



**IN THE EMPLOYMENT TRIBUNAL (SCOTLAND)**

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**Judgment of the Employment Tribunal in Case No: 4101721/2022, Issued  
Following Open Preliminary Hearing Held at Edinburgh on 30<sup>th</sup> and  
31<sup>st</sup> January and 1<sup>st</sup> February 2024 with Deliberation on 26<sup>th</sup> March, 29<sup>th</sup> April,  
20<sup>th</sup> May and 4<sup>th</sup> June 2024**

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**Employment Judge J G d'Inverno**

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**Dr Z Kirkham-Mowbray**

**Claimant  
Represented by:  
Ms M Armstrong,  
Solicitor**

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**Fife Health Board**

**Jointly Respondent  
Represented by:  
Ms A Stobart,  
Advocate**

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**Lothian Health Board**

**Jointly Respondent  
Represented by:  
Ms A Stobart,  
Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

40     The Judgment of the Employment Tribunal is:-

(First) That the claimant's complaints of Discrimination because of the protected characteristic of Disability are dismissed for want of Jurisdiction by reason of Time Bar;

5 (Second) That the claimant's Application, advanced on a contingent basis, for Leave to Amend in terms of the opposed elements of the tendered Further Particulars dated 27<sup>th</sup> September 2023, is refused.

Joseph d'Inverno

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Employment Judge

13 June 2024

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Date of Judgment

Date sent to parties

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13/06/2024

20 I confirm that this is my Judgment in the case of Kirkham-Mowbray v Fife Health Board and another and that I have signed the Judgment by electronic signature.

## REASONS

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### The Issues

30 1. The issues, for the determination of which the Open Preliminary Hearing was convened, and as confirmed with parties' representatives at the outset of the Hearing, were:-

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(1) Whether, by reason of asserted Time Bar, the claimant had Title to Present and the Tribunal has Jurisdiction to Consider her complaints as given notice of in her initiating Application ET1, first presented on 3<sup>rd</sup> April 2022, in terms of:

(a) Section 123(1)(a) and section 123(3) of the Equality Act 2010, which failing and in the alternative,

5 (b) In terms of section 123(1)(b) of the 2010 Act, upon a just and equitable extension of time.

10 (2) On a contingent basis, let it be assumed that the Tribunal has jurisdiction in terms of sub paragraphs (1)(a) or (b) above, and, let it be further assumed that the claimant requires Leave to Amend in terms of the Proposed Amendment of 8<sup>th</sup> December 2023 whether the claimant's Application for Leave to Amend of the same date should be granted or refused.

## Introduction

- 15 2. The claimant is employed by Lothian Health Board in the position of Foundation Doctor and commenced in that employment on the 1<sup>st</sup> of August 2018. At the time of her raising her proceedings before the Employment Tribunal and at the time at which appearance was entered, the claimant was 20 working on a placement with Fife Health Board.
3. The claimant first presented her initiating Application ET1 to the Tribunal on the 3<sup>rd</sup> of April 2022.

25 **The Claimant's Position:-**

4. The claimant, in her initiating Application ET1, having ticked the box at section 8.1 "**type and details of claim**" indicating "*I was discriminated against on the grounds of disability*" but, in the paper apart referred to at 30 section 8.2 having provided no further specification of the type of discrimination, it was the claimant's position;
- (a) That when subsequently tendering such specification, either by way of Tendered Further Particulars in August, or in a further iteration of

them in September of 2023 or, in the alternative, by way of a Proposed Amendment and Application for Leave to Amend on 8<sup>th</sup> December 2023, she should not be viewed as seeking to introduce new claims.

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- (b) That the incidents which the claimant now seeks to specify in the Tendered Further Particulars and or in terms of the Proposed Amendment, all form part of an act of discriminatory conduct which should be seen as extending over a period continuing as at the date of the Application for Leave to Amend, 8<sup>th</sup> December 2023, and thus the complaints about them timeously presented in terms of section 123(3)(a) and (b) of the Equality Act 2010 ("EqA"); and, in the alternative let it be assumed that the claims were not timeously presented, that it would be just and equitable that time be extended by the Tribunal in terms of section 123(1)(b) of the EqA such as to allow them to be received and considered although late.
- (c) As the claimant had not previously provided any specification of the particular type of discrimination of which she sought to give notice in her ET1 all of the specification which she now brought forward, either by way of Tendered Further Particulars of Claim or in the alternative by way of Proposed Amendment, were matters in respect of which no Leave to Amend was required.
- (d) That the claimant had expressly included in her ET1 a statement to the effect that what was contained in the ET1 should not be regarded as exhaustive of matters of which she intended to give notice and further expressed the intention (*reserved the right*) to add what was described in the paper apart variously as "*a comprehensive account of all the discrimination she has experienced*" / "further details", as the paper apart attached to the ET1 "*should only serve to outline the basis of that case and is not necessarily exhaustive as further details are likely to arise in the full description.*"

- 5 (e) In so far as the Tribunal were to determine that Leave to Amend was required in respect of all or any part of the terms of the Proposed Amendment dated 8<sup>th</sup> December 2023, which was tendered by the claimant on a contingent basis, that upon an application of the *Selkent* principles, and a consideration of relevant factors, the balance of injustice and hardship should be regarded as lying in favour of granting Leave to Amend.

### The Respondents' Position

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5. The position of the respondents, who have jointly entered appearance resisting the claims is:-

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(a) That the complaints as given notice of in the paper apart to the initiating Application ET1 do not fall to be regarded as part of a continuing act of discrimination for the purposes of section 123(3) of the EqA relating, as they are said by the claimant to relate to a unit of work ending in December 2019 and the claimant, having commenced a period of long term sick leave on October 2020 on which she remained as at the date of the Hearing.

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(b) That all of the claimant's claims variously as given notice of in her initiating Application ET1, or as further specified in the Tendered Further Particulars, and or in terms of the Tendered Proposed Amendment, fall to be regarded as presented out of time and thus the Tribunal lacks Jurisdiction to Consider them in terms of section 123(1)(a) of the EqA.

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(c) That the claims as presented in the initiating Application and the paper apart attached to it are so lacking in specification as to fail to give the respondent fair notice of the case that it has to meet and or to allow the respondent to respond meaningfully to them.

- 5 (d) That the terms of both versions of the Tendered Further and Better Particulars and of the terms of the Tendered Proposed Amendment, continue to lack specification such that they would continue to fail to give the respondent fair notice of the case which they would require to meet if those averments were to be received and or Leave to Amend in their terms granted, in numerous respects.
- 10 (e) That such specification as was provided in the Tendered Further Particulars and or Proposed Amendment serve to confirm that all the matters in respect of which the claimant bears to give notice both originally and as at the date of the Hearing, were time barred in terms of section 123(1)(a).
- 15 (f) That the entirety of the claimant's claim is time barred and in accordance with section 123(1)(a) of the EqA, the Tribunal lacks Jurisdiction to Consider alleged discriminatory acts or omissions of the respondent said to have occurred before 7<sup>th</sup> November 2021 (being 3 months less 1 day before the claimant started early conciliation).
- 20 (g) That none of the allegations founded upon by the claimant form part of a course of conduct extending over a period in terms of section 123(3) of the EqA.
- 25 (h) As a result of the passage of time between the occurrence of the events relied upon and the first attempts to specify them, in terms either of the Tendered Further Particulars of Claim or the Proposed Amendment, it has not and would not be possible for the respondents to fully investigate many of the allegations and that the respondents would be significantly prejudiced and the Tribunal restricted in its ability to conduct a fair Hearing, if an extension of time were to be granted.
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- (i) That it would not be just and equitable in the circumstances, including the explanations advanced by the claimant for delay in bringing forward her claims as she now seeks to do, for time to be extended in terms of section 123(1)(b) of the 2010 Act.

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- (j) That the respondent does not concede that the claimant was disabled for the purposes of section 6 of the EqA at the material time for the purposes of her claims nor did the respondents accept that they knew or ought reasonably to have known at the material time that the claimant was so disabled.

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- (k) That all of the averments in both version 1 and version 2 of the Tendered Further Particulars of Claim to the receipt of which the respondent took objection, were averments in respect of which Leave to Amend was required.

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- (l) That upon an application of the *Selkent* principles and upon a consideration and weighing of the relevant factors, including those of time bar and the occurrence of forensic prejudice to the respondent, the balance of injustice and hardship lay in favour of refusing Leave to Amend in terms of the Proposed Amendment of 8<sup>th</sup> December 2023.

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### **Sources of Oral and Documentary Evidence**

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6. The claimant gave evidence on her own behalf including as to the reasons underlying the decisions which she took in relation to the timing of her Application and its subsequent proposed further particularisation/amendment.

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7. For the respondent, the Tribunal heard evidence from:-

- (a) Dr Suzanne Pound, one of the consultant clinicians based at Victoria Hospital in Glenrothes responsible for the clinical supervision of trainees, including the claimant who was one of

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between four and five hundred trainees for whom she would have had clinical supervisory responsibilities in the preceding 5 year period, and who had no memory of having met the claimant nor of the incidents in 2018 of which the claimant now bore to give notice either in her Tendered Further Particulars or Proposed Amendment. Dr Pound spoke also to the fact that Minutes of the Meetings to which reference was now being made and dating from 4/6 years ago do not exist and to her inability to recall the occurrence of the meetings being referred to, particularly so given the lack of specification as to on which ward the surcharges were said to have taken place or who was present, given that some 20 to 30 different nurses would be rotating round those wards at any point in time, and,

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(b) from Ms Ruth Kelly, Deputy HR Director based at Lothian Health Board but providing services to, amongst others, Fife Health Board, and who spoke to

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(i) the processes applicable to the clinical supervision of trainees and the management of absence, as trainees move from one placement to another, and to the availability and non availability of documentary records relating to the period 2018/2019/2020.

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(ii) the fact that responsibility for absence management was handled in the first instance by the Placement Board, in relation to the claimant Fife Health Board but that when matters affect the employment of a trainee doctor, then the host Board, in the claimant's case Lothian Health Board took over that responsibility,

(iii) that Lothian Health Board had become responsible for management of the claimant's absence in September of 2023,

5 (iv) that she had attempted to find rotas for the periods 2018 to 2020 but that the information retained related only to banding information on the doctors which showed any additional payments made depending on the intensity of the rota and in relation to a whole 4 month rotation, but that no information was held which went to show who worked on any particular rota, and,

10 15 (v) that while she had attempted to source that information at service level, the rotas going back to 2018 to 2020 were no longer available, as the NHS was not required to keep such level of detail and did not,

20 (vi) that in relation to the allegation regarding parking permit, that there were no documents that went to inform the rationale for the decision that was made,

25 (vii) that the only paperwork retained by the Facilities Team was a copy of the application and its rejection and,

30 (viii) while able to confirm that Fit Notes relating to the claimant were normally kept at local level, upon seeking to identify these they could no longer be located.

8. All of the witnesses gave evidence on oath or on affirmation.
  9. None of Ms Kelly's evidence was challenged in cross examination.
- 5     10. The cross examination of Dr Pound was limited to the circumstances of the tendered averment which appears in the averments at paragraphs "11 and 12" of the Proposed Amendment and which relate to what the claimant characterises as a dismissive response to a remark made by the claimant, about the seriousness of "staffing levels on the ward", and said to have occurred at a morning meeting in or around November of 2018, it being put to Dr Pound that the claimant could potentially identify the hitherto unnamed nurse whom, at paragraph 12 she avers later that day commented to her that Dr Pound was "just like that, she's harsh".
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- 15     11. Parties lodged a Joint Hearing Bundle extending to some 197 pages to some of which reference was made in the course of evidence and or submission.
12. The convention of (number) is adopted hereafter to refer to the pages in the Joint Bundle at which a document being referred to is to be found.
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13. The terms of the ET1, as first presented on 3<sup>rd</sup> April 2022, and the paper apart attached to it setting out the grounds of claim is at (9-22). The terms of sections 8.1, 8.2 and the paper apart to the ET1 are referred to and held incorporated here by reference, for the purposes of brevity.
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14. The first version of Further Particulars of Claim, tendered by the claimant on 24<sup>th</sup> of August 2023 and in respect of which the claimant asserts Leave to Amend is not required, is set out in a table with a corresponding column showing the respondents' position in relation to the requirement for Leave to Amend is at (119-145).
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15. The second version of the Tendered Further and Better Particulars submitted by the claimant on 27<sup>th</sup> September 2023, upon which the claimant seeks to stand as at the date of the Hearing and in respect of all of which the claimant

contends Leave to Amend is not required, is set out in a table, with a corresponding column specifying the respondents' position regarding the requirement for Leave to Amend, which is at (146-176) and which latter document, for the purposes of brevity, is referred to for its terms which terms  
5 are held incorporated here.

16. The evidence of witnesses relevant to the determination of the issues was not in conflict one with the other, neither party being in a position to challenge on a direct evidential basis, the evidence of the other. I was not required, on any  
10 relevant issue, to prefer the evidence of one witness over that of another on the grounds of either credibility or reliability.

### **Findings in Fact**

- 15 17. On the oral and documentary evidence presented the Tribunal makes the following essential Findings in Fact, restricted to those relevant and necessary to the determination of the issues.
18. The claimant was employed by Lothian Health Board as a junior doctor.  
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19. The claimant's employment with the respondent started on 24<sup>th</sup> July 2018.
- 25 20. Between August of 2018 and October of 2020 the claimant was engaged in her "Foundation Training" which involved her undertaking placements at different hospitals.
21. The claimant remained employed by Lothian Health Board at all times but when undertaking placements with Fife Health Board she was managed locally and any issue dealt with by the local HR team. When an issue arose  
30 which affected the claimant's employment, responsibility for managing her sickness absence reverted to Lothian Health Board.

22. During her foundation training, the claimant completed rotations (or placements) as follows:-

5 (a) The claimant worked at Victoria Hospital, Kirkcaldy from August 2018 to December 18.

(b) The claimant worked in Trauma and Orthopaedics, Royal Infirmary of Edinburgh from December 2018 to April 2019.

10 (c) The claimant worked in General Surgery, Royal Infirmary of Edinburgh, April 2019 to August 2019.

(d) The claimant worked in Ear, Nose and Throat, St John's Hospital, Livingston from August 2019 to December 2019.

15 (e) The claimant worked at Rheumatology and Dermatology and latterly General Medicine, Western General Hospital, Edinburgh from December 2019 to July 2020.

20 (f) The claimant worked in Psychiatry, Stratheden Hospital, Cupar from July 2020 to October 2020.

23. In November of 2018 the claimant attended her GP in Edinburgh complaining of what she described as an escalation of anxiety triggered by stress at work (196) and was signed off from work for one week.

25 24. In July of 2019, 8 months later, the claimant reattended on her GP for what she described to her GP as being intrusive anxiety and panic attacks and difficulty sleeping which she again attributed to stress at work, and was signed off for 5 days and prescribed Venlafaxine 75 milligrams.

30 25. The claimant returned to work in July of 2019 and, four months later, represented to her GP in October of 2019, with what she, the claimant, described as "increased stressors at work", and was signed off from work for

4 weeks from the 2<sup>nd</sup> of October to the 1<sup>st</sup> of November 2019, returning to work in or about the first week of November 2019.

26. In October/early November 2019 the claimant contacted the British Medical Association requesting and receiving assistance in relation to her return to work meeting.
27. In February of 2020 (plus 3 months) the claimant opted, due to her state of health, to change to 'Less Than Full Time Training (LTFT)', working Monday to Friday daytime hours.
28. In August of 2020 the claimant's Clinical Supervisor referred her to Psychology and Psychiatry.
29. The claimant was again signed off sick on the 1<sup>st</sup> of October 2020 and remains at home not having returned to work as at the date of the Hearing.
30. In April of 2021 the claimant was diagnosed as suffering from Complex Post Traumatic Stress Disorder.
31. During the first year of her absence in, the period from October 2020 to October 2021, the claimant felt particularly ill and was reliant on her life partner, including for personal care.
32. From October 2021 onwards the claimant began to experience an improvement in her state of health.
33. As at the 9<sup>th</sup> of December 2022 the claimant was being prescribed Venlafaxine 375 milligrams M/R once daily and also Prazosin 2 milligrams for issues with sleep.
34. As at December 2022 the claimant was compliant with medication and was continuing under Psychiatry and Psychology follow up (196).

35. The absence management of the claimant was conducted by Fife Health Board from 1<sup>st</sup> October 2020. In September of 2023 the responsibility for conducting the absence management of the claimant transferred to Lothian Health Board.

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36. On 28<sup>th</sup> October 2019 the claimant accessed advice and support within the BMA regarding her concern arising from an alleged comment by Dr McDougall which at that time she considered was discriminatory.

- 10 37. In the period August to December 2019 the claimant became concerned about allegedly bullying behaviour of Mr Gohil. The claimant was aware that she had the option of making a formal complaint about the matter but took a conscious decision not to do so.

- 15 38. On the 11<sup>th</sup> of November 2019 the claimant returned to work.

39. On the 25<sup>th</sup> of May 2020, the claimant formed the view that an alleged comment made by Dr Gordon concerning her performance was discriminatory.

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40. On the 1<sup>st</sup> of October 2020 the claimant commenced her period of subsisting long term sick leave.

41. On the 2<sup>nd</sup> of January 2022, the claimant lodged her grievance by email.

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42. On 6<sup>th</sup> February 2022 the claimant first engaged with early conciliation (date A in terms of the early conciliation provisions).

- 30 43. On 19<sup>th</sup> March 2022 ACAS issued the claimant with an Early Conciliation Certificate (date B for the purposes of the early conciliation provisions).

44. On the 3<sup>rd</sup> of April 2022 the claimant first presented her initiating Application ET1.

45. On 31<sup>st</sup> August 2022 the claimant first formally instructed solicitors to represent her in the Tribunal process and advised the Tribunal of that instruction.
- 5 46. On the 13<sup>th</sup> of February 2023, the claimant's second instructed solicitor (who continues to act as her representative) notified the Tribunal of instruction.
- 10 47. On 27<sup>th</sup> June 2023 following a Closed Preliminary Hearing (Case Management Discussion) held on that date the claimant was ordered to tender additional specification of her claims in one document.
48. On the 28<sup>th</sup> of August 2023 the claimant's representatives lodged and intimated the Tendered Further and Better Particulars to which the respondent provided responses (119-145).
- 15 49. On 27<sup>th</sup> of September 2023 the claimant's representatives, upon their own initiative and without direction of the Tribunal, tendered a second iteration of the Further Particulars which bore to add additional allegations of fact not previously contained in the initiating Application ET1 and or in the first iteration of Tendered Further Particulars and to which the respondent provided responses (146-176).
- 20 50. Prior to commencing her period of sick leave the claimant was continuously at work during the 11 month period from 1<sup>st</sup> November 2019 and 1<sup>st</sup> October 2020 without absence.
- 25 51. In the period 1<sup>st</sup> November 2019 to 1<sup>st</sup> October 2020 the claimant:-
- 30 (a) was able to engage with management when working and regularly discussed her concerns with supervisors.
- (b) She was able to draft a bullying complaint relating to Rohit Gohil.

- (c) She was a member of the BMA and had access to advice from the BMA.
  - 5 (d) She had engaged with the BMA in relation to her return to work meeting in or around the first week of November 2019 and was accompanied by a BMA representative at that meeting.
  - 10 (e) The claimant had opportunity and could have taken advice from the BMA on that occasion and at any point regarding the raising and or progressing of complaints with the Employment Tribunal, including advice in relation to the applicability of time limits.
  - (f) The claimant sought no such advice from the BMA.
- 15 52. The claimant and her partner had access to the internet and could have accessed numerous websites on which the requirements for exercising and the methods by which her rights could be exercised, including the raising of complaints before the Employment Tribunal and the relevant applicable time limits, were set out.
- 20 53. The claimant could have approached the internal HR service for advice on the same matters.
- 25 54. On 5<sup>th</sup> November 2019, just after the claimant's return to work in the first week of November, she sent an email (4), to Dr Surinder Panpher, one of her supervising consultants, in which she set out the basis of one of the allegations described in her initiating Application ET1 first presented by her on 3<sup>rd</sup> April 2022, some 2 years and 4 months later.
- 30 55. In the email of 5<sup>th</sup> November 2019 the claimant, made reference to her engaging with the BMA on the question of rotas and indicated that she herself was going to look in detail at the rota in relation to Rheumatology, and highlight any issues that she may have with it, and further, that she was in discussion with "Occupational Health" regarding Less Than Full Time working (LTFT) which she was interested in discussing more.
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56. In 2019 when the claimant formed the view that she was being subjected to discriminatory conduct at the hands of the respondent, the claimant could, with reasonable diligence and enquiry, have fully informed herself as to her right to bring proceedings before the Employment Tribunal, and the mechanism by which she could do so, including the requirements of early conciliation and the time limits applicable to the exercise of that right. In the circumstances she ought reasonably to have known of those time limits at that time.
- 10 57. In December 2019 the claimant believed that the actings of Rohit Gohil constituted discrimination.
- 15 58. The claimant took a conscious decision not to bring a claim of discrimination because she wanted to continue with her FY training.
59. The bringing of such a complaint was not incompatible with the claimant continuing with her final year training.
- 20 60. As at November 2019 the claimant was aware of her right and cause of action, ought reasonably to have been aware of the Employment Tribunal, and of the relevant time limits and had available to her all of the information necessary to raise her proceedings.
- 25 61. In October of 2021, the claimant's life partner, who had assumed the role of agent acting on her behalf, made contact with the claimant's aunt and uncle to request financial assistance from them on the claimant's behalf.
- 30 62. The claimant's uncle shared with the claimant's life partner and with the claimant, in October of 2021 information which he had regarding the Employment Tribunal and the raising of proceedings before it. The claimant's uncle advised the claimant to use the BMA for advice and for assistance in progressing her complaints before the Employment Tribunal.
- 35 63. As at October 2021 the claimant was aware of her right and course of action, was aware of the Employment Tribunal, was aware of and separately ought

reasonably to have been aware of the relevant time limits and, had available to her all of the information necessary to raise her proceedings.

64. The claimant's partner acted on that advice and made contact on the  
5 claimant's behalf with the BMA. He sought and obtained advice, including as to the requirement to enter into early conciliation via ACAS as a prerequisite to the raising of proceedings.
65. The claimant's partner contacted ACAS on the claimant's behalf and received  
10 advice in relation to the raising of proceedings.
66. The claimant's partner discussed and shared with the claimant his communications with the claimant's uncle, with the BMA and with ACAS.
- 15 67. On the 2<sup>nd</sup> of January 2022 the claimant lodged a formal complaint with the respondent in which she stated that her intention was to bring a case of disability discrimination against the respondent and, on the advice of ACAS, would allow the respondents a period of 2 weeks to respond before doing so.
- 20 68. The claimant formally commenced early conciliation on 6<sup>th</sup> February 2022 after the elapse of a further 4 weeks.
69. ACAS issued an Early Conciliation Certificate to the claimant on the 19<sup>th</sup> of March 2022.
- 25 70. The claimant lodged her initiating Application ET1 on 3<sup>rd</sup> April 2022 after the elapse of a further two weeks.
71. The Particulars of Claim lodged with the initiating Application ET1 were  
30 lacking in specification such as to fail to disclose the types of complaint of discrimination of which the claimant bore to give notice and such as to fail to give the respondent fair notice of the factual grounds upon which discrimination was said to have occurred and of the case to which they had to respond.
- 35 72. On 8<sup>th</sup> December 2023, the claimant brought forward an Application for Leave to Amend accompanied by the terms of a Proposed Amendment, made on a

contingent basis, the claimant's primary position being that her complaints as first presented were not time barred and further, that no Leave to Amend was required.

- 5      73. In the first year of her long term sickness absence, that is October 2020 to October 2021 the claimant felt that her state of health was particularly poor. She describes herself in evidence as suffering from depression and fatigue, high levels of anxiety, unable to read, overwhelmed by conversation, experiencing poor appetite and generally reliant on her partner for all matters  
10     including personal care. She withdrew into herself and away from family and friends.

### **Applicable Law Relating to Want of Jurisdiction by Reason of Asserted Time Bar**

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The relevant statutory provisions when considering disability discrimination claims under the Equality Act 2010 are sections 123(1)(a) and (b) and section 123(3) and (4):

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#### **"123 Time Limits**

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(1) *Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—*

(a) *the period of 3 months starting with the date of the act to which the complaint relates, or*

(b) *such other period as the employment tribunal thinks just and equitable.*

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(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

(a) *the period of 6 months starting with the date of the act to which the proceedings relate, or*

5 (b) *such other period as the employment tribunal thinks just and equitable.*

(3) *For the purposes of this section—*

10 (a) *conduct extending over a period is to be treated as done at the end of the period;*

(b) *failure to do something is to be treated as occurring when the person in question decided on it.*

15 (4) *In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*

(a) *when P does an act inconsistent with doing it, or*

20 (b) *if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”*

## **Discussion and Determination**

25 74. The first of the issues to be determined was:-

Whether, by reason of asserted time bar, the claimant lacked Title to Present and the Tribunal lacked Jurisdiction to Consider her complaints of Discrimination, as given notice of in her initiating Application ET1 first presented on the 3<sup>rd</sup> of April 2022, in terms of:

30 (a) section 123(1)(a) and section 123(2) of the Equality Act 2010; which failing and in the alternative,

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- (b) whether in terms of section 123(1)(b) of the 2010 Act, it was, in consequence, just and equitable in the circumstances for the Tribunal to extend time so as to constitute its jurisdiction to consider the complaints though late,
- (c) whether the claimant's claims fall to be dismissed for want of Jurisdiction.
- 10 75. In approaching the issue of asserted time bar the first task is to identify the date of the act complained of, or if it is asserted that there is a continuing act to determine when the period of the asserted continuing act came to an end for the purposes of section 123(1)(a) and section 123(3) of the EqA. If the complaint is/complaints are out of time then the Employment Tribunal moves
- 15 to consider whether, upon a consideration of the relevant circumstances, it is just and equitable to extend time and thus constitute the Tribunal's Jurisdiction, in terms of section 123(1)(b) of the Act.
76. Upon a consideration of the totality of the initiating Application ET1 as first
- 20 presented and, on a contingent basis for the purposes of identifying the dates of acts and actual acts complained of, upon a consideration of the ET1 as potentially further specified/amended in terms of the claimant's second tendered Further Particulars of September 2023 or Proposed Amendment of 8<sup>th</sup> December 23; and,
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- (a) Let it be assumed that those parts of the tendered Further Particulars to the receipt of which objection is not maintained by the respondents on the grounds that they fall into the category of further specification of a claim already given notice of in the ET1, were to be formally received by the Tribunal and allowed to form part of the claimant's pleaded case; and,
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- (b) further let it be assumed that in respect of those parts of the tendered Further Particulars of September 23 to the receipt of which objection is maintained by the respondents were matters in respect of which Leave to Amend is required, and  
5 let it further be assumed that such Leave to Amend were to be granted,
- (c) upon the application of the normal rules of construction to both the ET1 and the tendered Further Particulars, and according to the words used their normal English language meaning,  
10 that the claimant bears to give notice of complaints of:
- (i) section 15 EqA Discrimination arising from Disability
- 15 (ii) section 19 Indirect Discrimination in respect of which, taken at its highest the last date upon which the relied on PCP could have been applied to the claimant was 1<sup>st</sup> October 2020 on which date the claimant commenced her subsisting period of long term sickness absence
- 20 (iii) section 21 Discrimination by reason of Alleged Failure in a Duty to Make Reasonable Adjustments said to arise in terms of section 20 of the EqA
- 25 (iv) section 26 EqA Harassment related to disability

30 77. All of the incidents relied upon, whether those mentioned in the initiating application ET1 or as further specified are, with one exception, all alleged acts or omissions of employees of the respondents for whose actings in the course of employment the respondent is said to be liable, and are said to have occurred in the period between August 2018 up to and including

October 2021. As at the date of first presentation of the initiating application ET1 (3<sup>rd</sup> April 2022 and as between that date and the date of tendered Further Particulars of 27<sup>th</sup> September 2023, they are variously presented and or tendered) between 6 months and 5 years late. The potential exception 5 relates to a new allegation, not heralded in the ET1 and which appears at paragraph 59 of the tendered Further Particulars and which is said to arise from an unspecified allegation of delay in the course of the grievance process and of a failure to fully investigate the claimant's complaints as set out in her grievance dated 2<sup>nd</sup> January 2022. The Proposed Further 10 Particulars/Amendment contains no offer to prove that matters complained of (alleged delay and failure to fully investigate) occurred because of the claimant's asserted possession of the protected characteristic of disability. While the averments are lacking in specification as to when the alleged discriminatory acts or omissions occurred they are, on their face seen to be 15 raised after the expiry of what would be the section 123(1)(a) early conciliation extended, statutory period measured from their alleged occurrence. The Tribunal concludes that it also lacks Jurisdiction to Consider that the potential complaint in terms of section 123(1)(a) of the Equality Act 2010.

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78. The acts complained of are directed against named individuals, variously employees of the 1<sup>st</sup> or 2<sup>nd</sup> respondent and are distributed across various separate placements or rotations of the claimant. They are largely said to arise from the claimant's characterisation of remarks said to have been made by different individuals at disparate times and in differing circumstances and are distinct one off acts or omissions attributed to named individuals. The 25 Tribunal did not consider that the evidence presented established that the 1<sup>st</sup> named respondent was responsible, by reason of any practice policy rule or regime, whether or not formal or whether or not expressed in writing, for an ongoing situation or continuing state of affairs in which, amongst other matters, the various named individuals in distinct circumstances during differing placements made remarks which were open to the interpretation placed upon them by the claimant as having a discriminatory purpose or effect.
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79. The burden is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged incidents of discrimination relied upon were linked to one another such as to amount to evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period." On the documentary and oral evidence presented and upon the submissions made the Tribunal found that the claimant had not discharged that burden of proof. The Tribunal concludes that it lacks Jurisdiction to consider the claimant's complaints of discrimination in terms of section 123(3) of the Equality Act 2010. The complaints given notice of in the initiating application ET1 are said by the claimant to relate to a unit of work which ended in December of 2019, in October of the following year 2020 the claimant commenced a period of long term sick leave which continues to subsist. For this separate reason the Tribunal concluded that the matters complained of do not fall to be regarded as sufficiently connected to constitute a continuing act of discrimination for the purposes of section 123(3).

### **Section 123(1)(b) of the EqA 2010**

- 20
80. Having concluded that it lacks Jurisdiction to Consider the complaints in terms of section 123(1)(a) and 123(3) and (4), the Tribunal requires to consider whether, in the circumstances, it is just and equitable to extend time for the purposes of establishing Jurisdiction in terms of section 123(1)(b) of the Act.
- 25
81. In the instant case that issue is focused not only in relation to the claims given notice of in the initiating application ET1 as first presented on 3<sup>rd</sup> April 2022 *per se*, but also as an integral factor to be considered in the application of the *Selkent* principles to the contingent application for Leave to Amend.
- 30
82. Although there is no formal burden of proof in assessing questions of justice and equity under section 123(1)(b) it is for the party asserting a positive case to establish the matter in issue thus it is for the claimant to show that an extension of time is just and equitable in the circumstances.
- 35

83. On its strict construction, section 123 does not set out a “primary time limit” that may be extended but rather a time limit of 3 months (minus a day) or such other period as the Employment Tribunal thinks just and equitable.
- 5 Notwithstanding the terms “primary time limit” and “extension of time” are generally accepted as “useful shorthand” and as such are used here.
84. There was no dispute between the parties’ representatives as to the relevant and applicable law relating to the implementation of section 123(1)(b) that now being largely regarded as settled law in terms of the series of authoritative decisions of the Higher Courts. Read short; while the starting point for the exercise of its discretion is that there is no presumption in favour of considering a claim out of time on just and equitable grounds and that it is for a claimant to convince the Tribunal that it is just and equitable in particular circumstances to extend time, Parliament has given the Employment Tribunal the widest possible discretion. While the concept of justice and equity will embrace all relevant factors it may be said that such factors will almost always include:-
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- 20 (a) the length of and reasons for, the delay, and
- (b) whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claims at a time proximate to the dates of their alleged occurrence).
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- 25 (c) the extent to which the cogency of the evidence is likely to be affected by the delay.
- (d) the extent to which the party sued has cooperated with any request for information.
- 30
- (e) the promptness with which the claimant acted once they knew of the possibility of taking action.

- (f) the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.
- 5 (g) whether any relied upon ignorance on the part of the claimant whether in relation to the existence or applicability of time limits, is justifiable ignorance in the circumstances.
- 10 (h) the extent to which a fair Hearing is likely to be possible on the proposed claims,
85. As the Tribunal has found in fact, in the first 12 months of the claimant's subsisting long term sickness absence, that is in the period from in or about October 2020 to in or about October 2021 the claimant's state of health was particularly poor. The claimant described herself in evidence as suffering during that period variously and from time to time from depression and fatigue, high levels of anxiety, a sense of feeling unable to read and of being overwhelmed by conversation, experiencing poor appetite and feeling generally reliant on her partner for all matters including personal care. The 15 respondents' representative accepted in the course of her submissions that that 12 month period from October 2020 to October 2021 was a period during which it may be appropriate, all other things being equal, to regard the claimant's particularly poor state of health as preventive of her taking steps to present her complaints to the Employment Tribunal.
- 20 25
86. On the evidence presented and Findings in Fact which it has made the Tribunal has found that as at November 2019 the claimant was aware of her right and cause of action and ought reasonably to have been aware of the relevant time limits relating to the exercise of that right and had available to her all of the information necessary to raise her proceedings. Excluding the period October 2020 to October 2021 the Tribunal has separately found that as at October 2021 the claimant was aware of her right and cause of action and was in fact aware of the relevant time limits in relation to exercising those rights and further had available to her all of the information necessary to raise 30

her proceedings. The matters given notice of by the claimant in her initiating application ET1 are said to have occurred in the period commencing in or about August 2018 up to and including 1<sup>st</sup> October 2020. In the 11 month period from 1<sup>st</sup> November 2019 to 1<sup>st</sup> October 2020 the claimant was continuously at work without any absence. In that period she was able to engage with the respondents when working and was able to and did discuss concerns with her supervisor. She was able to and did draft a bullying complaint relating to Dr Gohil. She had access to, was able to engage with and did engage with a BMA advisor in relation to her return to work meeting her perceived need for which arose from her concerns and belief that she had been discriminated against at that time. The claimant explained that her reason for not proceeding with the complaint was her desire to continue her final year training. Taking forward complaints at that time would not have been incompatible with the claimant continuing with her final year training.

The protections against, and remedies for, discrimination in the work place which are contained within the Equality Act 2010, are designed to be accessed and utilised by employees in the course of, and while continuing in, their employment. In so far as the claimant's state of health is relied upon as the reason for not timeously presenting her complaints and or as an explanation of subsequent delay in presenting her complaints, on the evidence presented the Tribunal did not consider that that was applicable to the 11 month period 1<sup>st</sup> November 2019 to 1<sup>st</sup> October 2020.

87. Nor did the Tribunal consider, on the findings which it has made, that that applied to the period from in or about October/November 2021 to the date of first presentation of her complaints on 3<sup>rd</sup> April 2022.
88. In so far as the claimant sought to rely upon ignorance of either the Employment Tribunal and or of the time limits relating to the presentation of her complaints to the Tribunal, the Tribunal has found in fact that as at October 2021 the claimant knew of both her right and cause of action, was aware or ought reasonably to have been aware of the Employment Tribunal and the relevant time limits. The Tribunal has separately found that as at November 2019 the claimant knew of her right and cause of action and ought

reasonably to have been aware of the relevant time limits and had available to her all of the information necessary to raise her proceedings.

89. In November of 2019 the claimant had available to her should she choose to access it, advice from the BMA. She engaged with the BMA at the time in 5 2019 at a time when she believed she was being discriminated against. She could have but chose not to take advice from the BMA at that time in relation to progressing her complaints, including in particular in relation to the Employment Tribunal, and as to relevant time limits. She separately had 10 available to her all of the information necessary to raise her proceedings timeously.
90. Following the raising of proceedings the claimant instructed a solicitor to act 15 for her in the Judicial Mediation which was fixed in the case. Judicial Mediation is a process which is concurrent with and not sequential to the process of formal litigation, the latter not being delayed to facilitate the former. The claimant could have sought and obtained advice from her then acting solicitor regarding her view that she could at any point bring forward additional details in relation to her claim and in relation to the need if seeking 20 to do so, to act without delay.
91. The claimant was supported during those periods by her life partner with whose assistance she could have reasonably presented and ultimately when she decided to do so, did present her application. In supporting the claimant 25 during those periods, the claimant's life partner acted on the claimant's behalf with the claimant's knowledge, consent and authority.
92. The terms in which the claimant first presented her claims, on 3<sup>rd</sup> April 2022, substantially lacked specification such as to fail to give the respondent fair 30 notice of the case which it had to meet. The principal reason for the claimant failing to present her complaints timeously, at first instance, and for failing to fully and sufficiently specify them at the time of first presenting them, was the claimant's view that she was entitled to defer doing so to some indeterminate future date and, that by inserting into the paper apart to the ET1 as first presented a statement of her intention to provide further detail/additional 35

claims at some indeterminate time in the future, she had reserved the right to do so, notwithstanding her knowledge, as at that date of the applicable time limits and of the fact that they had long since expired.

- 5 93. That perception of the claimant was and is erroneous. As Langstaff P, as he then was, stated in **Chandhok v Tirkey**: UKEAT/0190/14/KN:-

“The claim as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but unnecessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document,” [nor a statement of the other party’s intentions] “but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1. .... I readily accept that the Tribunal should provide straightforward, accessible and a readily understandable forum in which disputes can be resolved speedily, effectively and with a minimum of complication .... However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively, the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence ..... 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 that they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds so the costs incurred can be kept to those which are proportionate.”

94. While the evidence presented did not go to clearly explain how it came to be that the claimant perceived that proceeding in the manner which she chose to was appropriate and, accepting that there was no suggestion that she did so by way of contumelious disregard of the true position, the Tribunal considered 5 for the reasons set out above that the claimant's error (ignorance) in that regard was not excusable in the circumstances. Upon the making of reasonable enquiry either directly herself, or through the agency of her life partner or alternatively by accessing advice available to her from either the BMA and or her first instructed solicitor, the claimant would have and ought 10 reasonably in the circumstances to have known of the true position. At each of the times at which the claimant took a conscious decision not to proceed with presenting her complaints and or to defer presenting them all or as fully specified, the claimant had available to her all that she required to present the claims both timeously and sufficiently specified such as to give the 15 respondent fair notice of the case which it had to meet.

95. The extending of time, respectively, to the date of first presentation of the ET1 in respect of the matters given notice of in it or in respect of the matters which would require Leave to Amend to the date of presentation of the 20 Proposed Amendment (the terms of which are incorporated within the 29<sup>th</sup> September 23 tendered Further Particulars) would result in the respondent suffering prejudice both general and forensic in respect of:-

- Having to face causes of action which would have been dismissed as 25 out of time had they been brought as new claims
- Of requiring the respondent to respond to claims which, in terms of the Proposed Amendment, continue to fail to give fair notice of the case which they require to meet
- Of being unable to properly investigate incidents, many of which date from between 3½ to 5 years ago. As confirmed by relevant witnesses who spoke of their inability to recollect the incidents founded upon in the context both of the substantial lapse of time 30

between their occurrence and the date of Hearing and of the context of the claimant being one of several hundred trainees with whom they have engaged over that period

- 5           • By requiring them to expend additional resource in attempting to respond to claims which for want of specification may have little reasonable prospect of success
- 10          96. Upon a consideration of the circumstances presented the Tribunal does not consider that it would be just and equitable to extend time such as to constitute its jurisdiction in terms of section 123(1)(b) of the EqA to consider the late presented claims both as first presented as at 27<sup>th</sup> September 2023 and as proposed further particularised and proposed amended as at 8<sup>th</sup> December 2023.
- 15          97. The claimant's complaints of discrimination because of the protected characteristic of disability accordingly fall to be dismissed for want of jurisdiction.
- 20          98. Having determined that the Tribunal does not have Jurisdiction to Consider the claimant's complaints it is unnecessary to determine those aspects of the application for Leave to Amend in respect of which the granting of Leave was opposed. For completeness sake, however, the Tribunal makes clear that with the exception of those parts of the tendered Further Particulars of 27<sup>th</sup> September 2023 which, the respondents accepted, subject to the challenge of time bar, as otherwise falling within the category of further specification of claims already given notice of, the Tribunal considered, by reason of their content and the nature of the claims which they described in comparison with the content of the initiating application ET1, that all of the 25 objected to elements of the Tendered Particulars were matters which would have required the granting of Leave to Amend.
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99. As set out by the Honourable Lady Smith in **Ladbroke Racing Limited v Traynor** UKEAT/0067/06:-

“When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it;”

and by HH J Taylor in **Vaughan v Modality Partnership**: UKEAT/0147/BA(V):

10 “The key factor remains the balance of justice.”

100. In adopting that guidance in approach and upon application of the particular guidance, not intended to be exhaustive, and which is to be found in the seminal case of **Selkent Bus Company Limited v Moore** [1996] IRLR 661, 15 and a consideration of the relevant factors as presented in evidence, including those already itemised at paragraph (84) above, in respect of the consideration of the issue of jurisdiction and upon the findings in fact it has made in relation to the circumstances in which the terms of the Proposed Amendment were brought forward and the reasons for the claimant seeking 20 to introduce/specify the matters concerned as at September of 2023, the Tribunal would have held that the balance of injustice and hardship lay in favour of refusing Leave to Amend.

101. As stated by the EAT in **Vaughan v Modality Partnership**:-

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“Refusal of an amendment will self evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason ....”

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102. On the one hand, the Tribunal recognised that that would be the case in the event of its refusing Leave to Amend. As the Tribunal has found in fact, the effect of the Proposed Amendment, if Leave to Amend in its terms was to be granted, would not be to cure the Tribunal’s lack of jurisdiction, the Tribunal

not considering in the circumstances that it would be. Nor would it, taking the terms of the Proposed Amendment as a whole as the respondents are entitled to do and the Tribunal ought to do, cure the lack of specification across the totality of the claims presented such as to give the respondents  
5 fair notice of the case which they are to meet. Neither of those factors, of themselves, fall to be regarded as determinative of the exercise of the Tribunal's discretion. Rather, as part of a multi-factorial assessment, where no single factor is determinative, they each fall to be accorded significant weight in balancing the relative injustice and hardship associated with allowing the  
10 amendment as against that of refusing it.

103. On the other hand, the granting of the amendment would result in prejudice, including on the evidence presented at Hearing, forensic prejudice to the respondents by reason of the matters identified at paragraph 94 above in respect of the justice and equity of extending or not extending time, which matters are held repeated here. The allowance of amendment in the terms proposed and opposed would result, in the Tribunal's consideration, in it being unlikely that a fair Hearing could be conducted in respect of a number of the complaints which would be thus incorporated, by reason variously of the lack of specification and resultant in ability on the part of the respondents to investigate the allegations in respect of which the lack of fair notice would be likely to lead to objections to the pursuit of associated lines of enquiry at Hearing, and, of the inability of witnesses to recall incidents at 3, 4 and 5 years' distance in the context of the claimant being one of several hundred such trainees with whom the named individuals had interacted in those periods, further by reason of the non retention and thus non availability of documentary evidence given the passage of time.  
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104. On a balancing of the relative injustice and hardship of allowing the amendment against the injustice and hardship of refusing it and upon an application of the *Selkent* principles and consideration of the relevant factors, the Tribunal would have concluded that the balance of injustice and hardship  
5 lay in favour of refusing Leave to Amend and the claimant's application to amend, presented upon a contingent basis, would accordingly be refused.

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**Employment Judge:** d'Inverno  
**Date of Judgment:** 13 June 2024  
**Entered in register:** 13 June 2024  
**and copied to parties** 13/06/2024

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20 **I confirm that this is my Judgment in the case of Kirkham-Mowbray v Fife Health Board and another and that I have signed the Judgment by electronic signature.**