Case No: 2211492/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms Mehari

Respondent: SAP (UK) Ltd

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under Rule 69, the judgment sent to the parties on 30 April 2024 is corrected as marked on the attached corrected judgment.

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Employment Judge E Burns
9 May 2024

SENT TO THE PARTIES ON

29 May 2024

....

....

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for asking for written reasons, applying for reconsideration or appealing against the judgment are not changed by this certificate of correction and corrected judgment. These time limits still run from the date the original judgment or reasons were sent, as explained in the letter that sent the original judgment.

EMPLOYMENT TRIBUNALS

Claimant: Ms Mehari

Respondent: SAP (UK) Ltd

Heard at: London Central (in person)

On: 26 September and 21 and 22 November 2023

Before: Employment Judge E Burns

Representation

For the Claimant: Represented herself
For the Respondent: Dee Masters, Counsel

<u>CORRECTED</u> JUDGMENT

(1) The matters listed in the attached list of issues dated 29 April 2024 are permitted to proceed.[1]

(2) All of the matters listed in the list of issues dated 24 November 20223 that are not included in the attached list of issues are not permitted to proceed. ~~They have~~ Either:

(a) they are detriments that have not been allowed in by way of amendment or have been struck out because are out of time and there is no reasonable prospect of the Claimant establishing they are part of a continuing act or being granted an extension of time;

(b) they are purported protected disclosures or protected acts that have not been allowed in by way of amendment or have been struck out because the Claimant does not have reasonable prospects of success of showing that later decision makers were aware of them and that their behaviour ~~was influenced~~ towards her was influenced by them;

[1] The list of issues attached to the original judgment was changed at a case management hearing on 8 May 2024 and therefore a revised list of issues is not attached to his correct judgment.

(c) they have otherwise not been allowed in by way of amendment or they have been struck out on the grounds that they lack sufficient clarity and/or are not legally viable and therefore lack reasonable prospects of success

(3) The Claimant is ~~not~~ ordered to pay £1,000 towards the Respondent's costs of the preliminary hearing that was meant to take place on 26 September 2023. This is to be paid in instalments to be agreed with the Respondent.

REASONS

PURPOSE OF THE HEARING

1. This was a preliminary hearing in public for the following purposes:

   (a) identify exactly what factual and legal complaints the Claimant wished to pursue
   (b) determine the extent to which the Claimant needed to amend her original claim to pursue those complaints
   (c) to the extent required, determine the Claimant's amendment application
   (d) determine the Respondent's application that certain of the Claimant's complaints should be struck out or alternatively a deposit order should be made
   (e) determine the Respondent's applications for costs.

THE HEARING

2. The key material available to me at the hearing consisted of:

   2.1 A hearing bundle prepared by the Respondent that ran to 752 pages, which, in addition to other documents which I will not list, included the following documents:

   (a) The original claim form (ET1) (6 - 17) and attached particulars of claim (18 – 22)
   (b) A document prepared by the Claimant dated 22 September 2023, said to be a response to the Respondent's application dated 30 May 2023 for strike out/deposit order (493 – 502)
   (c) A document prepared by the Claimant confusingly dated both 21 and 26 September 2023, said to be a witness statement prepared in response to the same application (524 – 531)
   (d) A document dated 18 October 2023 (served on the Respondent on 23 October 2023) prepared by the Claimant, said to be her Amended Particulars of Claim. The version I relied upon was at pages 638 – 676 of the bundle as the Respondent had helpfully identified the changes from the original particulars of claim and highlighted information which it said was completely new and to which it objected in yellow.
   (e) The formal grievance the Claimant submitted to the Respondent on 17 November 2021 during the Claimant's employment and said also to be part of her claim (195 – 199)
   (f) A document served on the Respondent on 24 October 2023 prepared by the Claimant said to be an amended version of her original reply to the Respondent's request for further information

(g) A table produced by the Claimant said to set out a chorological summary of her allegations which she had prepared to support her contention that all of the allegations when considered together amounted to a continuing act. This document had additional new information in it (603 – 614)

(h) The Respondent's letter dated 8 November 2023 replying to the Claimant's application to amend, remaking its original strike out application (or for a deposit order int eh alternative) and making an application for costs (618 - 637)

(i) Two witness statements for Sandra Broos (145 – 152 and 699 – 707)

(j) The Respondent's Schedule of Costs (735 – 738)

2.1 A bundle of authorities prepared by the Respondent that ran to 372 pages. This had been provided to the Claimant in advance of the hearing;

2.2 An additional document provided by the Claimant on the day providing information about her financial means and responding to the Respondent's costs application; and

2.3 Additional correspondence on the tribunal's file that had not been included in the bundle, but which was discussed with the parties

3. The hearing was a continuation of an earlier hearing that had taken place in the afternoon on 26 September 2023. I return to the reasons for this ~~below~~ in more detail below, because it is relevant to the costs application and the amendment application. For the purposes of this section of the judgment, however, I simply set out how the time available was spent on 26 September and 20 and 21 November 2023.

26 September 2023

4. During the hearing held in the afternoon of 26 September 2023 the parties made a start on discussing and agreeing a list of issues. During that discussion it became apparent that the Claimant wished to amend her claim, but had not made an application to amend. For example, she sought to rely on complaints contained in her witness statement that were not in her pleaded claim.

5. As the hearing was being postponed to 20 and 21 November 2023 for another reason, I suggested that if the Claimant wished to apply to amend her claim she should prepare an updated version of her particulars of claim, showing the new information as tracked changed.

6. The Claimant asked if she should also update the document she had prepared in reply to the request for further information made by the Respondent. I left this up to her saying that it did not appear to be necessary.

7. I emphasised to the Claimant the importance of being clear about which factual matters were said to give rise to legal complaints and to expressly state what those complaints were. I also told the Claimant that she did not need to provide a great deal of factual information about the allegations she wished to pursue, as this is what is done in witness statements. I explained that the detail simply needed to be sufficient to enable the respondent to

understand the allegation and respond to it, but that it was helpful for this to be in chronological order.

8. I set a deadline of 18 October 2023 for the Claimant to make any amendment application she wished, explaining that this would enable the Respondent to digest the new information and consider how it might wish respond.

9. The Respondent had indicated that it wished to apply for its costs of the postponed hearing. I therefore ordered it to make that application in writing and send it to the Claimant in advance of the hearing so she would have time to consider it.

10. Finally, I explained that should I wish to consider a deposit order rather than a strike out, I would need financial information from the Claimant

11. The Claimant emailed an amended particulars of claim to the tribunal and to the Respondent on 23 October 2023. The original document had grown from five pages of A4 to thirty nine pages and did not provide the clarity required. She also attached the grievance dated 17 November 2021 that she had submitted to the Respondent.

12. The Claimant's email said that there was a third attachment, but there was not. The third attachment was sent the next day, 24 October 2023. That was an amended version of the reply to the request for further information. The email attached yet another document said to be "the corresponding supporting document which I had said would be helpful". This was the table at pages 603 to 614 referred to above.

20 November 2023

13. The full day on 20 November 2023 was spent, as painstakingly as time allowed, going through the five documents now said by the Claimant to contain her pleaded claim to enable it to be understood and distilled into a list of issues. Following the hearing, I produced a draft list of issues overnight which I provided to the parties at the start of the hearing the next day.

21 November 2023

14. The list of issues contained all of the matters which I understood the Claimant wished to include prior to me deciding the amendment and strike out applications. The parties were given an opportunity to review and comment on the document and I made some amendments to the working draft.

15. I then heard submissions from the Respondent in relation to the amendment and strike out applications and also the costs applications.

16. The hearing then adjourned to enable the Claimant to have time to prepare her submissions and have a break and some lunch. Prior to the adjournment, the Claimant said she would be applying for a longer adjournment so that her submissions were postponed to another date. The Respondent indicated it would oppose such an application.

17. The Claimant reflected on her position during the break and came back saying she had decided not to apply for an adjournment. She made her submissions accordingly. She asked to be given an opportunity to provide submissions in writing as well.

18. I gave her limited permission to do this, as there was not time to deliver a judgment that day in any event. The limited permission was confirmed in writing by an email dated 24 November 2023 sent to the parties shortly after the hearing. I also sent the updated list of issues, to the parties based on what the Claimant had said at the hearing on 21 November 2023 when we went through it.

19. The permission given to the Claimant was to provide the following to the tribunal and the Respondent by 4 pm on 6 December 2023:

    17.1 any written submissions she wished to make in response to the two costs application made on behalf of the Respondent ; and

    17.2 in relation to each of the paragraphs in the new list of issues which the Respondent says were not pleaded in the original claim in part or in full ~~(see highlighted)~~, confirmation whether she accepts or disagrees with the Respondent's position and why.

20. The Respondent was granted permission to send any reply to the Claimant's written submissions by 4 pm on 20 December 2023.

21. The following were received in response:

    ~~19.1~~ 21.1 An unsolicited, but nevertheless helpful email from the Respondent dated 1 December 2023 with tracked amendments on the latest version of the list of issues, highlighting which complaints it said remained unclear and highlighting all sections of the LOI which the Respondent is seeking to strike out and/or to which the Respondent resists the Claimant's application to amend.

    ~~19.2~~ 21.2 An email from the Claimant dated 6 December (sent at 4:02 pm) attaching a document called an orientation note which went beyond the limited order I made. The Claimant did not send in written submissions responding to the costs applications.

    ~~19.3~~ 21.3 ~~a~~An email from the Respondent dated 20 December (sent at 15:40) replying to the Claimant's document above.

22. I apologise to the parties for the length of time it has taken to produce this judgment. As they are aware, I was unable to do it in late December/early January as planned because due to illness and the bereavement of a close family member I took an extended period of leave.

23. Finally, I add that I did not hear any witness evidence. The Respondent had prepared two witness statements and the Claimant had also prepared some witness evidence. Neither gave evidence and so their evidence is untested through cross examination. I was pointed to some limited documentary

evidence in the bundle. I have therefore avoided making any findings of fact where the facts are disputed.

RELEVANT CHRONOLOGY

24. The Claimant's employment with the Respondent began on 1 May 2021. The Respondent wrote to her on 16 September 2022. The letter advised her that her employment was being terminated with immediate effect that day, but that she would receive a payment in lieu of notice.

25. The Claimant initiated early conciliation on 11 November 2022. The EC certificate was issued only three days later on 14 November 2022 (5)

26. The claim was presented to the tribunal on 18 December 2022 (6 – 22).

27. It is not in dispute that the claim is in time so far as the date of dismissal is concerned.

28. The Claimant told me that the particulars of claim were incomplete as far as she was concerned at the time she presented them. In submissions, she told me that she had been given inaccurate information about when the claim needed to be submitted and was working to a different deadline. She realised the mistake when she saw a lawyer on a pro bono basis, but this meeting was close to the deadline and she had insufficient time to prepare a full document.

29. When asked why the Claimant had not made a claim to the employment tribunal earlier, particularly about the matters she says occurred in 2017 and 2018, she said that it would be unthinkable for a person in employment to bring a claim of discrimination while remaining employed. I was provided with evidence that she sought legal advice about potential claims while she was still employed and she accepted that this was the case. She said it was not very detailed advice. I note that it is not in dispute that she commenced an Acas EC process as early as 7 April 2022 (256).

30. In her claim form, the Claimant had ticked the boxes for unfair dismissal, race discrimination and disability discrimination and other payments and that to make another type of claim that the Employment tribunal can deal with. In the text box on that page and in response to 8.2 she referred to a list of legal complaints.

31. Also attached to the claim form was an additional document which ran to five pages of A4. This document starts with a bullet point narrative about the things the Claimant says happened to her during her employment dating back to 2017 and then finished with a section headed outline Legal claims. The legal complaints referred to in this section repeat the same complaints referred to in the form. However it is not clear which parts of the narrative are said to give rise to which complaints.

32. The Respondent presented its Response to the claim on 31 January 2023. It made the point in it's attached Grounds of Defence, that the Claimant's claims were unclear and largely unparticularised. It sent the Claimant a request for further information on 14 March 2023. She did not reply to this prior to the first case management hearing.

33. That case management hearing took place on 11 April 2023. Although originally to be conducted by video, it was converted into an in-person hearing at the Claimant's request as a disability-related adjustment. The hearing was conducted by EJ Nash.

34. In the limited time available to her, EJ Nash was able to do the following:

- Identify the disabilities upon which the Claimant relied (April CMOs, para 15);
- Identify the heads of claim which included potential whistle blowing claims (albeit not expressly pleaded in the original claim form) (April CMOs, para 45);
- Provide a generic list of issues to assist the parties in formulating an appropriate bespoke document for the litigation and explain why a list fo issues is so important (April CMOs, para 46);

35. In response to the Respondent's concerns about the lack of clarity in the claim form, EJ Nash ordered the Respondent to re-serve its request for further information (RFI) by 12 April 2023 with the Claimant having until 5 May 2023 to respond. She added the sentence "*She must only include matters which are contained in the claim from. If she seeks to introduce new matters, she must make an application to amend*."

36. She also gave permission to the Respondent to amend its grounds of defence by 30 May 2023, adding that when doing so, the Respondent should state if it contended that the Claimant's response contained matters outside of the claim (i.e. requiring an amendment) and comment on any application to amend.

37. EJ Nash also listed a two day preliminary hearing in public hearing to take place on 25 and 26 July 2023, the purpose of which was to consider:

- Any clarification of the list of issues
- Any application to amend the claim
- Any application for a strike out order by the respondent
- Any application for a deposit order by the respondent
- Case management and listing for the final hearing.

38. The clear implication of these orders was that the Claimant should, when responding to the request for further and better information, be alert to the need to make an application to amend should she wish to add new information and that any such application should accompany her response. The orders also envisaged, however, that it was possible that the Claimant would not identify such information as new and therefore the Respondent was to be given a chance to point this out. I consider it was clear from this that even if the Claimant did not make a formal application of amendment, the inclusion of any new information by her would be treated as an application to amend.

39. There was also discussion about strike out and deposit orders with the Respondent being given a deadline by which to make any application. The Respondent indicated that it was likely to make a merits based strike out application, but that it also envisaged making an application that the

Claimant's prospects of succeeding in establishing that anything that occurred before around mid-2019 was in time by virtue of being part of a continuing act with later events or being given a extension lacked prospects of success.

40. The Claimant provided the RFI Response to the Respondent at quarter past midnight on 6 May 2023. Unfortunately, as often happens when unrepresented parties are asked to provide further information outside of a case management hearing, the Claimant's replies to the request for further information did not provide the clarity sought.

41. However, the Respondent produced a proposed draft list of issues in which it sought to set out the Claimant's case by reference to the original particulars of Claim and the RFI Response. In so doing, the Respondent highlighted areas where additional information would be required from the Claimant to enable the Respondent to understand and respond to the document. Despite the Respondent sending the list of issues to the Claimant on 30 May 2023, the Claimant did not engage with the document at all.

42. In addition, the Respondent complied with the order made by EJ Nash to prepare an amended Grounds of Resistance and an application for strike out/deposit order based on its understanding of the claim at that time.

43. EJ Nash had also ordered the Claimant to serve a schedule of loss on the Respondent, but more significantly to provide it with copies of her medical records and a disability impact statement. The Claimant did not do this. She also failed to comply with other case management orders.

44. The Respondent made several attempts to correspond with the Claimant about these matters, as well as the list of issues, but she failed to address them satisfactorily. This led the Respondent to apply, on 12 July 2023, for an unless order (153).

45. An unless order was duly issued on 13 July 2023 by EJ Goodman (160 – 161) giving the C a further week to comply with the orders, i.e. until 4 pm on 21 July 2023.

46. Prior to complying with that order, on 15 July 2023, the Claimant sent a short email to London Central Employment Tribunal saying that she intended to make an application to postpone the hearing (167). She prepared a longer email setting out that application which she sent on 16 July 2023 (169 – 179). She mistakenly sent the application to London South Employment Tribunal.

47. The short email was received and treated as an application to postpone the hearing. That application was rejected by EJ Spencer pending compliance with the unless order (171).

48. The Claimant sent further correspondence to London South Employment Tribunal on 20 July 2023 attaching a schedule of loss (283) and on 21 July 2023 providing her medical records and Disability Impact Statement (292). Because none of this correspondence was received at London Central Employment Tribunal, it appeared to the Tribunal that the Claimant had not

complied with the unless order and EJ Spencer directed that the claim stand as dismissed and the hearing in July be vacated.

49. When it became clear that the Claimant had in fact sent the information to the wrong place, the claim was reinstated. This was not until 22 August 2023 when it was too late to rescue the lost July hearing. The case was listed for a new two day preliminary hearing to take place on 26 and 27 September 2023.

50. The hearing was allocated to me on 25 September 2023. As I was already committed to a hearing in the morning of 26 September 2023, a clerk wrote to the Claimant to say that the hearing would need to start at 2 pm instead of 10 am. She replied at 18:51 saying that she had written to the tribunal on 14 September 2023 to request the hearing duration be reduced to 4 hours instead of two days and added that she had to catch a flight to attend her aunt's funeral on 27 September 2023.

51. It transpired that the Claimant had written to the Respondent, copying in the tribunal on 21 September 2023 asking the Respondent to agree to reduce the length of the hearing. She also said that she continued to be unrepresented and that she had learned that her Aunt had died suddenly on 2 September with the funeral taking place on 27 September 2023, but did not rely on this as the reason for wanting to reduce the hearing duration.

52. The Respondent had replied on 22 September 2023 saying that it could not agree to the request. When I saw this correspondence, I directed a clerk to write to the parties to say that I was treating the Claimant's email as an application that the hearing should not proceed on 27 September 2023 and indicated that if is was opposed by the Respondent, the application would be dealt with at the hearing.

53. The Respondent understandably expressed grave concerns about the hearing not proceeding and the issue of delay at the hearing on 26 September 2023. I reluctantly decided to postpone the next day's hearing because I considered it would not be fair to force the Claimant to miss her Aunt's funeral. The inevitable result of my decision was that it was not going to be possible to hear the Respondent's application for a strike out/deposit order because there was insufficient time that afternoon to clarify the issues and deal with the application. I therefore made the orders referred to above in the section headed Hearing.

54. I note that although I set an original deadline of 18 October 2023 for the Claimant to send her amendment application to the Respondent she failed to do this. The Respondent sent an application for a further unless order to the tribunal and the Claimant on 20 October 2023. This was not referred to a judge prior to the Claimant complying and therefore no unless order was made. The Claimant's explanation for the delay and manner of compliance was set out in her email as follows:

> *"As you are aware I was at a funeral in Sweden from 27 September 2023 until Sunday 1 October 2023 so I have had less than 13 working days since returning I really do not want to rush this and not be able to rely on the courses of conduct once at the 14 day trial next year. Let me know your thoughts?*

I have been struggling with anxiety and panic attacks last week so I had to seek help with my health before I could concentrate on completing the particulars.

Please accept my apology that I missed these off and for the delay which is due to my health I only managed to access legal advice on last Monday 16 October 2023."

55. The only reasons that the Claimant has given for not making the amendment application earlier and the manner and form in which the documents have been presented have been the fact that she is a litigant in person and her ongoing ill heath.

56. The Respondent's untested witness evidence confirmed that all of the people named by the Claimant in connection with the earlier allegations in her claim form have left its employment. In addition, it has been unable to locate relevant documents due to its retention policies for email and other documents. It has taken steps to protect what it has got now that it is aware of the claim.

RELEVANT LAW

Pleadings and Amendment

57. Two important principles of tribunal litigation are:

    (a) A tribunal does not have jurisdiction to determine claims that are not contained in the facts set out in the claim form.

    (b) A Respondent needs to know the case that they need to meet.

58. There are a number of authorities which deal with the importance of the not straying from the pleaded case as contained in the claim form.

59. Relevant authorities include Mr Justice Langstaff (then president of the EAT) in *Chandhok v Tirkey* [2015] ICR 527, EAT and *Chapman v Simon* [1994] IRLR 124 and *Ahuja v Inghams* [2002] EWCA Civ 1292) and *Tough v Commissioners for HM Revenue and Customs UKEAT/0255/19*.

60. Langstaff P observed in the *Chandhok* case, at paragraph 17 that:

    "…..*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…..*"

61. He adds at paragraph 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;*** *….. 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.' (bold emphasis added)

62. Mrs Justice Elizabeth Laing in *Adebowale* stated at paragraph 16:

"*In my judgment the construction of an ET1 is influenced by two factors: the readers for whom the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented), and by the EJ. The EJ is, of course, an expert, but (as this litigation shows) should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation. The EJ has the difficult job of managing a case like this, and the EJ's task will not be made any easier if this Tribunal imposes unrealistic standards of interpretation on him or on her.*"

63. Our system of justice does, of course, include a process whereby the information contained in the claim form and response can be developed. Requests for further information are a regular feature of employment tribunal litigation and an order for further information was made in this case. Such further information is intended to elucidate further detail of the claims in the claim form.

64. The basic principles that apply when ordering further information have been summarised by Wood J in *Byrne v Financial Times Ltd* [1991] IRLR 417 at 419: (EAT) as follows:

*"General principles affecting the ordering of further and better particulars include that **the parties should not be taken by surprise at the last minute**; that particulars should only be ordered when necessary in order to do justice in the case or to prevent adjournment; that the order should not be oppressive; that particulars are for the purpose of identifying the issues, not for the production of the evidence; and that complicated pleadings battles should not be encouraged."(again bold emphasis added)*

65. In *Secretary of State for Work and Pensions (Jobcentre Plus) v Constable [2010] All ER 190, further information was ordered in a case* where the claim was of automatically unfair dismissal for having made a protected disclosure. The EAT expressed the view that the Respondent was entitled to know what the Claimant claimed the disclosure was, when, how and to whom it had been made, and how it was alleged to have led to the dismissal. It ordered particulars to that effect to be provided. The Claimant did not have to amend the claim form in order to add this information into his claim.

66. Where an amendment is required, the leading case is *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661, in which it was held that when considering an amendment, the following are relevant factors:

- The nature of amendment
- The applicability of time limits
- The timing and manner of the application

67. However, as confirmed in the case of *Vaughan v Modality Partnership* [2021] ICR 535, EAT, having considered the relevant factors, which are not limited to those identified in the *Selkent* case, we must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and make our decision accordingly.

68. In *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634, it was confirmed that I am able to allow an application to amend subject to the time limits issue being resolved at the final hearing. I am not obliged to do this, however. It is permissible to allow a claim that has been presented late to proceed by way of an amendment and in doing so, effectively making a decision that the claim can proceed regardless of the fact that it has been presented late. What is important, however, is to consider the balance of the injustice and hardship to both parties with the matter of whether the claim has been presented late being one factor that is part of that consideration.

69. Another factor that can be considered is the merits of a claim. Where there is a factual dispute between the parties, a tribunal taking the merits into account must guard itself against the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored.

Time Limits

70. Because time limits are relevant when considering an application to amend, I have set out the law on time limits. Different provisions apply for whistleblowing claims and discrimination claims.

Whistleblowing Claims

71. Although frequently referred to as whistleblowing claims, the accurate statutory language is a claim that a claimant has been subjected to a detriment by her employer done on the ground that she has made a protected disclosure (section 47B of the Employment Rights Act 1996).

72. The term protected disclosure is defined in section 43A of the Employment Rights Act. That section cross refers to sections 43B – 4H3 which set out what types of disclosures qualify and in what circumstances.

73. The normal time-limit for claims brought by workers under section 47B of the Employment Rights Act 1996 is found in sub-section 48(3)(a) of that Act. It essentially says that the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

74. The normal three month time limit need to be adjusted to take into account the early conciliation process and the extensions provided for in subsections 207B(3) and (4) of the Employment Rights Act 1996.

75. Sub-section 48(3)(b) of the Employment Rights Act 1996 goes on to say that a tribunal may still consider a claim presented outside the normal time limit if it is satisfied that:

- it was not reasonably practicable for the claim to be presented within the normal time limit, and
- the claimant has presented it within such further period as the tribunal considers reasonable.

76. This is a two stage test. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the Claimant. It is a very strict test.

77. The factors that can be taken into account will vary from case to case (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470). A serious incapacitating illness of an employee is one of the factors that can be considered.

Discrimination Claims

78. The normal time-limit for discrimination claims is found in section 123 Equality Act 2010. According to section 123(1)(a) the tribunal has jurisdiction where a claim is presented within three months of the act to which the complaint relates.

79. The normal three-month time limit needs to be adjusted to take into account the early conciliation process and any extensions provided for in section 140B Equality Act.

80. The section contains some additional provisions dealing with when acts of discrimination are deemed to have taken place which are not relevant here. The important provision is that a tribunal can allow a late claim if the claim was brought within such period as the employment tribunal thinks is just and equitable as provided for in section 123(1)(b). This is referred to as a just and equitable extension.

Strike Outs and Deposit Orders

81. The Tribunal's power to strike out claims and responses is found in Rule 37(1) of the Tribunal Rules. The relevant parts of Rule 37(1) for the purpose of this hearing say the following:

    "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 part of a claim or response on any of the following grounds—

    that it is scandalous or vexatious or has no reasonable prospect of success;

82. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering applications of this nature. It says:

    "The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

    (a) ensuring that the parties are on an equal footing;
    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;
(d) avoiding delay, so far as compatible with proper consideration of the issues; and
(e) saving expense.

83. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

84. The courts have repeatedly warned of the dangers of striking out discrimination claims on the grounds that they lack prospects of success, particularly where "the central facts are in dispute" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

85. However, while exercise of the power to strike out should be sparing and cautious, there is no blanket ban on such practice.

6. The question of striking out discrimination claims was considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]: "*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."*

86. Rule 39 of the Tribunal Rules says:

"(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has <u>little reasonable prospect of success</u>, 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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

87. The purpose of a deposit order is to identify at an early stage claims with little prospect of success so as to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. Their purpose is not to make it difficult to access justice or to effect a strike-out by another route (*Hemdan v Ishmail and anor* 2017 ICR 486, EAT).

88. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claim is said to have no prospects of success.

89. When determining whether to make a deposit order, I am not restricted to a consideration of purely legal issues. I am entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward (*Van Rensburg v Royal Borough of Kingston-upon-Thames* UKEAT/0095/07).

90. The same caution should be exercised in discrimination claims where there are disputed facts as when considering applications for a strike out under rule 37 (*Sharma v New College Nottingham EAT 0287/11* applying *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL*). The test of 'little prospect of success' under rule 39 is however plainly not as rigorous as the test of 'no reasonable prospect' under rule 37 and the consequences of a deposit order are not as severe as a strike out order. It therefore follows that a tribunal has a greater leeway when considering whether to order a deposit.

91. An order should be for payment of an amount that the paying party is capable of paying within the period set (*Hemdan v Ishmail* [2017] IRLR 228, EAT) taking into account his or her net income and any savings. The employment tribunal must give its reasons for setting the deposit at a particular amount (*Adams v Kingdom Services Group Ltd* UKEAT/0235/18).

Time and Strike Out

92. It can sometimes be possible to address the issue of time as a preliminary issue under Rule 37 and 39. Rather than determine the issue as to whether a complaint is in time, the Tribunal instead considers the prospects of the Claimant succeeding in establishing that there is a continuing act or being granted an extension of time. The leading case is **E v X UK EAT/0079/20 RN and UK EAT/0080/20/RN** in which guidance is given as to when this is appropriate.

Costs

93. The Tribunal rules enable a legally represented party in employment tribunal litigation to make an application for a cost order.

94. When considering whether or not to award costs, the relevant tests (known as the "threshold test") which the Tribunal must apply are found in Rule 76 which says:

    (1) "A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—

    (a) a party (or that party's representative) has acted …. unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

    (b) any claim or response had no reasonable prospect of success;

(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.

(2) A Tribunal may also make such an order where a party has been in breach of any order ……..”

95. The Tribunal must consider an application in three stages:

- I must first decide whether the relevant threshold test is met
- if I am satisfied the relevant threshold test has been met, I should then decide if I should exercise my discretion to award costs (the rules say “may” rather than “must”)
- I should then decide the amount of the costs to be awarded

Each case depends on the facts and circumstances of the individual case.

96. Rule 84 is also relevant. It says:

“In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal ***may*** *have regard to the paying party’s (or, where a wasted costs order is made, the representative’s) ability to pay.” (emphasis added)*

97. I emphasise the word “may” because the Tribunal is permitted, but not required to have regard to the means of the party against whom the order is made. A tribunal can make an award even if the paying party has no ability to pay, provided that we have considered means. I must do this even when the paying party does not raise the issue of means directly. I must say whether or not we have taken the paying party's means into account.

ANALYSIS AND CONCLUSIONS

List of Issues

98. Because it has been so difficult to penetrate the various documents in which the Claimant has tried to set out her case I have approached the question of what can proceed and what cannot procced based on a list of issues, rather than by reference to the documents said to be pleadings, replies to further and better particulars or amendment applications.

99. In doing so, I note that the Respondent expressed concern that a list of issues is not a pleading and only a case management tool. This principle has been reiterated very recently in the EAT decision **of Z v Y [2024] EAT 63.** I acknowledge the Respondent’s very real concern that the Claimant may seek to persuade another judge to go behind the list of issues and refer back to the other documents at some point in the future.

100. I cannot fetter the discretion of any future judge with conduct of the case in that regard, but stress here that the amount of judicial time and effort that has been expended reaching this point have been considerable. I consider I have tried very hard to understand how the Claimant wishes to put her case and give her a fair opportunity to do so. In undertaking that exercise I was not passive, but explained the relevant law to the Claimant so that, to

the best of her ability, understood the legal tests that would be applied and was able to formulate her complaint with that in mind.

101. I also took ownership of drafting the list of issues so that the Claimant could be confident that it was drafted by me and not by the Respondent's representatives, of whom she was somewhat suspicious, as is typical of many litigants in person who are concerned that there lack of legal knowledge and experience will hamper their case.

Decision on What Can Proceed

102. Although the legal tests that apply when allowing amendment and considering striking out a claim are different, similar considerations apply in both cases.

103. Whether or not a claim is brought in time, either in the original claim form or by way of an amendment, is a key consideration. The decision whether or not to allow an amendment requires me to balance the competing interests and prejudice to the parties, as does a decision in relation to whether or not an extension of time should be granted on a just and equitable basis. There is a great deal of overlap which it is why is usually helpful once the issues in a case are clarified, that both are dealt with at the same time.

104. In reaching my decision I have taken into account the extent to which the complaint that was sent out in the original list of issues was contained in the original particulars of claim. Where new information has been provided, I have considered whether the Claimant has simply provided further information or introduced entirely new facts or legal claims which require an amendment.

105. To the extent an amendment is required, although the claim was issued in December 2022 and we are now in April 2024, the litigation is still at a relatively early stage in that there has been not yet been an order for general disclosure, exchange of witness statements or a final hearing listed.

New Disabilities

106. In relation to the new medical conditions the Claimant seeks to rely upon, I have decide that she should be permitted to do so. The only prejudice to the Respondent is that it has already reviewed the medical notes in relation to the other medical conditions, but this task can be undertaken quickly and easily given that the documents are searchable electronically.. The Claimant would not need to prepare an updated impact statement as her existing one already refers to these additional medical conditions.

Time Issue – Out of Time Detriments

107. Having heard submissions from both the parties, I find I am in agreement with the Respondent's general proposition that this is a case where ***E v Z*** applies in relation to time.

108. It is not in dispute that the Claimant was assigned a new line manager, Samantha Quinn, in April 2019 and that this, and the arrival of a new head

of PS, Stefan Weigand, led to the Respondent attempting to performance manage the Claimant and ultimately her dismissal.

109. The Claimant was extremely unhappy with the way Ms Quinn line managed her between April 2019 and the date when Ms Quinn took maternity leave and Ms Quinn's attempts to performance manage her. She was also unhappy with her line management by Ms Quinn's maternity cover, Abby Fielder. The Respondent has not sought to argue that any of the pleaded complaints, that occurred during this time frame should be struck out, although it has argued that new complaints in this time frame which were not originally pleaded should not be allowed in. It has asked that the complaints concerning earlier matters should not be permitted to proceed.

110. I have given this careful consideration~~,~~. The matters the Claimant describes that occurred in 2017 and 2018 if true, amount to serious allegations. However, in her own documents she explains that during the period she was required to report to Amelia Purdie she did not experience the same kind of difficulties that she had experienced earlier and would go on to experience. The period of line management by Ms Purdie appears to break any connection between the earlier and later events. This is a significant hurdle that the Claimant, in my judgment, has little reasonable prospect of overcoming when trying to succeed in her legal argument that there was a continuing act.

111. I also consider that the Claimant has no reasonable prospects of succeeding in establishing she should be granted an extension of time. The test for an extension of time for bringing complaints of detriments on the ground of a protected disclosure is very strict. The Claimant has not argued persuasively that there was any reason why it was not reasonably practicable for her to make such a claim far earlier than she did. The test for discrimination, harassment and victimisation claims is more generous, but still requires a balancing exercise to be undertaking comparing the prejudice to both sides. In this case, the prejudice to the Respondent far outweighs the prejudice to the Claimant. This is because the key people who were involved are no longer employed and it has been unable to find relevant records.

112. I have therefore decided not to permit any of the complaints that pre-date April 2019 to proceed. These are either struck out or not allowed by way of amendment.

113. With regard to the new detriments that are said to have occurred after April 2019, I have decided that these should be permitted to proceed by way of amendment. There are not very many of them, when all things are considered, and there is therefore limited prejudice to the Respondent.

114. The Respondent sought to limit the allegations now found in paragraph 25.1 to those that arose in the context of a particular project. I have not done this. I understand the allegations to be general criticisms of the way in which Samatha Quinn line managed the Claimant and that they should not ~~tn~~ therefore be limited.

Lack of Prospects – Protected Acts and Protected Disclosures

115. The time argument does not apply in the same way to the matters which the Claimant says are protected acts or protected disclosures. I have however decided to strike out the earlier matters relied on for a different reason.

116. The reason in this case is that I do not consider the Claimant has reasonable prospects of establishing the later behaviour was influenced in any way by the earlier disclosures. This is because I do not consider she is going to be able to establish that the decision makers in relation to the later behaviour were influenced by the earlier communications ~~in~~ whatsoever. There is a long list of similar, but later communications of which, if they are genuine, the decision makers would have been aware and which can proceed.

Lack of Clarity

117. Despite the painstaking process that I conducted, when drawing up the new list of issues I found that a few allegations remained unclear to me and I have therefore struck them out for this reason, or not allowed them in by way of amendment. However, where I was able to convert my note into a clear issue I have done so.

Costs

118. I have also decided to make a costs award against the Claimant in relation to the postponement of the second day of the last preliminary hearing.

119. The Respondent asked me to consider a broader costs award to take into account the Claimant's conduct since the start of proceedings. She has, by her actions, caused the Respondent to incur costs that would not otherwise have been required. These actions are:

- Her failure to make the amendment application promptly, before the Respondent submitted its amended Grounds of Resistance. The Respondent will need to do this again now that the case has been clarified.

- Her failure to comply with the deadlines to provide medical records which forced the Respondent to have to make an unless order

- The mistake the Claimant made sending correspondence to the wrong Tribunal which led to the claim being struck out;

- The manner in which the Claimant has advanced her amendment application, in several documents rather than in a straight forward single and clear document

- Her failure to identify the changes

120. Although these actions have had an impact on the Respondent's costs, I do not categorise them as the type of unreasonable behaviour that meets the threshold test for a costs award as required for Rule 76(a).~~.~~ They are not atypical of the type of behaviour that many litigants in person exhibit and are generally caused by their lack of understanding of employment tribunal

processes. That said, this is a particularly bad example of such behaviour and my decision has been finely balanced. It falls in the end in favour of her, but she should be aware that it is unlikely that future non-compliance will be tolerated.

121. The Claimant's behaviour with regard to the postponement of the hearing on 27 September 2024 is different in my judgment. She knew that her aunt had died at the beginning of September 20234 and that the date of the preliminary hearing may be at risk, although I appreciate that she did not know the date of the funeral at this time.

122. Rather than make a prompt anticipatory application for a postponement based on the possibility of the funeral, in good time, she disingenuously applied to shorten the duration of the hearing for another reason and waited until the evening before the hearing, outside of office hours, to inform the Tribunal. Her letter dated 21 September 20234 was not addressed to the Tribunal but only copied to it and she could not expect the Tribunal to guess that a postponement application would be forthcoming.

123. Had the Claimant contacted the Tribunal earlier it is likely that at the very least a full one day hearing would have been able to be conducted. Had the Claimant contacted the Respondent earlier, prior to them incurring counsel's fee for the hearing, it is possible the Respondent would have been able to agree to the postponement.

124. I therefore consider the gateway test in Rule 76(1)(c) is met in this case and that it is in the interests of justice to make a costs award.

125. The Claimant's financial means are limited because she is not working, has~~ve~~ little by way of savings and is in debt. I have take the means into account when making my decision. I have not ordered that she pay the Respondent's costs of the lost hearing in full, but make a contribution to them ~~tot hem~~. I anticipate that she will be able to agree to pay on an instalments basis that while stretching will make the award affordable.

Employment Judge E Burns
30 April 2024
Date of correction 9 May 2024

Sent to the parties on: 29 May 2024

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For the Tribunals Office