EMPLOYMENT TRIBUNALS

Claimant: Miss A Munir

Respondent: (1) Sheffield City Council; (2) Jane English, (3) Caroline Nugent, (4) Kate Josephs, (5) Claire Taylor, (6) Jo Charlesworth and (7) Elise Senior-Wadsworth

Heard at: Sheffield (by video link – Kinly Cloud)

On: Friday 22 November 2024 and (in chambers) on 10 December 2024

Before: Employment Judge James

Representation

For the Claimant: Represented herself, supported by her mother Mrs N Begum

For the Respondents: Miss A Ahmad, counsel

JUDGMENT

1) The claimant's application to amend her claim is refused, save for the limited extent set out below in the written reasons.
2) The claimant's claim of wrongful dismissal is struck out.
3) The other applications for strike out/deposit orders are refused, on the basis that grounds for doing so have not been established and/or that there is a less draconian alternative, and in particular, the issuing of Unless Orders.

WRITTEN REASONS

The issues for this preliminary hearing

1. This hearing was listed to consider the following:

1.1. The further information provided by the claimant in line with the orders made on 1 July 2024 and whether any further information is still required to understand the claims.

1.2. The claimant's application to amend, if that is being proceeded with; the claimant confirmed that it is. The application to amend was made on 18

April 2024, and is in the form of further particulars of claim, running to some 203 paragraphs, over 45 pages.

1.3. The respondent's application to strike out some or all of the allegations because they have no reasonable prospect of success; alternatively, for deposit orders, on the basis that some or all of the allegations have little reasonable prospect of success. On 6 November 2024, Employment Judge Davies added the disability discrimination claims to the list of claims being considered for strike out, if no medical evidence or Disability Impact Statement had been provided, due to the claimant's failure to comply with Employment Tribunal orders. Employment Judge Davies ordered that the Disability Impact Statement should be provided by return. It had not been provided by the time of the hearing. The claimant said it was about 28 pages long and she was still in the process of completing it. She said she could send it on the day of the hearing in its incomplete form. Ms Ahmad said that on review of all the medical evidence that had been provided and the lack of a Disability Impact Statement, the case was no further forward in relation to the disability issue. None of the case management orders had been complied with on time, if at all. Additional grounds for strike out were therefore that Tribunal orders had not been complied with and that a fair trial is no longer possible. The respondent requested that be added to the issues to be considered by the Employment Tribunal, in an email sent to the Tribunal and the claimant on 23 September 2024.

1.4. The respondent's costs application in relation to the costs associated with the claimant's interim relief application, if time allows.

1.5. Depending on the outcome of the above applications, a final hearing would be listed and related case management orders made.

The hearing

2. The hearing took place over one day. There was a preliminary hearing bundle of 790 pages. The day before the hearing, the respondent's representative sent an email to the Tribunal with six images attached, containing medical records, that the respondent had not been able to upload to the Document Upload Centre (DUC). It is understood that the claimant had asked that those be included.

3. Just before midnight on 21 November, the claimant sent an email with six further images attached. At 7:37 am on the morning of the hearing, the claimant sent an email with 26 attachments, including PDF documents and images. Four further emails, containing six attachments in total, were sent by the claimant between 9.00 and 9:30 am by the claimant, including a 7-page document with written submissions regarding this hearing.

4. At the last hearing, case management orders were made. Those were summarised in a checklist at the end of the orders section as follows:

Date	**Order**	✓
29/07/2024	Further information – C to ET and R	
12/08/2024	Medical records relied on – C to R	

26/08/2024	Disability Impact Statement - C to R	
23/09/2024	Response to costs application – C to R and ET	
23/09/2024	Is disability admitted? R to C and ET	
23/09/2024	R to set out basis for applications for strike out/deposit orders	
07/10/2024	Preliminary Hearing File – R to C	
19/11/2024	Bundle etc uploaded to DUC by R	

5. As can be seen from the above, the claimant was ordered to provide medical evidence in support of the disability issue by 12 August 2024 and the disability Impact statement by 26 August 2024. The claimant's written response to the costs application, due on 23 September, was to include full details of her income and outgoings and any savings/capital. The respondent was to add any further documents to the hearing file for the last preliminary hearing, send that to the claimant on 7 October, and upload it on 19 November. Time for compliance with the first three Orders was extended on 14 August 2024, on the claimant's request, to 2 September 2024.

6. Since the documents sent to the Tribunal on 21 and 22 November had been provided late, the claimant was invited by the Judge to make an application that the documents contained in the emails referred to above be considered at the hearing. Ms Munir applied to do so, saying that she had had difficulties obtaining the GP records, and that they were extensive. The application was opposed by Ms Ahmad due to the lateness of the disclosure. The Judge refused permission for the claimant to rely on those documents, save for the submissions regarding this hearing. Subsequently, on further application, the Judge agreed to consider the report from her psychiatrist dated 20 November 2024.

7. It is noted that report contains comments in support of the claimant's renewed application under Rule 49 (previously, Rule 50) that some of the hearing be conducted in private, and for other adjustments. Due to the other matters to be discussed, it was not possible to hear or consider the renewed Rule 49 application at this hearing. It was confirmed to the claimant that could be made and considered at a later date, depending on what happened at the hearing today.

8. The claimant asked the Judge to consider her application to strike out the response because of alleged misconduct of the respondent and their representative. The Judge refused that, on the basis that the mattes to be discussed at this hearing are already extensive and there would be no time to consider that. On the outcome of this hearing, the claimant could renew her application. The claimant is asked to note that if she intends to raise an argument that the respondent's representatives had deliberately not included documents in the bundle that she had asked be included, the claimant would need to provide relevant documentary evidence of that, in a logical order.

9. Finally, the Judge noted that in one of the recent emails from the claimant, she stated that it is not the respondent's decision whether the claimant has a

disability. Judge James confirmed that was indeed the case. However, the respondent is entitled to have sight of relevant documentary and witness evidence from the claimant, prior to deciding whether or not to concede that the claimant had a disability in relation to any of the impairments alleged, and if so from what dates. Judge James did not consider that the respondent's position in relation to disability was unreasonable. That was why the case management orders had been made for the claimant to provide relevant medical evidence and a Disability Impact Statement. Judge James explained to the claimant that the orders made were standard orders issued in most disability discrimination claims, where disability was not conceded prior to or during the first preliminary hearing.

Relevant law

Amendment

10. The leading case in relation to the amendment of claims is *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650* which confirms that when considering whether or not to allow an amendment, regard should be had to all the circumstances of the case and in particular, the Tribunal should:

> *consider any injustice or hardship which may be caused to any of the parties ... if the proposed amendment were allowed, or as the case may be, refused.*

11. The EAT in *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661, ICR 836,* held that, when faced with an application to amend, there needs to be a careful balancing exercise of all the relevant circumstances. Discretion is to be exercised in a way that is consistent with the requirements of "*relevance, reason, justice and fairness inherent in all judicial discretions*". Factors relevant to the balancing exercise would usually include consideration of the nature of the amendment, the applicability of time limits (especially where the new claim is wholly different from the claim originally pleaded) and the timing and manner of the application.

12. Mummery J re-iterated at 844B of *Selkent*:

> *Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment.*

This point has recently been re-emphasised by Tayler J in *Vaughan v Modality Partnership (UKEAT/0147/20/BA).*

13. As for 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.

14. In *McFarlane v Commissioner of police of the Metropolis [2023] WLR(D) 380*, Deputy Judge Michael Ford KC held at [44] and [46], in relation to the nature of the amendment, that the focus should be on the substance of the

new case sought to be advanced by the amendment, not on its legal form. In other words, tribunals should not ask whether a cause of action is 'new'; rather, the focus should be the substance of the new case, whether it relies on new facts and if so how substantial the further factual enquiry needs to be.

15. Support for that position was found by Deputy Judge Ford KC in the decisions of the EAT (UKEAT/0249/09/CEA) and the Court of Appeal in the case of *New Star Asset Management Holdings v Evershed*. Deputy Judge Ford KC noted at 48 and 49:

> *48. … In the EAT at §15, Underhill P (as he then was) was clear that it was "not a point of any significance" whether a section 103A claim was a new cause of action or not because the correct focus should be on whether the amendment is a "mere relabelling" or introduces "very substantial new areas of legal and factual inquiry" - echoing the approach based on substance not form in* ***Selkent****. Moreover, having decided to allow the appeal, with the agreement of the parties, Underhill P decided himself to allow the amendment, and he proceeded on the basis that the section 103A claim was out of time and so the time limits were relevant (though, as it turned out, not of sufficient weight to disallow the amendment): see §38(3). His approach to this question was endorsed by the Court of Appeal: see* ***New Star Asset Management Holdings Limited v Evershed*** *[2010] EWCA Civ 870, per Rimer LJ at §52.*
>
> *49. The approach of the Court of Appeal in* ***Asset Management*** *also appears inconsistent with* ***Pruzhanskaya****. Before the Court of Appeal, counsel for the employer argued that the section 103A claim was a new cause of action and this was a factor which the judge was entitled to take into account: see §29. But the decision of Rimer LJ, with whom Sir Scott Baker and Sedley LJ agreed, was based on a comparison of the allegations in the amendment with the factual allegations in the original claim; he concluded the employment judge was wrong to conclude that the amendment would require "wholly different evidence": see §§50-51. Once again, Rimer LJ did not consider whether the judge was right or not to consider the allegation was a new cause of action: his focus was on the substance of the new allegations, not on the legal classification of the causes of action.*

16. The same point is 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…..*

17. Arguably, time limits are a more substantive issue in relation to a type (iii) amendment because they could amount to a jurisdictional bar. Whereas time limits are simply a factor to consider for amendments of type (i) or (ii).

Indeed, in *Pereira v GFT Financial Services Ltd [2023] EAT 124* Deputy Judge Burns KC went so far as to suggest at [30] that in the case of a re-labelling amendment, time limits '*would probably be irrelevant'*.

18. In *Galilee Commissioner of Police of the Metropolis [2018] ICR 634*, Hand J held (presumably, in those amendment cases where time limits are a potential jurisdictional bar) that time limits must be considered at the time that the amendment application is decided, although the final question as to whether or not the claims were submitted in time can be deferred until the final hearing.

Strike out

19. Rule 38(1) of the Employment Tribunal Rules of Procedure 2013 (formerly Rule 37) provides:

> *(1) An employment judge or tribunal has power, at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on any of the following five grounds:*
>
> > *(a) that it is scandalous or vexatious or has no reasonable prospect of success (r38(1)(a)); ……*
> >
> > *(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious (r 38(1)(b)) (see paras **[647]**–**[654]**);*
> >
> > *(c) for non-compliance with any of the Rules or with an order of the tribunal (r 38(1)(c)).*

20. Before making a strike out order in any of these situations, the Tribunal must give the party against whom it is proposed to make the order a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing (r.38(2)). An application by a party for such an order should be made in accordance with the provisions of r.31 (formerly Rule 30).

21. The striking-out process requires a two-stage test (see *HM Prison Service v Dolby [2003] IRLR 694, EAT*, at para 15; approved and applied in *Hasan v Tesco Stores Ltd UKEAT/0098/16 (22 June 2016, unreported*). The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the Tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid.

22. The principles applicable to strike out applications are set out in numerous authorities; see for example, *Malik v Birmingham City Council, UKEAT/0027/19/BA*, 21 May 2019, Choudhury P, paras 29-33; *Cox v Adecco, UKEAT/Appeal No. UKEAT/0339/19/AT*, 9 April 2021, at para 28.

23. The general principle is that a Tribunal will not strike out discrimination claims except in the most obvious and plain case (*Anyanwu v South Bank Student Union [2001] 1 WLR 391*). The same approach applies in whistleblowing cases: see *Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*, at para 29, in which the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases.

24. However, self-evidently (and as *Anyanwu* and *Ezsias* themselves make clear) such cases must exist. The respondents argue that this is such a case.

25. As Lord Hope set out in *Anyanwu*, at para 24: *"The time and resources of the employment tribunals ought not to [be] taken up by having to hear evidence in cases that are bound to fail'.*

26. See further for example, the Court of Appeal's judgment in *Ahir v British Airways plc [2017] EWCA Civ 1392* at paras 15-16:

> *Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established…*

27. And, at para 24 of Ahir, per Underhill LJ:

> *… where there is on the face of it a straightforward and well-documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so.*

28. See also *Kaur v Leeds Teaching Hospital NHS Trust [2019] ICR 1,* CA at para 77:

> *… there is no absolute rule against striking out a claim where there are factual issues - see, eg Ahir v British Airways plc [2017] EWCA Civ 1392. Whether it is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.*

29. Finally, as put by HHJ Tayler in *Cox v Adecco*, at para 28(1) "*No-one gains by truly hopeless cases being pursued to a hearing*" (see also the authorities cited at *Malik* at paras 32-33 which make the same point). In that case, Judge Tayler also emphasised the importance of identifying the issues in the case, prior to deciding whether or not it should be struck out.

30. In a case under Rule 38(1)(b), the Tribunal must conclude that the conduct of the proceedings has been unreasonable, not the conduct more generally. It is also necessary to conclude that there is a significant risk that a fair trial is no longer possible. Again, consideration must be given as to proportionality of the sanction of strike out; that is, whether the discretion to strike out a claim should be exercised, if the grounds are made out, or whether to impose a lesser sanction such as an unless order or deposit order.

31. In a case under Rule 38(1)(c), the overriding objective must be carefully considered (although it does of course apply in any strike out application, regardless of the ground relied on). This requires Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as is practicable: (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as is compatible with proper consideration of the issues; and (e) saving expense.

32. In *Harris v Academies Enterprise Trust* ***[2015] IRLR 208****, EAT*, Langstaff J observed that the concept of justice in the overriding objective can have a

wider remit than simply reaching a decision that is fair between the parties. It also involves delivering justice within a reasonable time, having regard to cost implications, and dealing with a case in a way that ensures that other cases are not deprived of their own fair share of the resources of the court (see para 33). In other words, there is a collective dimension to dealing with cases fairly and justly to which tribunals should have regard. As Langstaff J put it:

> *'Justice is a wide concept. It includes justice viewed from the perspective of the system of which the tribunals are part in ensuring that indulgence given to one party does not deprive another party of that justice to which they are also entitled.'*

33. Again, it is necessary to conclude that there is a significant risk that a fair trial is no longer possible, unless the Tribunal concludes that there has been wilful, deliberate or contumelious disobedience of a Tribunal order (*De Keyser Ltd v Wilson [2001] IRLR 324, EAT*, per Lindsey P at [25], described in similar terms by the Court of Appeal in *Blockbuster Entertainment Ltd v James [2006] EWCA Civ 684***,** *[2006] IRLR 630, at [5]*, per Sedley LJ, as a situation where there is 'persistent wilful disobedience of an order'). Further, consideration must again be given as to whether strike out is proportionate.

Deposit Orders

34. Deposit Orders are covered by Rule 40 (formerly Rule39), which provides:

> *Where at a preliminary hearing (under rule 52) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

35. Rule 40(2) requires a Tribunal to make reasonable enquiries into the claimant's ability to pay and to have regard to any such information when deciding the amount of the deposit. Assuming such information is available, deposit orders should not be set at a level which a claimant cannot reasonably afford, since to do so would effectively turn them into strike out orders.

36. In *Jansen van Rensberg v Royal London Borough of Kingston-upon-Thames* UKEAT/0096/07, a case determined under the previous Rules, the EAT (The Honourable Mr Justice Elias (as he then was) presiding), observed at paragraph 27:

> *… the test of little prospect of success … is plainly not as rigorous as the test that the claim has no reasonable prospect of success … It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.*

Conclusions

37. This Judgment deals first with the question as to whether or not the issues have been sufficiently clarified by the claimant. The amendment application is then dealt with. The decision on strike out/deposit orders follows. The costs application is still to be determined.

Clarification of the issues

38. As noted above, the orders from the last preliminary hearing had attached to them as Annex A, a draft list of issues. The Judge had highlighted the sections of that list of issues that required further clarification. That information was to be provided by 29 July 2024. As noted above, that deadline was subsequently extended to 2 September 2024. At paragraph 31, the usual warning was given that if the any of the orders was not complied with, the Tribunal could, amongst other things, strike out the claim or the response.

39. As an example, the claimant was ordered to provide the following further information in relation to paragraphs 5.1.2 and 5.1.3. The high-lighted text was in the original, to explain to the claimant the information she was required to provide. A reference below to e.g. 'PC24', means this is referenced in the original particulars of claim at paragraph 24.

    5.1.2 [PC24] Kate Josephs defamed the claimant [Further information – what did R4 say, when and to who, that the claimant alleges was defamatory? What is the source of that information?]

    5.1.3 [PC25] Caroline Nugent told the claimant she made her colleagues feel uncomfortable [Further information – when?]; made a series of adverse comments in letters [Further information – what letters and what was said that was adverse?]; and insisted her line manager came to meetings [Further information – which meetings?]

    5.1.7 [PC57] Excluding the claimant from a number of meetings [Further information – what meetings, and who excluded her?]

40. The claimant was also ordered to provide further information about the protected disclosures, the direct race/religion discrimination claim and victimisation claims.

41. On 2 September 2024, the claimant sent a series of documents to the tribunal. The first is a five page document containing a summary of the protected acts, on 14 separate dates, only two of which correspond with those identified from the original particulars of claim. The second is a four page document containing further information in relation to the dismissal and remedy issues. In relation to the protected disclosures, the claimant had been ordered to provide further information in relation to the disclosures made on the four dates identified from the particulars of claim in the case management order. Those dates are 9 October, 15 November, and 1 and 17 December 2023. In response, the claimant simply questions why, if the disclosures made were not protected disclosures, the respondent used its whistleblowing policy?

42. The third document, which is seven pages long, contained further information in relation to the protected acts. Eight further dates are identifiable, in this 7

page document. The claimant confirmed at this hearing that she was applying to amend her claim to include these 18 additional protected acts.

43. The order of paragraph 16 of the document sent out following the 1 July 2024 hearing states:

> *In relation to the alleged protected disclosures, the claimant must also send, **by the same date [29 July 2024],** any further documents not already disclosed to the respondent; if the documents has already been disclosed, and is in the bundle, she should refer the respondents' solicitor to the relevant page number. The document need not be re-sent.*

44. In the third document, the claimant states:

> [In] relation to point 16 protected disclosures as far as I understand it the respondent has hold of all documents about disclosures relied on and discussed at previous hearing because some of the documents in question were provided to me by them or exchanges between us parties at the interim relief hearing included this as part of the process. I am unclear on what if anything further I am being asked to do in relation to this CMO request or what its relevance is to identify etc at the current stage as I do not recall what clarification is sought. I would appreciate it if this could be clarified should I be required to do anything more. Unfortunately reading the remainder of the CMO summary we have not been able to identify what its connection is to miss information or clarifying, what is the ET asking me to confirm or point out from the bundle please confirm?

45. In this third document, the claimant provided the further information in relation to 5.1.2, that she had been requested to provide. In relation to 5.1.3, the claimant's answer runs to nearly one and a half pages of text and is confusing. Following further discussion, it is apparent that the date when Ms Nugent is alleged to have told the claimant she made her colleagues feel uncomfortable, was 17 November 2023. As for the further information about a series of adverse comments in letters, the claimant was asked to identify what letters; although she refers to a number of different emails to different individual respondents, she has not provided any dates.

46. As for the further information requested in relation to the meetings that Ms Nugent insisted the claimant's line manager attend, a further 10 minutes was required at the hearing, before it was possible to understand that the claimant was referring to the NGDP meeting, about the grievances.

47. As for the allegation that the claimant was excluded from a number of meetings, the claimant provided in a fourth document, which is six pages long, 33 meetings/training and development opportunities she says she was excluded from. She ends by saying:

> '*this is a snapshot and by no means a complete account given that there was efforts made to prevent me from becoming aware or being involved there are likely other meetings and development opportunities and at the very least I was excluded on a weekly basis although several times during the week I would become aware of conversations and meetings that I could have shadowed'.*

48. The claimant was ordered to provide further information in relation to the direct race/religion discrimination claim, namely who she says refused her

request for a prayer space, when the request was made, and when was it refused. That information was not provided.

49. In summary, the further information provided by the claimant in the four separate documents provided by her, runs to some 22 pages. Even then, the claimant has not provided the further information requested in relation to the protected disclosures identified from the particulars of claim, as set out in the draft list of issues. Further, many of the claims are still confused. Even if the further information provided by the claimant was in a logical order, which could simply be copied and pasted into the existing list of issues, that would turn a seven page draft list of issues, into a 29 page list of issues. That would be a wholly exceptional Employment Tribunal claim.

50. It is worth noting that it took until 1 pm to get this far, in relation to the matters that it was necessary to deal with at this preliminary hearing. An hour lunch break with subsequently taken. Employment Judge James directed that after the break, the amendment application would be dealt with first, then the decision would be given, after an adjournment. Consideration would then be given as to what else it was possible to deal with, in the time available.

51. It is also noted that despite there already her having been a full day's preliminary hearing on the last occasion, and despite this hearing lasting, in the event, until 5:30pm, which is wholly exceptional, it has still not been possible to finalise the list of issues.

The amendment application

52. The current Particulars of Claim are 12 pages long, and contain about 75 paragraphs. The amendment the claimant wishes to make involves substituting a document which is 45 pages long, containing 230 paragraphs, and the addition of an eighth respondent. In addition, the claimant wants to add as detriments in the victimisation / whistle-blowing claims that the removal of her from the project in housing was a detriment; and that her dismissal was an act of victimisation. In addition, there is the further information provided on 3 September, which has been discussed above, the most substantial of which is the addition of numerous other alleged protected acts, and a list of 33 meetings/training opportunities the claimant was allegedly excluded from.

53. The claimant was employed between 9 October 2023 and 22 February 2024. Of that period of just over four months, the claimant only worked for the first two months or so, due to her medical suspension on 18 December 2023.

The nature of the amendment

54. In relation to the nature of the amendment, the sheer size of the document which the claimant is wanting to add/substitute for the current particulars of claim means that it cannot reasonably be classed as clarification of an existing claim or a mere labelling. It is a very substantial amendment. Further, whilst the summary of claims shown on page 67 of the current particulars of claim lists 11 causes of action, 27 causes of action are listed between pages 96 and 97 of the bundle, at paragraph 174 of the amended particulars. Further, the additional claims are not set out in any more of an understandable way in the new document. As demonstrated above, the claimant is having considerable difficulty assisting the Tribunal to identify the issues raised by her current, shorter particulars of claim. Inevitably,

substantial further time and resources would need to be spent by the parties and the Tribunal, to understand the issues raised by the proposed amendments.

55. By contrast, the Tribunal concludes that arguing that her removal from a project in housing and her dismissal were detriments due to victimisation, (and that the former is a whistle-blowing detriment too) is simply clarification of an existing claim, since those matters can be understood from the initial particulars of claim. Save that those amendments are allowed to the list of issues, nothing more needs to be said about them.

56. As for the numerous protected acts and the list of meetings the claimant was allegedly excluded form are concerned, those amendments are substantial and are not apparent from the current particulars of claim. Although the latter are by way of clarification of existing allegations they would nevertheless require substantial additional fact finding to be made. Further, it is noted in relation to some of the meetings listed, they took place after the claimant was medically suspended; it could not possibly be a detriment to exclude her from those meetings, whilst on medical suspension.

Time limits

57. As for the question of time limits, the claimant was dismissed on 22 February 2023. The application to amend was made on 18 April 2024. Given the date of Acas early conciliation, which commenced on 28 February 2024, anything which occurred on or before 29 November 2024 is potentially out of time. However, that is subject to arguments about continuing conduct over a period of six weeks or so, from 9 October 2023 when the claimant's employment commenced. Given those timescales, it appears to the Judge that the claimant may have an arguable case in relation to continuing acts. However, in relation to the list of meetings which the claimant alleges she was excluded from etc, and the list of additional protected acts, the application to amend was not made, in effect, until 3 September.

Timing and manner of the application

58. As for the timing and manner of the application, as noted above, it was made on 18 April 2024, within the original time limit. Had the claimant simply submitted a new claim, time limits would not have been an issue. However, the claimant has chosen to introduce the further particulars by way of an amendment, rather than a new claim.

The balance of prejudice

59. The case law makes clear that the most important matter to consider, when deciding whether to allow an amendment, is the balance of prejudice to the claimant were the amendment to be refused, compared to the balance of prejudice to the respondent, if the amendment were allowed.

60. Considering that balance of prejudice in relation to the first of the *Selkent* factors, the nature of the amendment, the balance of prejudice is very much in favour of the respondent. As already noted above, the claimant is having considerably difficulty assisting the Tribunal to identify the issues raised by her current claims, despite the time spent attempting to do so, including at this and the previous preliminary hearing (which lasted a whole day). Allowing the amendment would require substantial extra resources and costs

for all involved, including the Tribunal. The Judge has no confidence that the claimant will be any more able to assist the Tribunal in relation to the proposed amendment claim, then she has in relation to the existing claim.

61. Were the amendment to be refused, on the other hand, the claimant will still, subject to the strike out application which needs to be dealt with separately in any event, be able to pursue her existing claims. As has previously been remarked on by both the Judge and counsel for the respondent, the main issue raised by the claimant, and the one likely to lead to the most compensation if the claimant succeeds, is the dismissal. That at least is clearly identified in the existing claim.

62. Considering the balance of prejudice in relation to the question of time limits, that is not a particularly relevant factor, save in relation to the additional protected acts and the list of meetings/development opportunities etc which were not set out until 3 September 2024. Were the claimant to be allowed to amend her claim to add that further information, the scope of the claim would be considerably extended, and the amount of further documentary and witness evidence required in relation to those meetings would be substantial. That will be in relation to claims which, assuming the question of time limits is left to the full hearing (which appears to the Judge to be the correct approach in this case), the respondent would be put to the cost of providing all of that extra evidence, in relation to matters which the Tribunal may well find are out of time in due course. In relation to these additional matters, the Judge concludes that the balance of prejudice is firmly in favour of the respondent too.

The timing and manner of the application

63. As for the timing and manner of the application, the timing in itself of the additional particulars on 18 April 2024 is not objectionable. As for the manner of the application however, the claimant is seeking to increase the length of the particulars fourfold, when those particulars are no more clearly set out than the initial ones. In relation to the additional protected acts put forward on 3 September, again that would considerably extend the scope of the claim, and the legal and factual enquiry required by the Tribunal and the parties. Yet again therefore, the balance of prejudice is very much in favour of the respondent in relation to the timing and manner of the application.

64. Bearing in mind all of the above, the overall conclusion of the Tribunal is that the balance of prejudice is very much in favour of the respondent, in relation to the proposed amendments. The amendment application is therefore refused save as follows:

    64.1. the removal of the claimant from the project in housing will be added as an act of victimisation and an act of whistleblowing detriment;

    64.2. the dismissal of the claimant will be added as a detriment in the victimisation claim.

<u>The application for strike out/deposit orders</u>

65. By the time the Tribunal started to consider the strike out and deposit order application, it was 15:50. It was agreed that Ms Ahmad would address the Judge for up to 30 minutes, in relation to both this application, and the application for costs. It is noted, in relation to the cost application, that the

Judge has before him the written application, and the written response from the claimant. The Judge agreed to allow the claimant a break to consider her response to the submissions made by Ms Ahmad, and up to 30 minutes herself to respond. The decisions in relation to strike out and deposit orders and on the costs application were then reserved.

Respondent's submissions

The overall merits

66. In relation to the meris of the claim, Ms Ahmad relies on what is set out in the Grounds of Resistance. What is set out there is not however conceded by the claimant and remains a matter of potential factual dispute, save for paragraph 37 which reads, relating to 18 December 2023:

> *The Claimant subsequently accused the Fifth Respondent of ignoring her, to which the Fifth Respondent apologised and explained that her mother-in-law was in a coma following a recent serious accident. Due to some time away from work, the Fifth Respondent had not been able to respond immediately. In response, the Claimant rolled her eyes and made the grossly offensive and insensitive remark that she would trade places with the Fifth Respondent's mother-in-law as being in a coma would be better than being at work.*

67. At this hearing the claimant said that she was crying at the time and had 'lost functioning'. A little later on in the hearing she said she was having a 'panic attack'.

68. In relation to the wrongful dismissal claim, Ms Ahmad argues that the claim has no reasonable prospects of success because the claimant was given a months notice, which is a contractual notice she was entitled to under a contract of employment. This is not disputed by the claimant. The dismissal letter, giving the claimant a month's notice, is at page 428 of the Preliminary Hearing bundle.

The disability issue

69. Ms Ahmad submits that the claimant has had nearly five months since 1 July to provide the relevant medical records and a Disability Impact Statement in relation to the alleged impairments. As noted above, in relation to the DIS, the claimant told the Tribunal during the hearing that this was currently about 28 pages long and she could send a copy of the unfinished version to the Tribunal if that would help. This, Ms Ahmad says, indicates that the claimant could, in the time available, have provided a disability impact statement; instead she has chosen to concentrate on other matters.

70. Ms Ahmad also pointed out that none of the medical evidence which has so far been provided, which has in any event been improperly redacted, covers the period from 9 October 2023 to 22 February 2024, the dates of the claimant's employment. The fact that the claimant may have had impairments prior to or after those dates does not prove that those impairments were affecting the claimant during her period of employment with the respondent.

71. Whilst the claimant has provided evidence of her being a blue badge holder, that does not prove that the claimant was disabled at the relevant time by reference to the impairments relied on in this claim. The respondent is

entitled to be provided with the appropriate medical evidence and a disability impact statement, in order to decide whether to concede disability. It is noted that the claimant's explanation for redacting the medical records is that she does not want any of the respondents to have her NHS number because they might misuse it and she 'will accept no criticism' for doing so. She has in addition, redacted the names of the relevant NHS professionals in those records.

Unreasonable conduct of the proceedings – respondent's submissions

72. It is also asserted by the respondent that the claimant has conducted the proceedings unreasonably. The claimant's claim was submitted eight days after her dismissal, and the claimant indicated in the claim form her understanding that the application for interim relief was out of time. Despite being informed by the respondent that the interim relief application was out of time, and that the Employment Tribunal has no discretion to extend time for an interim relief application, the claimant nevertheless proceeded with the interim relief application, on 19 April 2024. The day before, the claimant had submitted a 45-page document containing 230 paragraphs and sought to amend her claim by substituting those particulars for the current set.

73. On 19 April 2024, because of time limits, the interim relief application was refused. Case management orders were made at the hearing and a Preliminary Hearing arranged. Despite the reasons for the decision being provided by Employment Judge Cox on the day and subsequently in writing, the claimant put in a 70 paragraph reconsideration application on 3 May. On that date, the claimant should have provided a schedule of loss but failed to do so, in breach of the Tribunal's order from the 19 April hearing.

74. Next, on 9 May 2024 the claimant made a six page 23 paragraph application to vary the case management order in relation to the provision of a schedule of loss and setting out why an unless order should not be made in respect of it.

75. On 25 May 2024, 20 days after the deadline, the claimant submitted a nine page schedule of loss seeking career length losses, the claimant having been 29 years old at the date of dismissal. The schedule included seven separate injury to feelings awards, with six at the top of the upper band. Only one such award could be made in a discrimination claim.

76. On 4 June 2024, the claimant submitted a 127 paragraph appeal to the Employment Appeal Tribunal, in relation to the interim relief decision.

77. At the last preliminary hearing, the claimant failed to attend during the morning of the hearing. During the rest of that hearing, attempts were made to clarify the claimant's claims, but the claimant was unable to answer simple questions about the factual background.

78. Despite being ordered to carry out a number of tasks in order to progress the case, the claimant has failed to respond in time in numerous respects. None of the Case Management orders were complied with. She made an application for further time at the last minute. In allowing the extension to 2 September 2024, on 14 August 2024, Employment Judge Jones stated:

> *[A]t the next preliminary hearing the Tribunal may consider whether the claims, or any of them, should be struck out because of the alleged*

disruptive and unreasonable conduct of the claimant and/or a fair hearing may no longer be possible, for the reasons set out in the correspondence of the representatives of the respondents dated 30 July 2024.

If there has been compliance with the order by 2 September 2024 that will be a relevant consideration. In her application the claimant said she could not comply with all the tasks by the deadline, but she has not complied with any. The number of claims the claimant wishes to pursue are substantial and extensive.

In order for there to be a fair hearing of the case, it is essential that the relevant information is provided as soon as possible. Otherwise, relevant evidence may no longer be available. Delay always impoverishes the evidence.

79. It is further submitted that the way in which the further information has been provided on 3 September 2023 amounts to unreasonable conduct of the proceedings. Although the requests for further information were clear and focused, the claimant's response covers 22 pages of single-spaced type in four separate documents. [It is noted by the Tribunal that the difficulty at this hearing of understanding the issues in the existing claim have been set out in detail above].

80. Since then, the claimant has still failed to provide full copies of all relevant medical records. Instead, in an email to the Tribunal dated 23 September 2024, for example, the claimant stated:

In the meantime the ET is required to provide written comment as to why they order as a CMO medical records and it is a error of the ET that despite Judge James allowing for written reasons to be asked for that an alternative judge has refused this.

The claimant's response

81. In response, the claimant says that she has provided as much evidence as she could in the time available. She thought that the evidence provided today, on the morning of the hearing, would be helpful.

82. The claimant maintains that it is unreasonable for the respondent to argue about the cost of the public purse of defending this claim, when they have made the decision themselves to involve external lawyers. She says the council has an in-house legal team and they should be dealing with the claim in house. The claimant suggested that Ms English, one of the named respondents to the claim, could do this work because she is a lawyer.

83. The claimant maintains that she has provided far more than other claimants for a preliminary hearing. She argues that the case is complex, because the respondent has been making numerous applications. She said the respondent had contested her Rule 49 application, even though they know that she self-harms. The claimant accused the respondents of taking her whole life away from her, including her career.

84. The claimant submits that asking her to provide a disability impact statement is not appropriate. In order to do so, she needs to talk about her disabilities and it is traumatic for her to do so.

85. The claimant maintains that at the interim relief hearing, Employment Judge Cox was 'highly biased'. She complains that the Judge did not go through a single whistleblowing entry; there was no testing of the claim. Judge James notes that at paragraph 4 of the written reasons for the decision, Employment Judge Cox states:

> *Even if it had had power to deal with the application, the Tribunal would have refused it. The Tribunal read the various documents and pieces of contemporaneous correspondence that the parties invited it to read. These included various emails reflecting concerns that several of the First Respondent's employees had about the Claimant's unreasonable and inappropriate attitude and behaviours. The Tribunal was satisfied that the Claimant did not have a pretty good chance of succeeding in showing that any or all of her many alleged protected disclosures was the principal reason for her dismissal.*

Decision on Strike Out/Deposit Orders

Wrongful dismissal

86. The Wrongful Dismissal is struck out because it has no reasonable prospect of success. As noted above, the claimant was given one month's notice of the termination of her employment on 22 January 2024, expiring on 22 February 2024. The claimant was therefore paid for the notice period that she was contractually entitled to.

Protected Disclosure claims

87. The Tribunal considered whether the protected disclosure claims should be struck out, because the claimant failed to provide the further information requested. However, the Judge does not consider that to be appropriate because it has been possible to identify the information provided by the claimant from the information she has provided, together with the information set out in the particulars of claim. The protected disclosure claim will proceed on the basis of those five protected disclosures only.

88. As for the alleged detriments, what was issue 5.1.7, now issue 4.1.7 (see the related case management orders), cannot proceed because the application by the claimant to amend her claim to include a substantial and disproportionate list of meeting she says she was excluded from (without limitation to her alleged right to include further meetings in due course), was refused. In any event, this allegation would have been struck out, because the attempt by the claimant to expand her claim so substantially, amounts to unreasonable conduct of the proceedings. In the circumstances, a fair trial would no longer be possible, because of the significant and disproportionate increase in the factual enquiry which would be necessary, in order to determine whether the claimant had been excluded from the meetings/development opportunities alleged.

Victimisation detriments

89. For the same reasons, the amendment application was refused in relation to what were issues 10.3.4 to 10.3.6 (now issues 9.3.4 to 9.3.6). Again, in the alternative, those allegations would have been struck out for the same reasons as set out above.

Direct race/religion discrimination claim

90. In relation to the direct race/religion discrimination claim, the claimant has failed to comply with the Employment Tribunal order to provide further information. The Tribunal does not consider it appropriate to strike out the claim at this stage however. In the alternative, the Tribunal concludes that the making of an Unless Order is appropriate. The claimant must understand however, that if the Unless Order is not complied with, the direct race/religion discrimination claim will be struck out.

91. Similarly, in so far as the respondent relies on the claimant's unreasonable conduct of the proceedings, the Tribunal is not satisfied that a fair trial is no longer possible. The Tribunal has concluded that despite the conduct of the claimant to date, a fair trial is still possible, if the claim continues to be tightly case managed and kept within reasonable bounds. Subject to the clarification of the direct race/religion discrimination claim, the issues have now been identified. It is those issues which will be allowed to continue to a final hearing, provided that the claimant complies with the orders made, together with any further orders made in due course. Again, the claimant must understand that further non-compliance with tribunal orders may lead to a strike out and/or to further unless orders being made, which if not complied with, will result in some or all of the allegations being struck out. It is noted from what is set out above the claimant has questioned number of the order is made. If orders are made however, they must be complied with, whether or not the claimant agrees with them.

The disability issue

92. Consideration has also been given as to whether or not the disability discrimination claims as a whole should be struck out, because of the failure of the claimant to comply with the orders to provide copies of relevant medical records and a disability impact statement. Again, for the reasons set out above, the Tribunal concludes that a fair trial is still possible, provided that the case is strictly case managed and kept within reasonable bounds; and further, that Unless Order is a more appropriate alternative at this stage.

93. The claimant is asked to note carefully the terms of the Unless Orders that have been made, in the case management order also sent out today. The claimant now has a copy of all relevant medical records. The terms of the order include that the claimant should send copies of all relevant medical records she relies on, in an unredacted form, save that she will be allowed to redact her NHS number from those documents. No other redactions should be made.

94. Although he is allowing the claimant to redact her NHS number, Judge James does not consider for a moment that any of the respondents would inappropriately use that information. However, allowing the claimant to do so appears to the Judge to be a pragmatic solution, given that such information should be redacted, in any medical records included in Tribunal bundles for public hearings in due course.

95. Names should not however be redacted from those documents. For the avoidance of doubt, the redaction of names of relevant medical experts etc, or any other redactions, will be considered a breach of the Unless Order, and could lead to the disability discrimination claims as a whole being struck out.

96. The order is that medical records relevant to the impairments relied on by the claimant must be provided to the respondent's representative. There is no obligation on the claimant to provide documents relating to other medical conditions. Finally, the claimant is asked to note that the claimant should provide any documents covering the period of her employment, as well as the period before her employment. It is for the claimant to prove that she has a disability.

Deposit orders

97. Given the shortage of time at the hearing, the application for strike out and/or deposit orders was made at a relatively high level. There wasn't time to go into the specifics of particular allegations, where clear documentary evidence would suggest that the claim has little reasonable prospects of success. The respondent is at liberty to renew its strike out/deposit order applications, at a later stage, if it considers that, on the basis of what should be undisputed evidence, the claims have no, alternatively little reasonable prospects of success.

Costs application

98. A decision on the costs application has yet to be made. That decision will be made as soon as possible. Judge James considers it expedient however to issue this judgement in the meantime, and related case management orders, to ensure that the claim can continue to be progressed.

Further Preliminary Hearing

99. A further preliminary hearing will be arranged, in order to consider any further narrowing down of the issues, any renewed application under rule 49 (formerly 50) to list a final hearing, and make related case management orders.

Employment Judge James
North East Region

Dated 7 January 2025