Case No: 3302409/2023

EMPLOYMENT TRIBUNALS

Claimant: **Mr H Ibe**

Respondent: **(1) Wood Ltd (2) RHI Talent UK Ltd**

Heard at: **Reading** **On:** **11 March 2024**

Before: **Employment Judge Shastri-Hurst**

Representation
Claimant: in person
First Respondent: Non-attendance
Second Respondent: Mr M Gordon (counsel)

RESERVED JUDGMENT

1. The claimant's application to amend is permitted to a limited extent, in relation to the claim for victimisation against Wood regarding Ms Hopgood's refusal to grant the claimant's subject access request in January 2024. Otherwise, the application is rejected.

2. The claimant's application to add respondents is granted solely in relation to RHI Talent UK Ltd. The application to add individual respondents is rejected.

3. The respondent's application to strike out is successful in relation to the direct sex discrimination claim;

4. The respondent's application to strike out is rejected in relation to the direct race discrimination claim;

5. The respondent's application for a deposit order is rejected.

6. The claim of direct age discrimination is dismissed upon withdrawal.

7. The claim of unfair dismissal is struck out as the claimant did not have the requisite two years' service under s108 Employment Rights Act 1996 and thus is not entitled to bring the claim.

REASONS

Introduction

1. The claimant was employed by RHI Talent UK Ltd ("RHI"), and was assigned to work at Wood plc ("Wood") as a Project Technical Assistant, from 5 September 2023. He was given notice of termination of his employment on 23 September 2023, and the effective date of termination was 30 September 2023.

2. It is RHI's position that the claimant was dismissed due to (in summary) time keeping, performance and attitude.

3. The claimant presented a claim to the Employment Tribunal against Wood on 6 March 2023. He had previously been through the ACAS Early Conciliation process, commencing that process on 29 December 2022, with the certificate being issued on 7 February 2023.

4. The claim form contained the following claims:

    4.1. Ordinary unfair dismissal – s98 Employment Rights Act 1996 ("ERA");

    4.2. Direct discrimination (age, race, sex) in relation to the decision to dismiss – s13 Equality Act 2010 (EqA")

5. The claimant had less than 2 years' service with RHI (or indeed Wood). As a result of this, the Tribunal sent a letter warning him that it was considering striking out his unfair dismissal claim on the basis that he did not have the qualifying service required by s108 ERA. He was given the opportunity to reply explaining why his case should not be struck out. He did not send in a reply, and today conceded (in his application to amend) that he had been mistaken in including a claim of unfair dismissal. That claim has therefore been struck out due to lack of qualifying service.

6. At this stage, it is important to set out the identity of the parties as they were before me at the hearing.

7. The claimant presented his claim against Wood only. No response has been forthcoming from Wood. It was not represented at the hearing before me.

8. Instead, a response was presented by RHI. RHI had not been formally added as a party, or substituted for Wood by the time the case came before me.

9. In terms of the working arrangement, as set out above, it is common ground that the claimant was an employee of RHI, and was assigned to Wood as the end user.

Procedural history

10. This claim has been listed for a case management preliminary hearing several times, as follows:

    10.1. 10 November 2023 – postponed due to the claimant's ill health;

    10.2. 14 December 2023 – postponed due to the claimant's ill health;

    10.3. 24 January 2024 – the hearing was intended to deal with the respondent's application for a strike out/deposit order. However, the claimant presented a 22-page application to amend at 0119 hours on the morning of 24 January 2024. Employment Judge Brown determined that the fairest way to proceed was to adjourn the hearing so that the respondent could have time to take instructions on the claimant's application, and the Tribunal could then deal with both the application to amend and application for strike out/deposit order at the same time.

11. This hearing today was listed by Employment Judge Brown on 24 January 2024, and was specifically listed to deal with the following issues:

> "(i) Whether the claimant should be permitted to amend his claim in the form of his 22-page application to amend (or any part of it), sent to the Tribunal on 24 January 2024, including by way of adding respondents;
>
> (ii) Whether the claim (or any part of it) should be struck out or made the subject of a deposit order (the original basis for the hearing on 24 January);
>
> (iii) If the Employment Judge at the next hearing considers it appropriate to do so, in light of the information then available, and the outcome of the hearing on other issues, whether in light of the adjournment of the hearing on 24 January 2023, the claimant should be ordered to pay the respondent's costs of attendance at the 24 January 2024 hearing;
>
> (iv) If any part of the claim proceeds case management, including fixing a date for a final hearing".

The hearing today

12. I had in front of me a bundle produced by RHI, of 82 pages, accompanied by an index. I also had a written application for costs from RHI relating to the 24 January 2024 abortive hearing. Furthermore, Mr Gordon had produced two skeleton arguments; one regarding the strike out application, and one in relation to the claimant's application to amend. The one document that I did not have sight of was the covering email to the claimant's application to amend. I have, since the hearing, obtained a copy of that email.

13. At the commencement of the hearing, I had hoped to get through all the matters set out above and give a decision on the various applications. Unfortunately, this proved unrealistic.

14. The claimant told me he had only received Mr Gordon's skeleton argument on the amendment application this morning, and ideally would have liked more time to respond to each point made.

15. At the commencement of the hearing, I explained to the parties that I needed some reading time (I had been reallocated the case shortly before 1000hrs). Having had initial discussions with the parties, we took a break at 1025hrs until 1100hrs for me to read the key documents, those being:

    15.1. The ET1;
    15.2. The ET3;
    15.3. The claimant's application to amend;
    15.4. The claimant's witness statement;
    15.5. Mr Gordon's two skeleton arguments.

16. The claimant therefore had 35 minutes at that stage to prepare further.

17. On reconvening at 1100hrs, I asked the claimant a few questions about his application to amend and gave him the opportunity to say anything further he wanted about the application, and/or in response to Mr Gordon's skeleton. On reaching the end of his submissions, he again made the point that he would have preferred to have more time to respond to Mr Gordon's skeleton, and that he had started to prepare something in writing. I told the claimant I would give him some more time, once we had heard what Mr Gordon had to say. This would allow the claimant to prepare any further response to Mr Gordon's skeleton, as well as his (Mr Gordon's) oral submissions.

18. Mr Gordon started his submissions at 1130hrs and spoke for half an hour. I then gave the claimant the opportunity to have a break. Before he took that opportunity, he gave me some submissions in response to Mr Gordon's submissions. The claimant ended by saying that he considered it would be necessary to go through each and every paragraph of Mr Gordon's skeleton, the claimant's application to amend, and the claimant's witness statement, in order to deal with the amendment application fairly. I explained that I had read those documents in full, and that we were concluding the amendment application today, but that I was willing to give the claimant more time to consider any further response he wished to make. We paused at 1240hrs, and I asked the parties to reconvene at 1400hrs, having had lunch.

19. On returning at 1400hrs, the claimant spoke for a further 50 minutes on the application to amend, with the occasional interjection from me.

20. At 1450hrs, it was clear to me that we would not get through all the issues, with decisions, for which this hearing had been listed. In an attempt to save the parties costs by avoiding another hearing if possible, I suggested the following way forward:

    20.1. I would reserve my decision on the amendment application;

    20.2. I would hear submissions from both sides on the strike out/deposit order application;

20.3. On Mr Gordon telling me that he did not wish to add anything to the written application for costs, I would ask the claimant to provide a written response to that costs application (date for that response to be confirmed in the case management orders arising from this hearing). The costs application could then be dealt with on paper;

20.4. I would set out in my case management summary a list of proposed orders in preparation for a final hearing which, hopefully, both parties could agree to;

20.5. I would list the case for a 2-hour case management video hearing, in case this proved necessary for any reason. This hearing is capable of being vacated if it is not needed;

20.6. I would list the case for a 5-day final hearing, to get a date in the diary. The length of that hearing can be revised if necessary.

21. My intention in setting out this suggested plan was to follow the overriding objective, by dealing with matters in a proportionate way whilst avoiding escalating costs if at all possible.

22. The parties agreed to this proposal. This is how the hearing therefore progressed, with me hearing oral submissions on the strike out/deposit order, as well as hearing evidence from the claimant about his current financial situation.

Findings of fact

Background

23. The claimant was employed by RHI from 5 September 2023 to 30 September 2023, as a Project Technical Assistant. He was given one week's notice of termination on 23 September 2023. In its Grounds of Resistance, RHI stated that it dismissed the claimant for the following reasons:

23.1. Timekeeping issues;
23.2. Lack of interest and engagement with the project team;
23.3. A request to work in a different area;
23.4. Poor communication skills.

24. By way of his claim form of 6 March 2023, the claimant alleged that his dismissal was an act of direct discrimination based on his age, sex and race. The claimant listed various comparators, those being:

24.1. Ahmad Nabil Fauld (male, 28);
24.2. Ana Abrantes (female, 40);
24.3. Harry Wright (male, 24);
24.4. Jaimar Maurera (female, 47);
24.5. Neil O'Connor (male 52);
24.6. Ali Rashidi (male 45).

25. As set out above, after two postponements, a preliminary hearing was listed on 24 January 2024. In the early hours of 24 January, the claimant sent an email attaching a 2 2-page document, comprising an application to amend his claim, including an application to add RHI as a respondent, as well as five individual respondents who were at the material time employees of Wood.

26. The amendment application also sought to add various claims, as follows:

    26.1. Against Wood:
        26.1.1. Direct discrimination (sex and race)
        26.1.2. Indirect discrimination (age)
        26.1.3. Harassment (sex and race)
        26.1.4. Victimisation

    26.2. Against RHI:
        26.2.1. Direct discrimination (sex and race)
        26.2.2. Victimisation

    26.3. Against Stacey Hunt (Principal Project Engineer):
        26.3.1. Direct discrimination (sex and race)
        26.3.2. Indirect discrimination (age)
        26.3.3. Harassment (sex and race)

    26.4. Against Maria Peskosta (Engineering Manager):
        26.4.1. Direct discrimination (sex and race)
        26.4.2. Harassment (sex and race)

    26.5. Against Simon Morhall (Disciplinary Manager);
        26.5.1. Direct discrimination (sex and race)
        26.5.2. Indirect discrimination (age)

    26.6. Against Ana Abrantes (Principal Project Engineer);
        26.6.1. Harassment (sex and race)

    26.7. Against Sue Hopgood (Senior P&O) Business Partner:
        26.7.1. Direct discrimination (sex and race)
        26.7.2. Victimisation

27. The claimant made clear that there was in fact no direct age discrimination claim for dismissal, as had been set out in the original claim form. As such I have dismissed that claim upon the claimant's withdrawal of it.

28. Given the late stage at which this application was sent to the Tribunal, coupled with its length, Employment Judge Brown considered that the step most in line with the overriding objective was to postpone the hearing. This would give time for the respondent to review the application, and would allow the Tribunal to deal with the issue of amendment, plus the application for strike out/deposit order at the same time.

29. The matter was therefore adjourned to today.

Claimant's evidence

30. The claimant provided a witness statement, at page 75 the bundle, in which he provided information pertinent to his application. He expanded on this slightly during the course of the hearing. Taking all the information together, including the covering email of 24 January 2024, I gleaned the following information as to why he had made his application to amend when he did.

31. Regarding adding respondents, the claimant had seen that he could add respondents on the claim form but was not clear as to what the purpose behind that would be. He said today that, when he was writing his application to amend, he thought he may as well seek to add the new respondents in.

32. Regarding the additions to his claim, the claimant raises various reasons for the fact the complaints were not in the original claim form.

33. First, he told me he relied on the advice he was given by Gavin Evans, his ACAS Conciliator. Mr Evans told the claimant that he had decades of experience, and gave his advice believing he was right, and having observed much over the years. The advice given, over a series of phone calls on 13 January, 8 February 2023 and 20 June 2023 was as follows:

    33.1. The claim form should be short and not "overloaded with minutiae". Mr Evans apparently quoted the words of an Employment Judge, berating long claim forms;

    33.2. There was no time limit for the complaints;

    33.3. The claimant should raise an internal complaint;

    33.4. Some of the claimant's issues (bullying and harassment) did not appear to be issues the Tribunal would deal with;

    33.5. In terms of amendments, Mr Evans told the claimant that a preliminary hearing was the appropriate time to ask to amend his claim. Mr Evans further said that the claimant need not do anything unless ordered to by the Tribunal or the Tribunal Office;

    33.6. In relation to RHI's request for further information from the claimant, Mr Evans told the claimant that this would usually be discussed at a preliminary hearing.

34. The claimant was advised by Employment Judge Brown at the last hearing that to have an ACAS Conciliator give such advice would be surprising, and that the claimant would be well placed to obtain evidence from Mr Evans to support the claimant's recollection of the conversations between the two gentlemen. No such evidence was forthcoming today. The claimant told me that he had contacted Mr Evans, who had said that he could not remember anything regarding their conversations. The claimant stated that Mr Evans did not deny that such conversations had taken place.

35. I find that Mr Evans did give the claimant some advice about the amendment procedure and timelines. Although it is often considered unlikely that ACAS

Conciliators offer inaccurate/incorrect advice, the Tribunal is aware that unfortunately this does happen. The claimant has recorded his conversations with Mr Evans in great detail in his witness statement: I find it unlikely that someone in the claimant's position would provide so much detail if the claimant was manufacturing this evidence. I find it more likely than not that there were some conversations in which Mr Evans gave poor advice in good faith, or that Mr Evans gave advice that was genuinely misunderstood by the claimant.

36. However, the claimant told me he did not take any steps to reassure himself that any information/advice gleaned from Mr Evans was accurate. From the documents provided to the Tribunal, and the submissions he made today, it is clear that the claimant has spent time researching the law and the legal processes of the Tribunal. This is to be commended. It therefore strikes me as strange that he took no steps to reassure himself that the advice he had been given by the ACAS Conciliator was correct. There are reams of information available on the internet about time limits and amendment applications in Tribunal proceedings. I find that the claimant should and could have researched these points to obtain the correct information regarding time limits and amendments. I am satisfied on the balance of probabilities that the claimant blindly accepted Mr Evans' advice, without undertaking any reasonable research to confirm that advice.

37. Second, the claimant argues that he lacked knowledge of the correct labels/sections of the EqA that should attach to his factual complaints. I accept that the claimant is a litigant in person, and discrimination law is complex, even for lawyers. However, it is pertinent that he did not even include his factual complaints within the original claim form; the claim form very much focuses on the dismissal.

38. When this was raised with the claimant, he referred back to the advice he had received from Mr Evans, that the claim form should be kept short. However, the claimant clarified, when I asked, that he had seen the reference at Box 8.2 of the claim form stating "Please use the blank sheet at the end of the form if needed". Further, I note that the claimant's information within Box 8.2 does not even take up half the available space. I therefore find that it was unreasonable of the claimant to interpret Mr Evans' advice as meaning that he should not or could not attach extra sheets in the face of the information at Box 8.2. The claimant could and should have at least provided details of the factual complaints he now seeks to raise in the amendment, even if he could not attach the correct legal labels.

39. Third, the claimant said he was trying to resolve matters internally before presenting all his complaints. He set out a chronology of the internal communications in his witness statement. The last date in that chronology is 19 July 2023, on which date Kate Donald emailed the claimant to say that his complaint would not be processed.

40. In any event, the claimant says in his witness statement that he started to compile his application to amend on 4 September 2023. There was therefore a 6.5-week delay between the claimant being told that his internal complaint would go no further, and him starting to draft his application to amend. This was during a period when his health was not posing difficulties. The claimant did not offer a reason for that 6.5-week gap. I find that this was

not a reasonable period to delay in drafting the application to amend, given the internal process finished several weeks earlier.

41. Fourth, the claimant suffered from ill health, and had several visits to the hospital between 27 September 2023 and 11 December 2023. His symptoms only started at the end of September 2023, and are ongoing at the moment. From the claimant's witness statement, I understand that this period of ill health led to him pausing his drafting of the amendment application. He continued his drafting on or around 15 December 2023. This period of ill health does not assist as to why the application to amend was not made prior to 27 September 2023.

42. Fifth, the claimant also said that some of the events he seeks to complain about took place after the presentation of the claim form on 6 March 2023.

43. In relation to the timing of the application, the claimant explained that he did not understand that an application had to be (or should be) submitted some time in advance of a hearing, to put the other side on notice. He was under the impression from Mr Evans that he would have the opportunity to discuss the application at the hearing on 24 January 2024. He did not send the written application in at the time he did in order to be disrespectful or deliberately cause the hearing to be postponed. I accept this evidence.
44.

Law – amendment

45. In considering an amendment application, the Tribunal must (as always) take into account the overriding objective, in that the case must be dealt with fairly and justly – rule 2 of Sch 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"):

46. In considering whether an application to amend is required (or indeed the nature of the amendment sought), it is necessary to scrutinise the claim form, by which is meant the entirety of the claim form. The important question is whether, on a fair reading of the completed claim form, the claimant has raised the claim in question. The case of Chandhok v Tirkey [2015] ICR 527 provides that the importance of the claim form cannot be overstated. It is a basic principle that the claim form must clearly set out the claimant's case, including the facts on which the claimant will seek to rely.

47. The case of Selkent Bus Co Ltd v Moore [1996] IRLR 661 sets out a non-exhaustive list of factors (not to be treated as a checklist, but as guidance) to consider in relation to an amendment application: the first being the nature of the amendment, of which there are three types:

    47.1. "Selkent 1" – an alteration to the basis of an existing claim, but without raising a new distinct head of complaint;

    47.2. "Selkent 2" – a "relabeling" exercise. The addition or substitution of a new cause of action but one which is linked to, or arises out of the same facts as, the original claim;

47.3. "Selkent 3" – the addition or substitution of a wholly new claim or cause of action which is not connected to the original claim at all.

48. In determining which type of application the tribunal is dealing with, I note the following cases to be of relevance:

48.1. Foxtons Ltd v Ruwiel UKEAT/0056/08 at paragraph 12:

> "it is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a re-labelling one, the claim must demonstrate the causal link between the unlawful act and the alleged reason for it."

48.2. Reuters Ltd v Cole EAT 0258/17 – the Employment Appeal Tribunal found the Tribunal had made error in allowing an amendment to a s15 and s20/21 Equality Act 2010 ("EqA") claim to add a s13 EqA claim as a relabeling exercise. The Employment Appeal Tribunal held that the difference in statutory test, and therefore the additional evidence needed, took this out of a relabeling exercise, and the case was remitted to consider the application as a Selkent 3 case.

48.3. Pruzhanskaya v International Trade & Exhibitors (JV) Ltd UKEAT/0046/18 - this was an example of a "Selkent 1" amendment. The claimant had presented a claim of ordinary unfair dismissal, and latterly applied to amend his claim to bring a claim of automatic unfair dismissal under s103A Employment Rights Act 1996. the Employment Appeal Tribunal permitted the claimant's appeal against the Tribunal's refusal of the amendment application. It did so on the basis that adding a new reason for dismissal does not involve bringing a new complaint, but was "simply a form of unfair dismissal".

48.4. Arian v The Spitalfields Practice [2022] EAT 67 – this case questioned the correctness of the Pruzhanskaya decision. The EAT in Arian considered that the finding that the addition of an allegation under s103A to an existing Part X ERA claim was not the introduction of a new complaint was out of sync with other Employment Appeal Tribunal and Court of Appeal decisions.

49. Once the nature of the amendment has been determined, the Tribunal must also consider the applicability of time limits. Only in a case of a "Selkent 3" amendment are time limits relevant.

50. Where a new claim is permitted by way of amendment, it takes effect from the date on which permission to amend is given – Galilee v Commissioner of Police of the Metropolis [2018] ICR 634. The Tribunal may then need to consider, if the claim would then be out of time, whether the relevant extension provisions apply. The case-law says that the Tribunal need not decide whether time limits should be extended at this stage of proceedings. It is possible to permit an amendment, subject to the time limits issue which can be determined at a final hearing – Galilee, followed by Reuters Ltd v Cole UKEAT/0258/17.

51. The Tribunal need then consider the timing and manner of the application, and, in particular, why the application was not made earlier.

52. Ultimately, the key issue is the balance of injustice and hardship. In Vaughan v Modality Partnership [2021] IRLR 97, EAT, the Employment Appeal Tribunal gave detailed guidance on the correct procedure to adopt when considering applications to amend Tribunal pleadings. It confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application:

> "Representatives should start by considering what the real, practical consequences of allowing or refusing the amendment will be. 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?"

53. In Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132, the Employment Appeal Tribunal held that, when considering whether to grant an application to amend to add a further out of time discrimination complaint, the Tribunal was entitled to weigh in the balance its assessment that the merits of the proposed complaints were weak. This will factor into the balance of hardship and injustice: the disadvantage of missing out on adding in a weak claim must be less than the disadvantage of not being able to pursue a strong claim.

Law – addition of parties

54. The power to add (or substitute or remove) parties is found within rule 34 of the Rules:

> "The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included".

55. The Presidential Guidance on General Case Management makes it clear that the addition or removal of a party is a type of amendment application, requiring the Tribunal to undertake an analysis of the same factors as in an amendment application.

56. In British Newspaper Printing Corpn (North) Ltd v Kelly [1989] IRLR 222, the Court of Appeal confirmed that the test of the balance of hardship and injustice was the key test to be applied when considering adding/removing parties.

57. When a claimant seeks to add both a new respondent and a new claim, the most appropriate way to deal with the application is in two stages. First, the tribunal will consider whether to allow the amendment to add a new claim. Second, the tribunal will then, having determined the scope of the claim, determine whether to add the new party – Zhang v Heliocor Ltd and anor 2022 EAT 152.

Law – strike out

58. The power to strike out a claim (or part of a claim) is found within r37(1) of the Rules. The relevant ground for strike out in this case is r37(1)(a), which provides as follows:

> 37(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 part of a claim on any of the following grounds –
>
> (a) That it is scandalous or vexatious or has no reasonable prospect of success;...

59. For discrimination claims, the starting point regarding case-law is Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

60. Further caution has been advised in Bahad v HSBC Bank plc [2022] EAT 83, at paragraph 25:

> "The approach that should be adopted to applications to strike out is of extremely long standing. From the House of Lords to the EAT, the appellate courts have for many years urged caution in striking out discrimination and public interest disclosure claims. Yet, on occasions employment tribunals having directed themselves that it is an extraordinary thing to do, strike out claims that are far from unusual. Experienced employment judges may sometimes feel that it is pretty clear that a claim will not succeed at trial and wish to save the expense and, possibly, the distress to the claimant of a failed claim. But that is what deposit orders were designed for. To strike out a claim the employment judge must be confident that at trial, after all the evidence has come out, it is almost certain to fail, so it genuinely can be said to have no reasonable prospects of success at a preliminary stage, even though disclosure has not taken place and no witnesses have given evidence. When discrimination claims succeed it is often because of material that came out in disclosure and because witnesses prove unable to explain their actions convincingly when giving evidence."

61. In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330, the Court of Appeal held that, as a general point of principle, cases should not be struck out when there is a dispute over the key facts. The reference to key facts also encompasses the reasons for a respondent's conduct, where those reasons are relevant to the applicable legal test – Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755.

62. I am also assisted by the case of Balls v Downham Market High School and College [2011] IRLR 217, in which Lady Smith held:

> "When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or

in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be *no* reasonable prospects."

63. Mitting J in Mecharov v Citibank NA [2016] ICR 1121 EAT provided the following guidance at paragraph 14:

> "…the approach that should be taken in a strike out application in a discrimination case is as follows:
>
> (1) Only in the clearest case should a discrimination claim be struck out;
> (2) Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> (3) The claimant's case must ordinarily be taken at its highest;
> (4) If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
> (5) A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

64. However, there are some caveats to the general approach of caution towards strike out applications. In Ahir v British Airways plc [2017] EWCA Civ 1392 CA, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

65. In Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11, it was stated that in appropriate cases, claims should be struck out and that "the time and resources of the ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

66. In Cox v Adecco & Others [2021] ICR 1307, HHJ Tayler gave the following summary of general propositions gleaned from the relevant case-law (paragraph 28):

> "(1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
>
> (4) The Claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;

> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;
>
> (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

40. HHJ Tayler went on to hold that the Tribunal must attempt to get to grips with the claimant's claims, and take reasonable steps to understand the complaints that the claimant is bringing, before considering strike out. However, he also made it clear that the Tribunal can only be expected to take reasonable steps when attempting to identify the claims (paragraph 32).

Law – deposit order

67. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers have little reasonable prospect of success under r39 of the Rules:

> "39(1) Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim…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.
>
> 39(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."

68. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for making a deposit order.

69. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – Hemdan v Ishmail and anor [2017] IRLR 228.

70. In terms of the test of "little reasonable prospect of success", the Tribunal is permitted to consider the likelihood of the claimant being able to establish the essential facts of his or her case. In undertaking this exercise, it is

entitled to reach a preliminary view on the credibility of the allegations and assertions that the claimant is making in his/her claim – Van Rensburg v Royal Borough of Kingston-upon-Thames [2007] All ER (D) 187 (Nov). The Tribunal must have a proper basis for considering it unlikely that a claimant will be able to establish the necessary factsto prove his/her claim.

71. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – Adams v Kingdon Services Group Ltd EAT/0235/18.

Conclusions – amendment

Nature of the amendment

72. Scrutinising the claim form, I can only see a complaint about dismissal present there. In terms of the type of complaint under the EqA, the claimant uses the words “less favourable” and “comparator” which are very squarely language of a direct discrimination claim under s13 EqA. The claimant also made it clear on the claim form that he considers a contributing factor in his dismissal was his sex, age and race. Although the claimant says in his claim form that he will expand on why the reasons given for his dismissal were inaccurate, he does not state anywhere on this ET1 that he will also expand on the behaviour about which he wishes to complain.

73. Therefore, I am satisfied that the only claim on the claim form is a s13 direct discrimination (sex, race, age) claim, in which the less favourable treatment is dismissal.

74. This means that the applications relating to the addition new claims and new respondents that fall outside a s13 discriminatory dismissal claim are wholly new claims, or “Selkent 3” amendments.

Time limits

75. Given that I have concluded that this is a Selkent 3 application, it is necessary to consider time limits.

76. If I were to allow the amendment, the date the amendment would be deemed presented would be the date of this Judgment.

77. The majority of the claims that the claimant seeks to add occurred pre-dismissal; in other words, before 23 September 2022. Those claims added by way of amendment would therefore be substantially over 12 months past the primary time limit. The two victimisation claims in which the detriments are said to have occurred in July 2023 are also out of time; they should have been presented to the Tribunal by October 2023.

78. If minded to allow the amendment, I would allow it subject to the need for the final hearing to deal with the issue of time limits. I therefore do not seek to deal with the time limit in full at this stage. However, I do conclude that the merits of the claims within the amendment application must be negatively affected by the need of the claimant to overcome this time limit hurdle as effectively a pre-condition. Given I am permitted to take merits of

the claims subject to the amendment application into account, this is a factor that weighs against permitting the application (see "Merits" below).

Timing and manner of the application

79. In terms of the timing of the application, overall, I note that we are at the early stages of litigation, before any case management. This is the first effective preliminary hearing in this matter. Thus, although time has passed, in relation to the litigation process we are at the early stages.

80. However, in calendar time, the application was made nearly 11 months after the original claim form was submitted, and on the morning of the third listing of a preliminary hearing.

81. I have set out above the claimant's proffered reasons for delay, being 5-fold. I do not accept that they are good reasons for the delay in making the application to amend, for the following reasons:

    81.1. ACAS conciliator advice: it was unreasonable for the claimant to accept the advice of Mr Evans blindly, without undertaking his own due diligence to confirm the advice given was accurate. This is particularly given that the claimant has demonstrated he is capable of legal research;

    81.2. Lack of knowledge of legal labels: this lack of knowledge does not explain why the factual allegations were not included in the original ET1. The claimant says that this was because he thought claim forms needed to be short. I do not accept that this was a good reason for not including the factual allegations, given the ET1 form is clear that a blank sheet can be added, and the claimant confirmed he had seen that statement but still did not provide further information on a blank additional sheet;

    81.3. Seeking to resolve matters internally: the claimant became aware that his concerns would not be resolved internally on 19 July 2023. Despite this, he did not start drafting his application to amend until 4 September 2023. 6.5 weeks later. The claimant has offered no good reason for that period of delay. I therefore conclude that resolving matters internally is not a good reason for the delay in this case;

    81.4. Ill-health: this reason may explain a delay from 27 September 2023 to 11 December 2023, when hospital appointments were taking place. However, ill-health does not explain why the application to amend was not done prior to 27 September 2023;

    81.5. Date of some events: I accept that some allegations did occur after the ET1 form was submitted, and so could not have been included within the original ET1. These are the victimisation claims, which are set out at paragraphs 40 and 42 of the Amendment Application. The alleged protected act is the claimant presenting his claim form to the Tribunal. There are then three alleged detriments:

        81.5.1. Against Wood (and Sue Hopgood) - in July 2023 Ms Hopgood refused to process the claimant's complaint;

81.5.2. Against Wood (and Sue Hopgood) – in January 2024 Ms Hopgood refused to process the claimant's Data Subject Access Request; and

81.5.3. Against RHI – in July 2023 Kate Donald (Contractor Compliance Advisor at RHI) refused the claimant's complaint.

I have been given no explanation (other than the above reasons at paragraphs 81.1-81.4 immediately above) as to why there was a 6-month delay in applying to add in the claims that date from July 2023. I accept that the application relating to the alleged detriment in January 2024 has been made promptly, within the same month.

82. In terms of the manner of the application, RHI complains that it was made in the early hours of the day of the last preliminary hearing, meaning that hearing could not be productively utilised. This is the subject of RHI's application for costs, to be dealt with separately.

83. I have already accepted the claimant's evidence as to what he understood to be the appropriate procedure for an amendment issue. He did not understand that an application had to be (or should be) submitted some time in advance of a hearing, to put the other side on notice.

84. I therefore do not accept RHI's criticism of the claimant in terms of this specific manner of the application (i.e. early hours of the morning of the hearing). I note that the Presidential Guidance – General Case Management on Amendments does not specifically state that an application must be made in writing in good time before any hearing.

Balance of injustice and hardship

Merits

85. I have made the point already that, in relation to all the claims bar the victimisation claim against Wood and Ms Hopgood regarding an alleged detriment in January 2024, are, on the face of it, out of time.

86. This immediately presents the claimant with an additional hurdle to clear prior to the Tribunal moving onto the substantive claims themselves.

87. The route for extending time in relation to discrimination claims is less stringent than that for unfair dismissal (it is the "just and equitable" test). However, it is by no means guaranteed that a Tribunal will find that time should be extended so as to make all the claims in time.

88. I am able to take into account the merits of the claims sought to be added when considering the balance of injustice and hardship.

Cogency of evidence

89. Some of the evidence relevant to the claims subject to the amendment application will be documentary evidence (emails, Teams messages and so on). These should be capable of being retrieved. However, this is not a given: some electronic systems only retain data for a certain amount of time, and the claims go back into 2022.

90. Furthermore, the new allegations will need to be answered by witnesses from the respondent(s). Although the dismissal was some time ago now, the respondents have been on notice of a claim relating to dismissal since at the latest March 2023. A further 12 months has passed since then, meaning that memories will have faded, and there has been no reason why the respondent witnesses should have thought it necessary to retain information/evidence about matters relating to the claimant, other than in relation to his dismissal.

91. I therefore conclude that there would be prejudice to the respondent(s) in terms of the cogency of evidence regarding the new claims (except the January 2024 victimisation claim).

Time and costs

92. I consider that the length of any hearing would be increased fairly substantially by the addition of 5 new independent respondents and a multitude of new factual and legal allegations.

93. This means that more tribunal resources would be spent, and the respondents would be put to greater cost of answering the claims, if the amendments were to be allowed.

Remedy

94. At the stage of my consideration of this application, the claimant has a live discrimination claim under s13 EqA for his dismissal.

95. He therefore has a route to a remedy and, if his claim is well-founded, he will be awarded appropriately.

96. Although I accept that the claimant would lose out on the opportunity to argue more claims, and therefore the opportunity of a greater award if successful, I consider it is relevant that the claimant has a route to remedy by the existence of his live dismissal claim.

97. Furthermore, as set out above, I consider that on the time limits point alone, at least the majority of the claimant's claims subject to the application have weak prospects. As such, there is less of a hardship to the claimant being prevented from running these claims than if these claims had strong merits.

Summary of balance of injustice and hardship

98. Taking all the above relevant factors into account, I find that the balance of injustice and hardship falls in favour of refusing the application to amend the claim.

99. This is save for the victimisation claim relating to Ms Hopgood's refusal to process the claimant's Data Subject Access Request in January 2024. In relation to this claim, this is a discrete issue, which I consider will not add much additional evidence (whether documentary or oral) to the length of hearing, nor will it require lengthy submissions. Also, the events relevant to this claim are recent, and so it cannot be said that there is any danger to the cogency of evidence.

100. I note that RHI's position is that the subject access request has been complied with. This may be so, however I have seen no evidence to this effect within the preliminary hearing bundle. Although Mr Gordon makes this point in his skeleton argument, this is a submission as opposed to evidence.

101. I therefore permit the application in relation to the victimisation claim to the following extent:

101.1. The alleged protected act is the presentation of the claim form on 6 March 2023;
101.2. The alleged detriment is that Ms Hopgood refused to grant the claimant's Subject Access Request in January 2024.

Further detail of the live s13 claim

102. I note that, within the amendment application, there was detail relating to the manner of dismissal within the detail of the direct discrimination claim – paragraph 33.7 on page 54 of the bundle. I take these allegations to be background relevant to the discriminatory dismissal claim, and may be used in order to invite the tribunal to draw an inference of discrimination in relation to the decision to dismiss:

> "33.7 The manners (as opposed to the fact of) the claimant's dismissal on 23 September 2022, and in particular:
>
> 33.7.1 The absence of any recognised procedure;
> 33.7.2 That the claimant was summoned to the dismissal meeting without being informed of the purpose of the meeting;
> 33.7.3 The misleading content in the Microsoft Teams call, including the false allegation that the claimant was dismissed for timekeeping and enthusiasm;
> 33.7.4 The refusal to provide to the claimant the necessary information about the claimant's dismissal such as his last day;
> 33.7.5 The failure to follow an appeal procedure in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures;
> 33.7.6 The failure to inform the claimant of the basis of the problem and give him an opportunity to put his case in response before any decisions are made in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures."

103. As these points are just further information regarding the existing direct discrimination claim, I consider that these may be included without the need for an amendment. They provide context to the existing claim.

Conclusions – adding parties

104. Given my decision on the amendment application to add new claims, I now turn to consider the application to add further respondents.

105. The person who made the decision to dismiss the claimant was Stacey Hunt. The other individual relevant to the claim as it now stands is Sue Hopgood, regarding the victimisation claim.

106. In terms of Stacey Hunt, I consider that the only good reasons for adding the dismissing officer as an individual respondent are:

106.1. if there are concerns that, if the claim was to be successful, the respondent company would be unable to meet the obligation to pay a financial award to the claimant; and,

106.2. if the employer seeks to run the statutory defence under s109 EqA, which permits an employer to avoid vicarious liability where they have taken reasonable steps to prevent their employees from acting in a discriminatory manner.

107. There has been no suggestion, and no good evidence, presented to me that RHI or Wood are suffering financially, or are unlikely to be able to meet a judgment award should one be made in the claimant's favour.

108. Furthermore, RHI has not sought to run the statutory defence within its existing Grounds of Resistance.

109. As such, there seems to be no good reason to add Stacey Hunt in order to protect the claimant's route to a remedy. There is therefore no hardship to the claimant in refusing his application. There would be hardship to Ms Hunt, in having to defend the claim herself, as an individual.

110. In relation to Ms Hopgood, she is an employee of Wood as I understand it from the claimant's application. Wood is yet to present a Response to the claim. Currently, I see no reason to add Sue Hopgood as an individual respondent given the fact that Wood is alleged to be vicariously liable for her. Once Wood has presented a Response to the claims, if any factor arises which suggests Ms Hopgood should be added as an individual respondent, this point may be reconsidered.

111. Therefore, the application to add all the individual respondents is rejected.

112. In terms of the two companies, Wood and RHI, RHI has assumed the part of respondent, pre-empting any decision being made by the Tribunal. RHI has taken on the role of respondent unilaterally it seems. However, given that it is agreed by all sides that RHI was the claimant's employer, it makes sense that it be formally added as a respondent (the second respondent).

113. At this stage, and in light of the amendment to add the victimisation claimr relating to Ms Hopgood for whom I am told Wood is responsible, Wood will remain the first respondent.

Conclusions – strike out application

114. This application relates to the original claim of discriminatory dismissal on the grounds of race and sex. It was clarified in the amendment

application that the direct discrimination claim on the grounds of age is not pursued against either respondent.

115. The respondent primarily based its argument on the identity of the alleged comparators. They are set out above, and repeated here for convenience:

115.1. Ahmad Nabil Fauld (male, 28);
115.2. Ana Abrantes (female, 40);
115.3. Harry Wright (male, 24);
115.4. Jaimar Maurera (female, 47);
115.5. Neil O'Connor (male 52);
115.6. Ali Rashidi (male 45).

116. It is said by the claimant that each of these comparators attended work after 0900hrs, and yet they were not dismissed – [14].

117. RHI says that this list of comparators defies logic. The claimant cannot pick and choose his comparators from a list, depending on which specific protected characteristic the Tribunal happens to be looking at. In other words, the claimant cannot say "I rely on the female comparators for my sex claim, but I rely on the non-black comparators for my race claim".

Sex discrimination

118. The fact that the claimant can highlight other male colleagues as comparators suggests that he was not treated less favourably because of his sex. In short, he has volunteered a list of male peers who arrived after 0900hrs but were not dismissed. The claimant cannot cherry pick and say that he seeks only to rely on Ana Abrantes and Jaimar Maurera and ask the Tribunal to ignore the four men on his list for the purposes of the sex claim.

119. I therefore conclude that there is no reasonable prospect of the claimant, on his own case, getting over the initial burden of proof. This is on the basis that the claimant's own evidence is that people of the same sex as him were treated differently (more favourably) than he was. As such, the claimant will not be able to produce evidence from which the Tribunal could draw an inference that the respondent discriminated against the claimant on the ground of sex.

120. In other words, I conclude that the claimant has no reasonable prospects of meeting the initial burden of proof given that his own cases suggests that he was treated less favourably than some male colleagues.

121. I therefore strike out the direct sex discrimination claim.

Race discrimination

122. In terms of the claimant's race claim, he clarified at the hearing that he identifies as Black. Although the respondent has produced a list of

comparators with relevant information at [47], that list does not set out whether the individuals are black or non-black: instead, it sets out their country of citizenship. The claimant informed me at the hearing that none of his comparators in that list are black. The point made by RHI (and accepted by me) in relation to the sex claim cannot therefore be applied to the race claim.

123. RHI's position in its Grounds of Resistance is that the six individuals are not appropriate comparators under s23 EqA, as they did not share the claimant's other poor behaviours or the same poor timekeeping as the claimant. I have no evidence within the preliminary hearing bundle to demonstrate this and remind myself that, at this stage, I must take the claimant's case at its highest. I must also avoid conducting a mini trial where there appears to be a dispute of fact (such as whether the named comparators are appropriate comparators, given their conduct and so on).

124. I am therefore not satisfied that the claimant has no reasonable prospects of satisfying the initial burden of proof under s136 EqA on the basis of the identity of the comparators.

125. RHI further alleges that, even if the burden of proof shifts to RHI, it can still meet that burden, and demonstrate that the claimant's race did not significantly influence Stacey Hunt's decision to dismiss, whether consciously or unconciously.

126. Again, although I understand RHI's case on dismissal to be that it can demonstrate a non-discriminatory reason, it has not produced any evidence to me at today's preliminary hearing to that effect. I once more remind myself that I must take the claimant's case at its highest. There is no contemporaneous documentary, contradictory evidence before me that would allow me to strike out this claim on the basis that the claimant has no reasonable prospects of proving the alleged facts needed for his claim to succeed. I have no evidence of the severity of his conduct, no evidence of any admissions from him in relation to his conduct, for example.

127. I am therefore not satisfied that the respondent has proven to me that there are no reasonable prospects of succeeding on the race claim.

128. The strike out application regarding the race claim is therefore rejected.

Conclusions – deposit order application

129. In light of my decision to strike out the direct sex discrimination claim, I focus my conclusions regarding a deposit order solely on the direct race discrimination claim.

130. For the same reasons set out above at paragraphs 122-128, I am not satisfied that the respondent has proven that this case has little reasonable prospects of success. The claimant's case, taken at its highest, is that

colleagues of a different race were treated better than he was when guilty of (at least part of) the same misconduct levelled against the claimant. As above, the respondent has produced no evidence as to whether the alleged comparators are Black or not, nor has it produced documentary evidence to demonstrate the reason for dismissal.

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Employment Judge Shastri-Hurst

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Date 8 April 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10/4/2024

N Gotecha

FOR EMPLOYMENT TRIBUNALS