



EMPLOYMENT TRIBUNALS

Claimant: Mr Qays Hashmi

Respondent: Apple Retail UK Limited

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP **On:** 10 October 2024

Before: Employment Judge Sekhon

Appearances

For the claimant: In person

For the respondent: Ms Churchhouse, Counsel and Ms Ensor, solicitor

RESERVED JUDGMENT

1. The Claimant's application to amend his claim to add Incidents 4,5,8,9,10,12,13 referred to in the draft List of Issues is refused.
2. The claimant's application to amend his claim to include allegations of disability discrimination is dismissed and / or in the alternative refused (that his dismissal was discriminatory, and he was refused leave to appeal his dismissal because he was disabled).
3. The Claimant's complaints of race discrimination, disability discrimination and religion and belief discrimination against the respondent are dismissed as the Tribunal has no jurisdiction to hear them.
4. The claimant's claim for unfair dismissal continues.

REASONS

Introduction

1. After considering further correspondence from the parties, Employment Judge Rice-Birchall confirmed to the parties on 16 May 2024 that the hearing today is "*to consider any amendment application and whether the claims were presented in time*".

2. The respondents clarified at the outset of the hearing that having received further information provided by Mr Hashmi in the form of a document titled “Draft list of issues” at pages 74 – 87 of the bundle, that they were now pursuing the following points at the hearing:
 - (a) That Mr Hashmi’s claims against the respondent in the Draft List of Issues, namely incidents 4, 9, 10,12 and 13 contain allegations that are not currently included in the pleadings (ET1) and that incidents 4, 5, 8, and potentially incidents 12, and 13 contain allegations that are new causes of action and are out of time. The respondent does not agree that Mr Hashmi’s application to amend his claim should be granted. (“Issue 1”)
 - (b) The discrimination claims (for race, disability and religion or belief discrimination) that Mr Hashmi is making were made out of time given that the last act is alleged to have occurred in February 2022, and these were bought out of time as there is no continuing act to extend the time. If these claims were bought out of time the respondent submits that the Tribunal should not find that it is just and equitable to extend time. Mr Hashmi was dismissed on 27 March 2023 and the ACAS early conciliation process started on 6 April 2023 and a claim form was served on 6 August 2023 so that Mr Hashmi’s unfair dismissal claims were bought in time. (“Issue 2”)
 - (c) When questioned further by the Tribunal and in the course of Mr Hashmi giving evidence, Mr Hashmi stated that his case is that he was dismissed on 27 March 2023 due to discriminatory conduct by the respondent because of his disability and that he was denied the opportunity to appeal this decision because he was discriminated against because of his disability. Mr Hashmi accepted that his draft List of Issues and ET1 do not make these claims, and he sought to make an oral application to amend his claim to include these two additional allegations. The respondent submitted that these allegations have not been raised before despite Mr Hashmi being given several opportunities to do so and requested the Tribunal to dismiss Mr Hashmi’s application. I informed both parties that I would consider whether to grant Mr Hashmi’s application and if I did agree to grant Mr Hashmi’s application, I would set out my decision in this Judgment. (“Issue 3”)

Background

3. Mr Hashmi brings claims against the respondent by way of a claim form dated 6 August 2023 for unfair dismissal, race discrimination, disability discrimination and religion or belief discrimination. He has also stated that he is owed other payments but provided no particulars in the ET1.
4. Early conciliation commenced on 6 April 2023. ACAS issued Mr Hashmi with an ACAS certificate on 18 May 2023.
5. An ET3 was filed with the Tribunal on or about 20 September 2023, denying the allegations, stating that Mr Hashmi was dismissed for reasons of capability arising from Mr Hashmi’s long term sickness absence of 20 months. The respondent sought further particulars of the allegations raised for disability discrimination, race discrimination, and religion or belief discrimination and other payments and stating that these claims are out of time.
6. A case management hearing took place on 22 February 2024 before Employment Judge Rice-Birchall and Mr Hashmi was ordered to provide further particulars of his claims to the respondent by 4 April 2024. The Tribunal agreed to extend this time until 11 April 2024. Mr Hashmi provided further particulars of his claim in the form of a document titled “Draft list of issues” at pages 74 – 87 of the bundle. He informed the Tribunal at the hearing that this was a standalone document setting out all his claims against the respondent, which sets

out the date, the decision makers and the relevant legislation he is relying on. The Tribunal clarified that he is not seeking to rely on any additional claims set out in his ET1 and Mr Hashmi confirmed that any other information in the ET1 is by way of background only. However during the course of giving evidence, Mr Hashmi when questioned by the Tribunal stated that he wished to make an oral application to amend his claim to include two additional allegations of disability discrimination (as set out in 2c above) and these allegations were not in the ET1 or draft List of documents.

7. Employment Judge Rice -Birchall ordered that the respondent prepare and seek to agree a list of issues with Mr Hashmi by 9 May 2024 and to confirm with the Tribunal by 25 April 2024 whether they considered Mr Hashmi needed to make an application to amend his claim.
8. Upon receipt of the draft List of Issues, the respondent confirmed that Mr Hashmi is required to make an application to the Tribunal as his further particulars contain allegations that have new causes of action, and factual issues which have not been pleaded in his ET1. Mr Hashmi made a written application to amend his claim to include all the allegations as set out in his draft List of Issues and as set out above (at paragraph 2c) an oral application at the hearing to include two additional claims of disability discrimination.
9. The parties have not provided the Tribunal with a List of Issues as the issues to be determined remains in dispute.
10. A final merits hearing has been listed to take place on 18 February 2025 for 4 days.

The Hearing

11. The respondent provided a bundle totalling 95 pages in advance of the hearing which had not been agreed by Mr Hashmi and informed the Tribunal that they did not seek to call any witnesses at the hearing.
12. Mr Hashmi did not serve a witness statement prior to the hearing despite the respondent's correspondence of 27 September and 4 October 2024 requesting that he do so. However when the claimant attended the hearing he stated that he wished to give evidence to the Tribunal. When questioned why he had not serve any witness statements in advance of the hearing, Mr Hashmi stated that he believed the date of exchange of witness statements was 13 October 2024 as per Employment Judge Rice-Birchall's order (which is in 3 days' time) but when questioned further about his accepted that he does not have any witness statements (even in draft) from others on whom he wishes to rely and could not explain what evidence they would provide the Tribunal on the issues before the Tribunal today.
13. Mr Hashmi attended without representation and Ms Churchhouse, Counsel, attended upon behalf of the respondent.
14. Mr Hashmi gave oral evidence under oath and Ms Chuchhouse, was able to cross examine him.

The Law

15. The legislation is as follows:

Amendment of the claim

16. The Employment Appeal Tribunal (“EAT”) in *Selkent Bus Company Ltd v Moore* [1996] ICR 836, confirmed the law previously set out in *Cocking v Sandhurst (Stationers) Limited* [1974] ICR 650, that applications to amend involves the assessment of the balance of injustice and hardship of allowing or refusing the amendment and noted a non-exhaustive list of relevant circumstances which would need to be taken into account in the balancing exercise, namely; the nature of the amendment, the applicability of time limits, and the timing and manner of the application to amend.
17. Other factors can be taken account in the balancing exercise. This may include the merits of the claim being sought to be added. However, a Tribunal should proceed with caution in considering the prospects of success in the context of an application to amend. The EAT in *Woodhouse v Hampshire Hospitals NHS Trust* (UKEAT/0132/12), noted that whilst an examination of the merits may be a relevant consideration, as there is no point in allowing an amendment to add an utterly hopeless case, it should otherwise be assumed that a case is arguable.
18. In relation to the nature of the amendment, distinctions may be drawn between
- (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint.
 - (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often referred to as ‘re-labelling’); and
 - (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
19. The EAT, in *Vaughan v Modality Partnership* [2021] ICR 535, gave detailed guidance on applications to amend Tribunal pleadings. The EAT confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the claimant has a need for the amendment to be granted as opposed to a desire that it be granted.
20. Ms Churchhouse referred the Tribunal to the comments made by Underhill LJ in *Abercrombie v Aga Rangemaster* [2014] ICR 209 at 48:

“... the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.....”

Time limits for discrimination claims

21. Section 123 of the Equality Act 2010 state as follows:
- (1) 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.
 - (3) For the purposes of this section—
 - (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.
22. In relation to the discrimination complaints, the Tribunal has to consider in the first instance whether there was a continuing act? Subsection (3) in paragraph 21 above refers to conduct extending over a period also referred to as “a continuing act”. The Tribunal has to decide whether any of the discrimination complaints are out of time. If they are, the Tribunal must determine whether the allegations are part of a continuing act or decisions each of which could be described as a ‘one-off’. If the Tribunal decides that they are ‘one-off acts’ then time would run from each separate allegation.
23. The leading case for a Tribunal to consider when analysing whether there was a continuing act or an act extending over a period is the Court of Appeal case of *Hendricks v Metropolitan Police Comr* [2003] IRLR 96. This case set out that the focus of inquiry must be on whether there was an ongoing situation or continuing state of affairs in relation to the alleged discrimination as opposed to a ‘succession of unconnected or isolated specific acts’. In deciding whether a particular situation gives rise to an act extending over time it will also be appropriate to have regard to (a) the nature of the discriminatory conduct about which complaint is made, and (b) the status or position of the person said to be responsible for it. The Tribunal is also to be careful to distinguish between the ongoing effects of a one-off discriminatory act as opposed to an act that extends over a period of time.
24. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will usually amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing, even though that act has ramifications which extend over a period of time. *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686 followed in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548.
25. The Court of Appeal’s decision in *Aziz v FDA* [2010] EWCA Civ 304 set out how the Employment Tribunal should approach the question of whether there is a continuing act at a preliminary hearing. The Court approved the approach laid down in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548 that the test to be applied at the pre-hearing was whether the claimant had established a prima facie case, or, to put it another way, ‘*The claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs*’. The Court also stated that in considering whether separate incidents form part of an act extending over a period, a relevant but not conclusive factor is whether the same or different individuals were involved.
26. The claimant cannot rely on some ‘floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time’. (See *Southwestern Ambulance Service NHS Foundation Trust v King* [2020] IRLR 168). A continuing act can fall under different headings. (see *HHJ Eady in Robinson v Royal Surrey County Hospital NHS Foundation Trust* [2015] All ER (D) 409 (Jul)).
27. Where there is no continuing act and the discrimination claim is prima facie out of time, as stated above, section 123(1)(b) of the Equality Act allows a Tribunal to extend time to ‘such other periods as the employment tribunal thinks just and equitable’.
28. If the claim is out of time, the burden is on the claimant to show that it is just and equitable to extend time. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunal considers exercising the discretion under s.123(1)(b) EqA 2010, ‘*there is no presumption that they should do so*

unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.'

29. In *Adedeji v University Hospitals Birmingham NHS Foundation* [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunal relying on the checklist of factors found in s 33 of the Limitation Act 1980 and said at paragraph 37 that *'The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"'*.
30. The fact that a claimant has awaited the outcome of his or her employer's internal grievance procedures before making a claim is just one matter to be taken into account by an employment tribunal in considering whether to extend the time limit for making a claim and there is no principle of law that pursuing an internal grievance process will automatically render it just and equitable to extend time (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 (CA)).
31. The Tribunal must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other. (*Pathan v South London Islamic Centre* EAT 0312/13)
32. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 194 at paragraphs 17-19 and 25, Leggatt LJ said that Tribunals have the widest possible discretion. Tribunals are not required to go through a checklist of factors. The length of and reasons for delay, and whether the delay has prejudiced the respondent, are almost always relevant factors to consider. The Tribunal does not need to be satisfied that there was a good reason, or any explanation, for the delay.
33. The EAT in *Director of Public Prosecutions and anor v Marshall* [1998] ICR 518, provided authority to argue that the Tribunal should consider when the claimant became reasonably aware of his right to bring a claim, which may justify extending the time limit.

Discussion

Issue 1- Amendments to Mr Hashmi's case

34. As set out above, when considering an application to amend, the most important matter to consider is the balance of prejudice to the parties, if the application is allowed, compared to the prejudice to the parties, if the application is refused. Three factors are normally considered the nature of the amendment, the question of time limits, and the timing and manner of the application. Whilst other factors may be relevant, the parties did not ask me to consider any other relevant factors, and none appeared to me to be relevant in the circumstances of this application.

(a) Nature of amendment

35. Mr Hashmi's submission was that the incidents 4,9,10,12 and 13 as set out in the draft List of issues are not new factual allegations and were included in the ET1. However when giving evidence and asked to refer to the relevant paragraph of the ET1 that set out the relevant allegations, Mr Hashmi conceded that incident 9 (relating to an incident on 31 May 2021) is not referred to in the ET1 at all. Further he stated that incident 10 (relating to an incident in June 2021) is referred to at point 10 of the ET1 (page 22 of the bundle), incident

12 (relating to an incident in October 2021) is referred to at points 12 and 13 of the ET1 (page 23 of the bundle) and incident 13 (relating to an incident in 1 November 2021) is referred to at points 12 and 13 (pages 23 and 24 of the bundle) of the ET1.

36. Ms Churchhouse submitted that the contents of the ET1 referred to by Mr Hashmi at pages 22, 23 and 24 of the bundle refer to a chronology of events but do not specify how Mr Hashmi suffered from discrimination (race or disability discrimination) and the allegations in the draft List of Issues go further than the ET1 setting out how he experienced less favourable treatment and refer to comparators.
37. Ms Churchhouse submitted that the respondent accepted that the allegations as far as they refer to direct race and direct disability discrimination claims are not new causes of action, however Mr Hashmi has set out the incidents in the draft List of Issues include allegations of breach of contract for allegation 4, marriage and civil partnership discrimination for allegation 5, failure to make reasonable adjustments and indirect race discrimination for allegation 8 and indirect race discrimination for incident 12.
38. When questioned, Mr Hashmi conceded that in his ET1 he only ticked the boxes for race, disability and religion or belief discrimination and did not specify in the ET1 that he wanted to bring claims for breach of contract, marriage and civil partnership or a failure to make reasonable adjustments. He stated that he did not know where to set out the other claims. He could not explain to the Tribunal why he had not ticked the box at page 8.1 of the ET1 (page 8 of the bundle) which states, *"I am making another type of claim which the Employment Tribunal can deal with"* and why he did not list these additional claims in the text box.
39. Taking each incident in turn, I find that incident 4 is referred to in the ET1 (page 14 of the bundle) where it states, "breach of confidential information by manager JJ" and that incident 4 of the draft List of Issues now provides further information of the date this occurred of 9 December 2020. However I accept Ms Churchhouse's submission that this is a new cause of action of a breach of contract claim which was not made in the ET1.
40. I find that incident 9 is not referred to in the ET1 and is a new allegation not previously made.
41. In relation to Incident 10, whilst the ET1 refers to Mr Hashmi sharing experiences of racial trauma on an I & D call in June 2021, it does not set out that Mr Hashmi received less favourable treatment compared to a comparator because of this. I read point 10 of the ET1 as background information or taken as its highest as evidence from Mr Hashmi that he contemporaneously raised his experiences of racial trauma with the respondent. I therefore accept the Ms Churchhouse's submission that this is a new allegation.
42. Incidents 12 and 13 alleges that there was an insufficient handover in October 2021 impacting Mr Hashmi's wellbeing. Further Mr Hashmi's new manager reached out to Mr Hashmi showing a lack of consideration for Mr Hashmi's mental health and his manager was dismissive when Mr Hashmi asked for essential information about his role. Having considered pages 23 and 24 of the bundle, I find that the ET1 did refer to Mr Hashmi's belief that his manager did not receive a detailed handover and states that *"if a thorough handover was received then TT would surely understand his mental health and situation but it's like this was totally ignored and not important."* However I accept Ms Churchhouse's submission that it is unclear whether this was background information, and Mr Hashmi's draft List of Issues now goes further and makes specific allegations stating this occurred because of his race / disability. I therefore accept Ms Churchhouse's submission that these are new allegations.

43. I find Incidents 4, 5, 8 are new causes of action, as Mr Hashmi has conceded that he failed to set out in the ET1 that his claims included any other claims other than race, disability and religion and belief discrimination.
44. From the analysis above, I do not accept Mr Hashmi's assertion that Incidents 4,5,8,9,10,12,13 referred in the draft List of Issues are sufficiently referred to or pleaded in the ET1. I find that these are therefore new allegations and new causes of action and involve a separate factual background/ set of circumstances which are likely to involve substantially different areas of enquiry by the respondent and the respondent was not aware of such issues until a draft List of Issues was sent to them on 11 April 2024. I take the view therefore that these are substantial amendments, providing important and substantial new factual details, in relation to allegations which are either not mentioned in the grounds of claim, or only mentioned in passing.

(b) Time limits

45. The Tribunal must consider whether a new complaint or cause of action is out of time, and if so, whether the time limit should be extended under the applicable statutory provisions.
46. I accept Ms Churchhouse's submission that all the Incidents 4,5,8,9,10,12,13 referred in the draft List of Issues were first made on 11 April 2024, some 8 months after the claim form was issued and in any event were prima facie out of time at the time Mr Hashmi served his ET1 on 6 August 2023. I note the dates that Mr Hashmi has provided for each Incident is as follows:-
- Incident 4 - 9 December 2020
 - Incident 5 - 24 December 2020
 - Incident 8 - 30 May 2021
 - Incident 9 - 31 May 2021
 - Incident 10 - June 2021
 - Incident 12- October 2021
 - Incident 13 - 1 November 2021
47. Ms Churchhouse has made a separate application stating that in any event all Mr Hashmi's discrimination claims were out of time by the time Mr Hashmi issued his claim form, and this has been considered separately below. I have found that all the discrimination claims have been made out of time and I have decided that it is not just and equitable to extend the time for the claims brought for the reasons given below. I do not repeat them here.

(c) Time and manner of the application

48. The timing and manner of the application is important. The Tribunal should consider why the application was not made earlier and why it is now being made.
49. By way of background, the respondent was unclear as to the claims being made against them and set out in their Grounds of Resistance on 20 September 2023 that further information was required. I have not been provided with any documentation to show that Mr Hashmi provided the respondent with this information after this request. It is therefore not sufficient for Mr Hashmi to say that he believed the respondent knew the allegations that he was making against them.
50. Even in advance of the Case Management hearing with Employment Judge Rice-Birchall on 22 February 2024 (4 months later) Mr Hashmi did not provide any further information about his claim prior to the hearing and Employment Judge Rice-Birchall therefore set out

in the Case Management Order clear details that Mr Hashmi needed to provide the respondent and the Tribunal about his claims, which Mr Hashmi provided on 11 April 2024.

51. I do not find that Mr Hashmi has given me any adequate reasons why he did not seek to amend his claim earlier to include these claims from the date of service of his claim form on 6 August 2023 to 11 April 2024, some 8 months later. Mr Hashmi's evidence is that he his mental health issues have been ongoing, and his health is up and down such that some days he finds it difficult to get out of bed and for which he continues to take antidepressants.
52. Mr Hashmi submitted that he is disabled by virtue of severe depression and anxiety, and I note the respondent accepts this in their Grounds of Resistance. However Mr Hashmi has not provided the Tribunal with any documentary evidence to support his claim of ill health between 6 August 2023 to 11 April 2024, and I have not been provided with any previous correspondence from Mr Hashmi to the Tribunal / respondent explaining the difficulties he was facing and his inability to respond to the issues.
53. Mr Hashmi accepted and apologised for making a mistake by not including all his allegations in the claim form and explained that he was litigant on person which hampered his ability to do so. I accept this may be the case, but I do not find that Mr Hashmi has taken active steps to seek legal advice and assistance despite Employment Judge Rice-Birchall signposting sources of legal advice and assistance with the Case Management Order.
54. I am conscious of the obvious hardship to each party; of the claimant not being able to pursue claims he wishes to pursue, if I refuse the amendments, and of the respondent having to defend a claim that it did not consider it should have to defend, if I grant the amendment. However I am also persuaded by Ms Churchhouse's submissions that if I were to grant the amendments proposed at this last stage the respondent would be prejudiced due to the need to carry out a broader investigation, obtain evidence covering a greater range of matters, and the need to do so in a very limited time frame as the final hearing is due to take place in 4 months' time. I also accept that due to the late notice of these additional allegations, the respondent has been deprived the opportunity of preserving evidence and seeking potential witnesses that could be asked to recall events that occurred between December 2020 and November 2021 to defend the amended claims.
55. The final hearing has been listed for 18 February 2025 and allowing for an amended response to be served and disclosure and witness statements may put the final hearing date in jeopardy and would be a timely and costly process for the respondent. Of practical concern also, allowing the amended claims is likely to result in the need for a longer hearing and if this was the position the current final hearing in February 2025 would need to be vacated and relisted resulting in significant delay for both parties.
56. Having regard to all the circumstances above, I do not allow Mr Hashmi to amend his claim to include Incidents 4,5,8,9,10,12,13. Accordingly the Tribunal has no jurisdiction to consider these amended claims.

Issues 2 and 3

Time limits

57. It is not in dispute that Mr Hashmi's allegations relating to unfair dismissal on 27 March 2023 have been brought in time and this claim will continue.
58. However the respondent submits that all allegations of discrimination (race, disability, religion and belief) are prima facie out of time since Mr Hashmi sought early conciliation on

6 April 2023 and issued a claim form on 6 August 2023. Turning to the separate heads of claim.

Race discrimination

59. Mr Hashmi referred to Incident 16 in the draft List of Issues as the last act of race discrimination. Incident 16 appears to state that Mr Hashmi's requests to delay an incapacity meeting until his grievance process was addressed were ignored resulting in him receiving less favourable treatment than a white colleague. Mr Hashmi has set out in the draft List of Issues that the incident took place in February 2022.
60. Further after some uncertainty, Mr Hashmi confirmed that his case was not that he was dismissed because of his race and accepted that he was not in work between February 2022 and March 2023 and there were no further incidents of race discrimination that he refers to for the purposes of his claim. I find that Mr Hashmi's case was not therefore that there was an ongoing situation or continuing state of affairs in relation to the alleged race discrimination claims. His race discrimination claims should have been brought to the Tribunal by May 2022 (within 3 months of the incident in February 2022) and instead the claims were not brought until April 2023 (some 11 months late).

Religion and belief discrimination

61. Mr Hashmi's evidence was that the allegation of religion / belief discrimination took place on 22 July 2020 and is set out at Incident 19 in the draft List of Issues. Mr Hashmi confirmed that his case was not that he was dismissed because of his religion / beliefs and accepted there were no further incidents of religion / belief discrimination that he was referring to. I find that Mr Hashmi's case was not therefore that there was an ongoing situation or continuing state of affairs in relation to this type of discrimination and find that in the way Incident 19 was pleaded this was an isolated specific act. The religion / belief discrimination claim should have been brought by 21 October 2020 and instead the claim were not brought until April 2023 (some 26 months late).

Disability discrimination

62. The respondent submits that Incident 16 in the draft List of Issues is the last act of disability discrimination. As above, Incident 16 appears to state that Mr Hashmi's requests to delay an incapacity meeting until his grievance process was addressed were ignored resulting in him receiving less favourable treatment than a non-disabled colleague and Mr Hashmi has stated in the draft List of Issues that the incident took place in February 2022. It would follow then for the reasons set out paragraphs 59 and 60 above that Mr Hashmi's disability discrimination claims should have been brought to the Tribunal by May 2022 (within 3 months of the incident in February 2022) and are out of time (some 11 months late)..
63. However Mr Hashmi's evidence at the hearing in response to questions from the Tribunal was that the disability discrimination continued until the date that he was dismissed and that he was dismissed on 27 March 2023 because of his disability and the respondent treated him less favourably than a non-disabled colleague by not allowing him to appeal his dismissal and therefore his disability discrimination claims were therefore brought in time.
64. When questioned further, Mr Hashmi accepted that he has not made such claims in the ET1 or the draft List of Issues and had not made a written application to amend his claim to include these additional allegations of disability discrimination prior to the hearing today. Mr Hashmi made an oral application to amend his disability discrimination claims to include two additional allegations, namely that he was dismissed on 27 March 2023, and he was denied an appeal for his dismissal because he was disabled. The respondent disputes that Mr

Hashmi was not offered an appeal for his dismissal and referred to paragraph 18 of the Grounds of Resistance (page 56 of the bundle) which states that Mr Hashmi never sought to appeal the dismissal. Mr Hashmi could provide no further details of whether this was correct including the date he alleges he sought to appeal the dismissal decision or the date the respondent denied his appeal.

65. In respect of his dismissal, Mr Hashmi states in the ET1 (page 9 of the bundle), *“I believe that Lauren Curtis was not the right person to handle the capability process and that her decision making was rushed and lacked empathy especially after I suffered a physical attack and underwent surgery. This was read and ignored..... The company did not consider alternatives to dismissal and did not offer sufficient support to help me return to work safely. I requested a hearing with an independent manager to present my appeal in greater detail and also consider my grievance appeal as this was not done against me and my union’s wishes.”*
66. Having considered the contents of the ET1 relating to Mr Hashmi’s dismissal, I do not find that Mr Hashmi made allegations or even implied that his dismissal was because he was disabled. He gave clear other reasons why he believes the decision maker reached the conclusion that she did, namely the decision was rushed and she lacked empathy. I accept Ms Churchhouse’s submission that Mr Hashmi did not use language such as discriminatory to describe his dismissal and he has used such language in other places in the ET1.
67. I informed both parties that I would consider whether to grant Mr Hashmi’s oral application on 10 October 2024 to amend his claim.
68. Having considered all the issues, I find that these claims are now substantially out of time and being raised with the Tribunal and the respondent some 14 months after the claim form was issued and 4 months before a final hearing has been listed to take place. I accept Ms Churchhouse’s submission that these amendments were sought in response to questioning by the Tribunal and Mr Hashmi did not attend the Tribunal with a view to seeking these amendments but sought to do so when he realised that his disability claims were out of time. To this end, I find that Mr Hashmi was not wholly clear of what his case actually was and in what ways the dismissal was discriminatory, and he could provide no details of the date he states he sought to appeal the dismissal decision.
69. Mr Hashmi did not raise with Employment Judge Rice-Birchall on 22 February 2024 that his dismissal was discriminatory, or that the respondent had failed to respond to this in their Grounds of Resistance. Mr Hashmi was given a very clear Order from Employment Judge Rice-Birchall asking him to further particularise his case and in response he produced a detailed document totalling 21 incidents that he states occurred which referenced the relevant date, persons involved and the relevant legislation he relied upon including the Equality Act 2010. This did not include what could be considered a central allegation that he was dismissed and denied the right to appeal his dismissal because he was disabled. I do not find that was something that can be explained by a mere omission, the fact that Mr Hashmi is not legally represented or that could be wholly attributed to Mr Hashmi’s mental state which he described was up and down and for which he currently receives support from his mother.
70. Due to the proximity these amendments are being sought to the final hearing date and the manner in which the application was made, I have decided to refuse to allow Mr Hashmi’s oral application of 10 October 2024 to amend his claim to include two additional disability discrimination claims.

71. Even if I were minded to allow Mr Hashmi's application to amend his claim to include the two additional allegation on disability discrimination, I find that the nature of these amendments are such that they are new allegations (not having been made previously in the ET1 or Draft List of Issues) involving a separate factual background/ set of circumstances which would require different areas of enquiry than the other allegations, namely the state of mind of the decision maker when deciding whether to dismiss Mr Hashmi and the respondent was not aware of such issues until today's hearing.
72. Further the late receipt of the amendment application and the haphazard manner in which the application was made has real practical consequences. It is very likely that the 4 day hearing listed for February 2025 would need to be vacated and potentially a longer final hearing window sought which would lead to a substantial delay in the final hearing being listed.
73. Whilst I accept that Mr Hashmi would be precluded from bringing further claims on disability discrimination, if the amendment were granted the respondent will be put to the continuing time and expense of defending the claims of disability discrimination in a situation where, the respondent was entitled to assume, having received the draft List of issues from Mr Hashmi in April 2024 that Mr Hashmi was not pursuing a claim for a discriminatory dismissal and that his claims were out of time. There is also further prejudice to the respondent in defending these claims at this late stage as they have not had the opportunity to preserve relevant evidence, and it is unclear whether the relevant witnesses are available to help the respondent defend the claims. In all the circumstances, I find that the balance of injustice and hardship in allowing the application would be too onerous on the respondent.

Just and equitable

74. Having found that all the discrimination claims have been bought out of time, the Tribunal must consider whether it is just and equitable to extend time so that it has jurisdiction to consider the discrimination complaints.
75. Mr Hashmi's case was that the Tribunal should exercise its discretion to extend time on a just and equitable basis because in January 2022 he was attacked and suffered a broken jaw and fractured skull for which he required surgery and came out of hospital on 1 February 2022. He was signed off from work with anxiety and depression and could not attend work from May 2021 to March 2023.
76. When questioned why Mr Hashmi could not bring his claims earlier between February 2022 and August 2023, Mr Hashmi explained that he was suffering from anxiety and depression. During this period he had a lot of stress in his personal life, he was grieving a miscarriage and having issues in his relationship, which ultimately led to him getting divorced. He found it difficult to carry out day to day activities and at times felt suicidal and was unable to get out of bed. He spoke to a counsellor during this period and took anti-depressants.
77. Mr Hashmi confirmed he spoke to ACAS in March 2023, but he could not recall discussing time limits in which to bring a claim with them. He recalled a friend told him about time limits to bring a claim after he was dismissed and Mr Hashmi explained he issued his claim as soon as he was able to do so after that.
78. Ms Churchhouse submitted that despite Mr Hashmi's explanation for the delay in bringing a claim, he was able to submit a grievance (which was a detailed document) in February 2022 and engage in subsequent correspondence with the respondent, he had a remote meeting with Lauren Curtis on 2 March 2022 to discuss support from occupational health and engaged so that an occupational health report could be prepared which was produced in

July 2022. Mr Hashmi virtually attended Attendance and Absence process meetings with the respondent on 2 December 2022 and 17 January 2023 accompanied by a Trade Union representative.

79. Mr Hashmi accepted that he did engage with the respondent during this period and that he found this difficult, but he did not accept that he could have put a claim into the Employment Tribunal during this period without any further explanation of why this was the case save that he did not know the process for bringing a claim. Mr Hashmi accepted that he was a member of UNITE in 2021 and 2022 and they assisted him with making a grievance and attended meetings with him.
80. The Tribunal is aware that time limits are strictly imposed in employment cases and that there is no presumption that a Tribunal would exercise its discretion to extend time. The onus is on Mr Hashmi to convince the Tribunal that it is just and equitable to do so; the exercise of the discretion being the exception rather than the rule.
81. Having considered all the evidence, the length of the delay in bringing the discrimination claims are significant ranging from 11 months to 26 months (as set out above), I am persuaded by Ms Churchhouse's submissions that the reasons for the delay given by Mr Hashmi relating to his ill health during this period did not render him incapable of managing his affairs and during this time he brought a lengthy grievance, participated in occupational therapy discussions and he participated in the respondent's Attendance and Absence process.
82. Even were it Mr Hashmi's evidence that he delayed bringing his claim as he was waiting on the outcome of the grievance process, which it was not, I note that the grievance outcome was communicated to Mr Hashmi in August 2022 and he still delayed in bringing a claim to the Tribunal until 6 August 2023, some 12 months later.
83. As to legal advice, it is not clear to me whether Mr Hashmi is relying on the lack of such as an explanation for the delay in bringing a claim. However, Mr Hashmi accepted that he received assistance from his union with his grievance and gave me no reason why he could not have taken advice earlier about making a claim from his union as he was a member of the Union in 2021 and 2022. Indeed, his grievances made in February 2022 raised complaints of disability and unfair treatment and he was aware of legal duty upon the respondent to not act in this way.
84. I was not really provided with sufficient information on which to judge the merits of the discrimination complaints, although I note that the comparators on which the claimant intends to rely are not named and in some instances he relies on hypothetical comparators and further information on his discrimination claims is therefore still outstanding.
85. Weighing the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other, I find that although Mr Hashmi will suffer prejudice if he is not allowed to continue with his discrimination claims, this will not be as extensive as the prejudice caused to the respondent by allowing the discrimination claims to continue.
86. Mr Hashmi will still be able to pursue the complaint of unfair dismissal involving his allegations about the dismissal process and whether considering his ill health the dismissal was reasonable in all the circumstances. However I accept Ms Churchhouse's submissions to allow the discrimination claims to continue would require a longer hearing, and a loss of the current final hearing date on 18 February 2025 which in turn would have time and cost implications for both parties and the Tribunal. Further due to the delay in Mr Hashmi bringing the discrimination claims, it is more likely than not, that this has negatively affected the

respondent's ability to preserve documentary evidence and secure evidence from the relevant witnesses which will impact on the cogency of respondent's evidence and the ability for there to be a fair hearing.

87. After assessing all the factors in this case, I have reached the conclusion that it is not just and equitable to extend time and so I find that the Tribunal has no jurisdiction to hear the discrimination claims.

88. Further case management is dealt with in the record of the private preliminary hearing.

Employment Judge Sekhon

Date: 14 October 2024