant that Mr Taverner had said to him that he, the claimant, was not doing any work and was 'taking the piss'.**

81. The Claimant would require permission to amend, this was not in his original claim.

82. It is not in the interests of justice to grant permission to amend.

83. The complaint is circa 18 months late.

84. It is not just and equitable to extend time.

85. The Claimant does not say how or in what terms Mr Taverner encouraged Mr Busz to find fault with his work. It is not suggested he overheard an instruction. The allegation appears to result from the Claimant extrapolating, working backwards from the "taking the piss" comment he says was relayed by Mr Busz. Whilst a claim would be 18 months late, in practical terms the Respondent had no notice of this complaint until nearly 2 years after the alleged event. Expecting

Mr Taverner to recall a passing comment of that sort after this passage of time is a tall order.

86. Once again, I am also highly doubtful about prospective merits. There is nothing here which is indicative of a connection with race. Whilst the Claimant may not appreciate the course language, he is likely to struggle in satisfying the Tribunal that Mr Taverner did not otherwise speak in such terms. Furthermore, the allegation itself appears to include a non-discriminatory explanation for the behaviour complained of, namely that Mr Tavener felt the Claimant was not pulling his weight at work. The balance of prejudice weighs against the Respondent. The Claimant will face very little prejudice if unable to pursue a weak claim.

87. The Claimant has no reasonable prospects of showing a continuing act for the same reasons as set out above in connection with Event 8.

Event 11

88. Per EJ Lewis:

> **19. The remaining incidents, which are referred to in the ET1, relate to a sequence of events after the claimant returned to work in 2021, when he was subjected to a disciplinary process, leading to a final written warning in relation to his attendance. The final written warning was issued on 8 June 2022 and the claimant's appeal against it was rejected the following September. I designate this sequence together as Event 11.**
>
> **20. For this incident, the claimant compares himself with a white colleague, Mr Thomas Taggart. A valid comparator in law must be a person whose circumstances were the same or not different in any relevant way from the claimant's circumstances. As the respondent explained, its case is that there were two reasons why it does not agree that Mr Taggart is a suitable comparator.**
>
> **One was that the relevant absences were 80 days in the case of Mr Taggart and 195 days in the case of a claimant; and the other was that at the start of the sickness absences the claimant was already on a final written warning, and Mr Taggart was not. The respondent's case is that those two factors explain why (a) the claimant was issued with a final written warning, and (b) why he was managed more harshly than Mr Taggart.**

89. This is the central complaint in the Claimant's original claim form. He needs no permission to amend, he has merely provided better particularisation.

90. The complaint about the warning issued on 16 June 2022 is 8 days late.

91. The Claimant does have a reasonable prospect of showing a continuing act. Given the matters complained of are all steps in a continuing disciplinary process, they arguably comprise part of a continuing course of conduct, even if different officers were involved at the respective stages. The Claimant's complaint about the appeal process was undoubtedly in time and, therefore, it would not be appropriate to strike out these claim for that reason.

92. If and to the extent there was not a continuing act, then I am satisfied it is (or would be) in the interests of justice to extend time.

93. The delay of 8 days is small. It would make no material difference to the Respondent's ability to access relevant witnesses or for them to recall these events. The process was also documented.

94. As far as the merits are concerned, whilst I have some doubts, these are not such as to satisfy the threshold under either rule 37 or 39.

95. The Claimant says that his absence levels and those of his comparator, Mr Taggart, were very similar. What differs on his account was the response, whereas his comparator was supported on return to work, the Claimant was escalated through a disciplinary process and toward a final written warning. The Respondent disputes this analysis, it says the Claimant had a worse absence record than Mr Taggart and a live warning. If the Respondent is right about this, then section EqA section 23 is unlikely to be satisfied. A non-statutory comparator can still, however, be useful evidentially. If the Claimant can demonstrate a, generally, more sympathetic approach to Mr Taggart, then even if the number of absences differ, the Claimant may still derive some support from this comparison. Furthermore, the Claimant indicated he would be calling Mr Taggart as a supportive witness. If Mr Taggart himself will say that he has been dealt with more leniently, that might strengthen the Claimant's position. In any event, these are not questions susceptible to a firm provisional view at a preliminary hearing. They should instead be considered by a Judge with members at a final hearing.

96. The Claimant also alleges victimisation. He relies upon various grievances. Separately from whether the Claimant can show any link with race, it is far from absurd to allege that the disciplinary approach to his absences may have been influenced by his propensity to make complaints about colleagues or managers. The grievances include references to "racism" and may amount to him doing protected acts.

Event 12

97. Per EJ Lewis:

> **21. The final point, Event 12, was that the claimant asserts that his grievance, presented in August 2021, was not properly investigated, or investigated in the appropriate time frame. He raised this allegation at this hearing. He said that the investigation officer did not interview all witnesses. He disregarded that Mr Busz had supported the claimant's allegations of discrimination and he did not interview Mr Buchanan, the trade union representative.**

98. The Claimant would require permission to amend, this was not in his original claim.

99. It is not in the interests of justice to grant permission to amend.

100. Time for this complaint would run from the grievance outcome, which is May 2022. As such, this complaint was a little over 12 months late.

101. It is not just and equitable to extend time.

102. Whilst the delay in this instance was not insignificant, given the complaint is about what steps were or were not taken in a grievance investigation and that process is documented, I am not persuaded there would be any great prejudice from the memories of witnesses fading.

103. I do, however, have considerable doubts about the merits. I have already referred to the grievance outcome. Ms Gill provided an ostensibly thorough and detailed decision letter. The content of this is strongly suggestive of various relevant investigatory steps being carried out. The mere fact the Claimant can propose additional steps it might have been possible for the Respondent to have taken, is not a factor likely to show even unfairness, let alone any connection with race. This is a week complaint. Whilst the Claimant may not agree with the decision Ms Gill made, he is very far from being a show that it was discriminatory.

104. The Claimant has no reasonable prospect of showing a continuing act. There is nothing to link this grievance process with the later events about which the Claimant complains.

Case Management

105. I will list a case management hearing to consider orders necessary to prepare this matter for a final hearing.

Issues

106. The issues arising on the Claimant's claims, to the extent they have been permitted to proceed, are set out below:

1. **Direct discrimination (Equality Act 2010 section 13)**

    1.1 Did the Respondent do the following things:

        1.1.1 after the claimant returned to work in 2022, he was subjected to a disciplinary process, leading to a final written warning issued on 8 June 2022;

        1.1.2 the claimant's appeal against it was rejected in September 2022.

    1.2 Did the Respondent's treatment amount to a detriment?

    1.3 Was that less favourable treatment?

        The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's.

        If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated (a hypothetical comparator).

The Claimant says their treatment was worse than Mr Taggart.

1.4 If so, was it because of race?

2. Harassment (Equality Act 2010 section 26)

2.1 Did the Respondent do the following things:

2.1.1 after the claimant returned to work in 2022, he was subjected to a disciplinary process, leading to a final written warning issued on 8 June 2022;

2.1.2 the claimant's appeal against it was rejected in September 2022.

2.2 If so, was that unwanted conduct?

2.3 Did it relate to race?

2.4 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

2.5 If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the Claimant do a protected act as follows:

3.1.1 Grievance 16 May 2018;

3.1.2 Grievance 12 August 2021;

3.1.3 Statement at the appeal meeting in September 2022.

3.2 Did the Respondent do the following things:

3.2.1 after the claimant returned to work in 2022, he was subjected to a disciplinary process, leading to a final written warning issued on 8 June 2022;

3.2.2 the claimant's appeal against it was rejected in September 2022.

3.3 By doing so, did it subject the Claimant to detriment?

3.4 If so, was it because the Claimant did a protected act?

3.5 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

4. Remedy

4.1 To what remedy or remedies is the Claimant entitled.

Employment Judge Maxwell

Date: 6 October 2023

Sent to the parties on:
15 November 203

For the Tribunal Office: