EMPLOYMENT TRIBUNALS

Claimant: Simran Bharaj

Respondent: Santander UK Plc

Heard at: London Central (via CVP) **On:** 14 February 2025

Before: Employment Judge Bunting

Appearances
For the claimant: Iain Mitchell KC, counsel
For the respondent: Paul Nicholls KC, counsel

JUDGMENT AT A PRELIMINARY HEARING

Introduction

1. The claimant's application to amend her claim form is refused.

WRITTEN REASONS

Introduction

2. This is a ruling on application to amend a claim form that was heard at London Central (via CVP) on 14 February 2025.

3. The case was listed for a full day Preliminary Hearing to determine this application, as well as case management generally. The final hearing has yet to be listed.

4. A bundle running to 225 pages was produced for the Preliminary Hearing.

5. Both parties were represented, and I was provided with comprehensive submissions orally and in writing which were of great assistance. Due to the length

of the hearing and the arguments, it was not possible to give reasons on the day, and so these were reserved to be given in writing.

6. The claimant did not attend the hearing as she stated that she was unwell. A witness statement had been provided.

Factual background

7. For current purposes, this can be set out briefly. The claimant is a financial services economic crime compliance professional, and the respondent is a well-known bank.

8. The claimant had previously been employed by the Financial Conduct Authority ('FCA'), the forerunner of the FSA, as a financial crime specialist until 2015.

9. Subsequently she was employed by the respondent (as a 'Senior Policy Implementation Manager') for a 12 month period between 2017 and 2018. The issues in this claim relate to matters that occurred during, and after, her employment.

10. In brief it is said that she had made a number of protected disclosures relating to the alleged non-compliance of the respondent with the Money Laundering Regulations (2007).

11. The claimant has made a previous claim to the Tribunal that related to a number of issues, including detriment claims relating to nine protected disclosures. That claim was struck out on the grounds that the claimant had breached orders of the Tribunal. The strike out decision was appealed to the EAT, but was upheld.

12. That claim is said to be relevant in that the current claim (as originally pleaded) concerned matters that were either raised in that claim, or should have been. For that reason, the current claim was said to be an abuse of process.

13. The claimant still seeks to rely on those nine disclosures in this claim, at least to the extent of stating that they were the reason (along with further disclosures) for further detriments that she has suffered since the end of her employment.

Chronology and procedural history

14. The chronology, so far as is relevant, is as follows:

19 June 2017	Claimant's employment started
July 2017	First alleged protected disclosure
11 July 2017	Second alleged protected disclosure
04 August 2017	Third alleged protected disclosure
August / Sep 2017	Fourth alleged protected disclosure
Sep – Oct 2017	Fifth alleged protected disclosure
Sep – Oct 2017	Sixth alleged protected disclosure
07 October 2017	Seventh alleged protected disclosure
22 October 2017	Eight alleged protected disclosure
06 November 2017	Ninth alleged protected disclosure
29 January 2018	Grievance submitted
02 April 2018	Claimant resigned
27 July 2018	Tenth alleged protected disclosure
24 December 2020	**Detriment alleged** – email from Respondent to the FCA
10 June 2022	Eleventh alleged protected disclosure
08 August 2023	**Detriment alleged** - Respondent provides a briefing to FCA about struck out employment claim
10 November 2023	**Detriment alleged** - Email from Respondent to the FCA
29 December 2023	Early Conciliation starts

09 February 2024	Early Conciliation concludes
25 February 2024	ET1 submitted – 'Post-employment detriment' and/or 'post-employment victimisation'
29 July 2024	**Detriment alleged** - Respondent emails Claimant alleging that her motivation for her actions was to 'assist an ET claim' and stating that thy would send the correspondence to the FCA
08 August 2024	Letter setting out strike out application
22 August 2024	Claimant withdraws claim against the FCA Preliminary Hearing listed that day - vacated by agreement Claimant states that there will be an application to amend the ET1
31 October 2024	**Detriment alleged** - Claimant receives an email from the FCA
05 December 2024	Amended ET1 sent to the respondent
11 January 2025	Email sent to the Tribunal from the Claimant containing this application to amend.

15. On 22 August 2024 the claimant sent an email to the respondent that included the following:

> The Claimant will submit an application to amend her Particulars of Claim, and will provide further information and in the relevant format before the upcoming preliminary hearing. We understand this is made with consent with the Respondent.

16. As can be seen, the respondent does not consent to the application to amend.

17. The claimant initially stated that she was providing further and better particulars of her claim. However, in correspondence on 05 December 2024 it was accepted that this was an amended claim that required an application.

The application to amend

18. A significant part of the hearing was spent trying to identify exactly what the proposed amendments were.

19. The ET1 contained, as an annex, a 33 page document headed 'Particulars of Claim' running to 44 paragraphs and two tables which provided further details of the disclosures (page 17 bundle).

20. The proposed amendments are set out in a document headed 'Amended Particulars of Claim' that is dated 18 December 2024. A 'clean' (page 125) and 'tracked changes' (page 170 bundle) version was provided.

21. In addition, the claimant has provided (page 205 bundle) a schedule of what she states is a comparison between the two documents.

22. As an overview, the claim as first presented alleged nine separate protected disclosures that occurred between July 2017 and 06 November 2017. These can be summarised as follows (page 21 bundle):

1.	July 2017	To - Deputy MLRO & HCA (Head of Corporate Advisory) Content – deficiencies in scrutiny and corporate governance
2.	11 July 2017	To – MLRO, Deputy MLRO & HCA Content – lack of robust ABC systems
3.	04 August 2017	To – Director of Financial Crime Content – Breaches of AML and lack of oversight
4.	August / Sep 2017	To – Head of Financial Crime Policy Content – failure to identify suspicious international transactions

5. Sep – Oct 2017 — To – Head of Financial Crime Policy
   Content – concerns about a named bank account and sanctions risk management
6. Sep – Oct 2017 — To – Head of Financial Crime Policy
   Content – failure to identify suspicious international transactions
7. 07 October 2017 — To – HR Business Partner
   Content – tensions between named senior managements had led to insufficient focus on compliance
8. 22 October 2017 — To – Director of Financial Crime
   Content – significant breaches of regulation that led required escalation
9. 06 November 2017 — To – Director of Financial Crime
   Content – systems weakness, and concerns about the team, that led to a regulatory risk

23. It should be noted that this is a relative brief overview of the claimed disclosures.

24. In relation to the detriments that were alleged in the ET1, it is now accepted that they were 'not clearly articulated and lacked specification'. In brief, as against the respondent, it was complained that there was a 'long lasting' 'campaign' over many years to damage her reputation.

25. The proposed amendment relates to three further disclosures, summarised as follows:

AD1. 27 July 2018 — To – Chief Legal and Regulatory Officer
   Content – a report summarising, and re-iterating, the above nine disclosures and raising a concern that the respondent had not acted on them

AD2. 10 June 2022 — To – the FCA (by email)

		Content – a summary of the previous disclosures that was said to present a pattern, and concerns about a failure to take the disclosures seriously
AD3.	27 September 2022	To – the FCA (in a meeting) Content – as AD2

26. In addition, the claimant alleged fives specific detriments:

Det 1 – 24 December 2020	Email to FCA containing extracts of her witness statement from the previous claim, and allegations that undermined her standing with the FCA (including implicitly that she had stolen documents relating to 'Project Orford')
Det 2 – 08 August 2023	Briefing to FCA about employment claim withholding information in order to mislead about the Tribunal's assessments of the merits of the claim
Det 3 – 10 November 2023	Email to FCA implying that the EAT had found that she was a vexatious litigant, or similar
Det 4 – 29 July 2024	Email **to** the claimant questioning her motivation for bringing a previous Tribunal claim and stating that this would be sent to the FCA
Det 5 – 31 October 2024	Claimant received an email from the FCA that reiterated Det 4

27. In relation to Det 4 and Det 5, it is necessary to set out further details given the potential impact of this on time limits.

28. It is agreed that a letter was emailed to the claimant on 29 July 2024. The claimant's case is that this contained three assertions made by the respondent that it could not have genuinely believed were correct and/or were made without any proper basis.

29. It is accepted by the claimant that this was sent to her, and therefore would not be a detriment. However, she relies on the fact that the letter stated that the respondent '**would be** sharing a copy … with the FCA' (emphasis added), with the threat to forward it on being a detriment (and the sending of it – Det 5 – being a separate detriment).

30. In fact, it appears that on 19 August 2024 the claimant replied to that email, copying in the FCA and, as part of that email that she sent, forwarded the letter to the FCA herself.

31. It was agreed that the letter from the FCA on 31 October 2024 contains the letter of 29 July 2024. There was an issue at the hearing as to when that had been sent from the respondent to the FCA, which may be the relevant date for it being a pleadable detriment.

32. The respondent's submission was that the only inference was that, given the regulatory framework, this would have been sent on the 29 July 2024, or shortly afterwards, as otherwise the respondent would have been in breach of its own regulator requirements.

33. The claimant says that that is not a permissible inference to be drawn, and the only safe conclusion is that it was sent at some time before 31 October 2024. However, whether that was hours, days, or even months before, could not be said.

34. In addition, the respondent submits that the claimant must have been aware on the 29 July 2024 that it would be the case that this would be forwarded to the FCA. For that reason, if there was a valid cause of action, then it would have arisen at that point.

35. Against that, the claimant submits that what was contained in the 29 July 2024 letter was a threat, and she could not plead that as a separate allegation unless and until she had confirmation that this had, in fact, been sent to the FCA. Any attempt to plead that as a detriment before then would be premature.

36. Given that the ET1 was submitted on 25 February 2024, it was accepted that the last two alleged detriments (Det 4 and Det 5) could not have been included as they post dated this.

37. In relation to the other detriments, there is a reference to what is Det 1 (Project Orford and the surrounding circumstances - paras 21 and 36(b)), in the ET1, although this is undated, and unparticularised.

38. It was accepted by the claimant that what is now Det 2 and Det 3 do not feature in the original ET1.

The claimant's witness statement

39. The claimant has submitted a witness statement for this application (pages 221-225) dated 13 February 2025. As well as stating matters of fact, it also presents a number of legal arguments in support of her claim.

40. She states that the matters that give rise to this claim arose from a number of Subject Access Requests that she has made, with the relevant one being received on 10 October 2023. In those circumstances, when allowance is made for the ACAS conciliation period, the ET1 was in time. Her proposed amended particulars of claim state that this SAR was received on 02 October 2023, but even with that earlier date, the ET1 would still have been with a three month period.

41. There were a number of other SARs that yielded material. These were received on 20 December 2023, 21 March 2024, 03 May 2024, 14 June 2025 and 28 June 2024.

42. At that point, the claimant was acting in person, but she engaged her current solicitors in August 2024. She states that her and the respondent's lawyers 'agreed' to 'permit [her] to update the particulars of claim (I note that there was no such agreement, and the suggestion that there was was not proceeded with).

43. She also states that after the ET1 was submitted there was ongoing communication with the FCA who, on 18 March 2024, confirmed that there was an 'active review' of matters relating to her allegations.

The law

Amendments

44. There is a general power for the Tribunal to make amendments as set out in Rule 30:

> **Case management orders**
>
> **30.**—(1) Subject to rule 32(2) and (3) (postponements), the Tribunal may, on its own initiative or on the application of a party, make a case management order.
>
> (2) The particular powers identified in these Rules do not restrict that general power.
>
> (3) A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

45. This was in force as of 06 January 2025, replacing what was Rule 29 of the 2013 Rules. Although the 'new' Rule 30 is expressed in different terms to the previous Rule 29, it was not suggested that there should be any difference in approach. In particular, it was agreed that all the authorities and guidance under the 'old' Rules are still applicable.

46. The power is a discretionary one. In exercising this discretion, there are a number of factors to take into account.

47. I start with 'Presidential Guidance – General Case Management'. Of particular importance is 'GUIDANCE NOTE 1: AMENDMENT OF THE CLAIM AND RESPONSE INCLUDING ADDING AND REMOVING PARTIES'.

48. I will not set this out in full, but bear it in mind. In particular, at para 4:

> 4. In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment.

49. There are also a number of authorities of relevance.

50. I start by reminding myself of **Chandhok v Tirkey [2015] IRLR 195, [2014] UKEAT 190**. This reminds me of the importance of the ET1 in relation to a claim:

> 16. I do not think that the case should have been presented to [the Employment Judge] in this way or that it should have formed part of his determination. That is because such an approach too easily forgets why there is a formal claim, which must be set out in an ET1. The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

51. I was referred to the decision of the EAT in **Selkent Bus Co Ltd v Moore 1996 IRLR 661**. Towards the end of the judgment Mummery J (then President of the EAT) sets out five paragraphs that contain the relevant principles to be applied.

52. I bear all these in mind, but set out paras 4 and 5 in full :

> (4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they

> are unlikely to be recovered by the successful party, are relevant in reaching a decision.

53. There have been an extremely large number of cases that follow, and build on, the ***Selkent*** judgment. I will refer to some further ones.

54. In **Marrufo v Bournemouth Christchurch and Poole Council (PRACTICE AND PROCEDURE) [2020] UKEAT 0103_20_0312** (paras 34-38) it was re-iterated that it is the Claimant's responsibility to formulate and present her claim in the ET1 and, once that has been done, it cannot be changed or altered without permission.

55. In **Transport and General Workers Union v Safeway Stores Ltd UKEAT/009/07** Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In relation to time limits, he said (para 13)

> But, as I have sought to show, ***Kelly*** and ***Selkent*** are inconsistent with the proposition that in all cases that cannot be described as "re-labelling" an out-of-time amendment must automatically be refused: even in such cases the Tribunal retains a discretion. No doubt 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, but that will be a discretionary consideration and not a rule of law.'

56. Mr Justice Underhill also referred to **Ali v Office of National Statistics [2005] IRLR 201**. In that case, Lord Justice Waller referred to ***Selkent***, and, stated:

> There are, as Mummery J said in ***Selkent***, many different circumstances in which applications for leave to amend are made. One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so. There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating

> application, that justice requires the amendment to be allowed, even though it is technically out of time. In the instant case, where the appellant only discovered the facts on which he relies for bringing his indirect discrimination claim during the process of disclosure or during the hearing, it is inconceivable that an application to amend to add that claim as soon as it was discovered would have been refused. The fact that technically it was being brought out of time could not have been an answer, having regard to the appellant's ignorance. So in a case such as this being out of time is certainly not an answer in itself.

57. There appears to be a conflict in authority as to the approach taken to time limits between, on the one hand, **Amey Services Ltd v Aldridge UKEATS/0007/16/JW** and, on the other, **Galilee v The Commissioner of Police of The Metropolis [2017] UKEAT 0207_16_2211**. In relation to this, I was referred to the recent case of **Douglas v North Lanarkshire Council [2024] EAT 194** where, in December 2024, Lord Fairley considered the conflict between ***Amey*** and ***Galilee***, at least as it related to the question of time limits. He stated that a Tribunal hearing an application to amend should normally examine the question of a time bar when considering the principles under ***Selkent***. However, (provided that there was a prima facie case that it was in time, and/or that an extension should be granted) where the issue as to limitation is unclear it can be reserved to a full hearing.

58. I also remind myself of **Vaughan v Modality Partnerships UKEAT/0147/20/BA**, where HHJ Tayler reminded the Tribunal that "the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application". It is necessary to consider ***Selkent*** in all cases, but it is not a checklist to be followed – the "balancing exercise is fundamental".

59. In addition, at para 27, it was said that "*Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it*".

60. The question of whether to allow or refuse an amendment is not a punitive sanction for breaches of the Rules. The central question is 'the balance of injustice and hardship in allowing or refusing the application'.

Time Limits

61. The relevant time limit depends on the claim that is advanced. In this case, the time limit is set out in section 48(3) Employment Rights Act 2010:

62. This provides that a tribunal shall not consider a claim unless it is presented before the end of the period of three months beginning with the date of the matter complained of.

63. Where there is more than one allegation, then the test is 'where that act … is part of a series of similar acts'. If so, then the time limit will apply to 'the last of them'.

64. However, contained with s48(3) is an exception. There are two limbs to this test. Accordingly, a tribunal may consider a claim presented outside the normal time limit, if it is satisfied that:

    64.1 it was not reasonably practicable for the claim to be presented within the normal time limited; and

    64.2 the claimant has presented it within such further period as the tribunal considers reasonable.

65. In addition, by virtue of s48(4),

> For the purposes of subsection (3)—
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on;

66. In **Arthur v London Eastern Railway Ltd (t/a Stansted Express) [2006] EWCA Civ 1358** the Court of Appeal considered an appeal against a decision of the EAT

upholding the Employment Tribunal's decision at a preliminary hearing to strike out a number of the claimant's claims as being out of time.

67. In relation to the question of whether a number of allegations are part of a series is (para 31, per Mummery LJ):

> 31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a "series" and (b) being acts which are "similar" to one another.

68. The Court of Appeal also said this about the procedure adopted:

> 33. The question is whether the tribunal erred in law in determining the important time limit point in the way that it did, solely on the basis of legal argument and without hearing any evidence or making any findings of fact. In my judgment, it did. The difficulty with the decisions of the tribunals below is that, in my view, it is not a particularly enlightening exercise to ask whether, as a matter of construction, "the motive" for the acts is a relevant link between acts to make them part of a series or to make them similar acts. Nor does it advance matters much to ask in the abstract what makes acts part of a series or what makes one act similar to another act.
>
> 34. In my judgment, it is preferable to find the facts before attempting to apply the law. I do not think that this is a strike out situation in which

assumptions have to be made as to the truth of the facts in order to decide whether there is a cause of action. It is assumed at this stage that the acts (and failures) alleged occurred and that the complainant may be able to establish a cause of action in respect of the acts within the 3 month period. The question is whether he can bring in pre-14 April 2004 acts as part of the claim.

35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find "motive" a helpful departure from the legislative language according to which the determining factor is whether the act was done "on the ground" that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.

36. Ms Seymour objected that, if this was the case, there was no point in having a pre-hearing review to determine time-limit issues in a case such as this. The matter would always have to go to a full hearing. Two points can be made on this submission. First, it is possible to direct a preliminary hearing *with evidence* relevant to the time limit point. Secondly, I agree that there would be no real point in having a preliminary hearing with evidence, if it was not going to save time and costs. That will often be the case in this sort of situation. Even if it is decided at a pre-hearing review or other preliminary hearing that there is no continuing act or series of similar acts, that will not prevent the complainant from relying evidentially

on the pre-limitation period acts to prove the acts (or failures) which establish liability. It will in many cases be better to hear all the evidence and then decide the case in the round, including limitation questions, on the basis of all the evidence: see, for example, *Hendricks v. Metropolitan Police Commissioner [2003] 1 All ER 654* (particularly at paragraphs 48 and 49) regarding the approach to multiple acts alleged to extend over a period.

69. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law (**Marks & Spencer plc v Williams-Ryan [2005] EWCA Civ 470**) confirms that the tribunal can take into account a number of factors.

70. These include:

70.1 the substantial cause of the claimant's failure to comply with the time limit;

70.2 whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;

70.3 whether the claimant had been advised by anyone and, if so, the nature of the advice given;

70.4 whether there was any substantial fault on the part of the claimant (or her lawyers) which led to the failure to present the complaint in time.

71. Where ignorance is a factor, the tribunal will need to be satisfied that the claimant's ignorance was reasonable in all the circumstances.

72. This time period is extended by any time spent in early conciliation with ACAS. Although that does not apply in relation to the application to amend, it is a factor to take into account.

The arguments of the parties (a brief overview)

73. At the hearing the claimant accepted that the proposed amendment was not a re-labelling, although it was submitted that it was not a wholly new claim, as the germs of the amended claim could be seen in the original ET1.

74. Mr Mitchell KC submitted that there was course of conduct (a 'campaign') against the claimant. In light of that, the relevant date for the purposes of time limits was that of the last act complained of, so 31 October 2024.

75. In relation to that, he did not accept that it could properly be inferred that the letter of 29 July 2024 was forwarded to the FCA at approximately the same time as it was sent to the claimant.

76. Whilst his primary application was for the claim to be amended in full as requested, as an alternative he submitted that due to the lack of clarity about the relative timings the claim should be allowed to proceed on the basis of the amended claim, but with the question of time limits being reserved to the final hearing

77. On behalf of the respondent, Mr Nicholls KC submitted that the proposed amendment was a substantial one. He also accepted that, in reality, the particular prejudice to his client if the application was granted was limited.

78. However, he submitted that the most significant, and in this case determinative, point, was the question of time limits. The claim that it is proposed to be advanced by the claimant is substantially out of time.

79. In relation to the claim as currently presented, it was not accepted that there was a course of conduct pleaded.

80. Mr Nicholls invited me to resist the temptation to put the decision on time limits off to a final hearing, submitting that there was sufficient to determine the issue at this stage.

Analysis

81. Although I had the benefit of extensive legal argument and analysis, I did not have any oral evidence from the claimant. She has provided a witness statement, but did not attend the hearing due to ill health.

82. However, she did not provide any medical evidence or ask for an adjournment. In those circumstances, the witness statement carries less weight than it would have done otherwise.

The approach I will take

83. Whilst the ultimate question is a balancing exercise of all the relevant factors in the case, it seems to me that it is appropriate to give consideration to some discrete points separately.

84. For example, the question of whether the first detriment was pleaded in the original ET1, and whether therefore that can be considered to be a re-labelling is separate to the other detriments.

85. In addition, it is appropriate to consider the question of time limits separately. However, whilst this consideration will proceed initially as if it were a time limit application, I bear in mind that is not the ultimate question that I have to resolve.

86. It will also be necessary to consider the question of whether the detriments are part of a series of similar acts.

87. I remind myself that there is a danger of 'compartmentalising' the different issues and losing focus on the whole. For that reason, it is necessary at the end to 'step back' and consider all the relevant factors in relation to the application before deciding where the balance of injustice and hardship is.

Was the first detriment pleaded in the ET1?

88. As it appears in the proposed amended ET1, this detriment reads (para 92, page 187):

> On 24 December 2020, in an email from Santander (sender details redacted) to the FCA (recipient details redacted) excerpts of her witness statement were disclosed to the FCA and it was implied that she had stolen documents relating to Project Orford' and additionally suggested that her statement might damage an FCA investigation, as if she was

purposely seeking to prejudice the FCA's ongoing investigation, with the result of costing the FCA many millions of pounds. The effect of this communication was apt to undermine her position vis a vis the FCA.

89. Whilst there are references to 'Project Orford' in the original ET1 (para 36(b), page 28), these are not linked back to any specific email.

90. It was said in the respondent's letter of 08 August 2024 (page 82) that much of this was part of her first claim. It appears that the specific email pleaded now was not. At para 34 of the original ET1 the claimant refers to her being first aware of the 'victimising conduct' following the SAR of October 2023.

91. The allegation, as it is now pleaded, is specific, and the time clearly set out. It is far from clear that this email was referred to in the ET1 at all. Given that, this cannot be considered to be an addition 'of factual details to existing allegations'.

92. I consider that this is properly to be considered to be a new factual allegation that effectively changes the nature of the original claim.

When was the application to amend made?

93. Before considering the relevant time limits, it is necessary to determine when the application to amend was actually made.

94. The letter of 22 August 2024 foreshadowed that an application would be made, but it was not suggested that this could be taken as the application to amend itself.

95. After some correspondence between the parties, the claimant's solicitor's wrote to the respondent on 18 October 2024 (page 115-116) stating that further and better particulars would be provided, '*which we intend to submit over the next month and we believe these would properly clarify the claim and alleviate any need for a [strike out] application*'.

96. There was then discussion about the timetabling of that document, with it being agreed on 20 and 21 November 2024 that this would be provided by 04 December 2024 (page 114-115).

97. This document (then titled 'Further and Better Particulars') was provided to respondent on 04 December 2024, although the Tribunal was not copied in (page 122). The claimant followed this up on 10 December 2024 (page 121) to say that counsel will be reviewing the document, but that any changes would likely be grammatical. A tracked changes version would be provided at that point, although a draft could be provided now if wished.

98. That email confirmed that '*while incorrectly titled FBPs, we can confirm this is an amended claim*'.

99. It seems that nothing further was heard until 07 January 2025 when the respondent wrote to the claimant chasing up the final version (page 120). The claimant replied the next day saying that they were tidying up the grammatical changes, and this would be provided shortly.

100. On 09 January 2025 the respondent wrote to the claimant requesting confirmation that the proposed document would replace the previous Particulars of Claim in their entirety (page 119). The claimant replied the same day confirming that this was the case.

101. It was also confirmed that this *was* an amendment application and that the claimant intended '*to make that application shortly (after sending you the final version) and hoping to deal with it at the PH*'.

102. Following that, the claimant wrote to the Tribunal on 11 January 2025 (page 124) enclosing the application to amend.

103. There was discussion at the hearing as to what the relevant date would be for the application to amend – was it 04 December 2024 when the draft was sent to the respondent, the 11 January 2025, when it was sent to the Tribunal with the application to amend, or at some point in between.

104. There is no time limit in the Rules for making an application to amend. For that reason, the answer to that question is not determinative of the application. However, it will filter in to the question of a discretion (particularly if the application, had it been started as a fresh claim, would have been out of time).

105. I shall set out the following parts of the Rules which impact on service and time limits.

> **Time**
>
> **5.**—(1) Unless otherwise specified by the Tribunal, an act required by these Rules, a practice direction or an order of the Tribunal to be done on or by a particular day must be done at any time before midnight on that day. If there is an issue as to whether the act has been done by that time, the party claiming to have done it must prove compliance.
>
> **Sending documents to the Tribunal**
>
> **83.**—(1) Subject to paragraph (2), documents may be sent to the Tribunal—
>
> (a) by post;
>
> (b) by direct delivery to the appropriate tribunal office (including delivery by a courier or messenger service);
>
> (c) by electronic communication.
>
> (2) A claim form, or a response form may only be sent in accordance with any practice direction.
>
> (3) The Tribunal must notify the parties following the presentation of the claim of the address of the tribunal office dealing with the case (including any email or other electronic address) and all documents must be sent to either the postal, email or other electronic address so notified.

106. I agree with Mr Nicholls that the relevant date for these purposes is 11 January 2025. This can be seen in the email sent by the claimant two days previously. That

spoke of the future intention to make 'that application' after sending the respondent the 'final version'.

107. There is no suggestion there that that the claimant considered that the application had previously been served.

108. In addition, the claimant's email of 04 December 2024 was sent solely to the respondent. It is clear from the contents that this was not an oversight, and the claimant was not intending to copy in the Tribunal.

109. The first day that this application was presented to the Tribunal as an application to amend was therefore 11 January 2025.

Delay in making the amendment application

110. It is unclear why this was not done earlier, especially as the application was substantially ready by 04 December 2024. That failure would be a relevant factor in relation to any application to extend time.

111. It is also unexplained why there was that delay from 22 August 2024 until 04 December 2024. Even setting aside the question of the 29 July and 31 October 2024 matters, the first three detriments could have been forward at that point.

112. Whilst there are not time limits in making an application, there was substantial delay in this case for which, I consider, there was no good reason. I do not accept that the claimant could reasonably have considered that what was to be put forward was uncontentious and likely to be agreed by the respondent.

The significance of time limits

113. Mr Nicholls's primary submission was that the time limit point was determinative, in the sense that if I concluded that had the application been made as a new claim then it would be out of time, and I concluded that an extension of time would not be granted, then that would be the end of the matter.

114. His alternative position is that it is a factor 'of the greatest weight' that should, in this case, outweigh the other factors that may exist.

115. The reality is that, in most cases, anything that is put forward as an application to amend would be out of time, otherwise it could be simply submitted as a separate claim (thereby avoiding assessing the other factors in ***Selkent***) and an application made subsequently for the cases to be heard together.

116. However, that is not always the case. In **Patka v BBC UKEAT/0190/17/DM (2018)** the EAT upheld the decision of the Tribunal to refuse to allow an amendment, even when it appeared to be in time. That was a case where the claimant continued to be employed (and so would still be suffering the effects of any alleged indirect discrimination in pay) but the application in issue was made so close to the final hearing that it could not be allowed without causing a postponement, and subsequent prejudice to the respondent.

117. The authorities are clear that whilst it is 'essential' for me to consider time limits as part of an application to amend, the question of whether the amendment, if it had been put forward as a new claim, would have been out of time is not determinative of whether the application to be allowed, although it will always be a factor to be taken into account.

118. The question of time limits (and, if applicable, any extension) will be always important, sometime decisive, but never determinative, of the application to amend.

The application of the time limits in s48 in this case

119. Had the amendment been a new claim that was lodged on 11 January 2025, then anything before 12 October 2024 would have been out of time.

120. It is therefore clear that all of the detriments would have been out of time, other than (if taken at face value) the 31 October 2024 allegation. That would be subject to an argument that some (or all) of the other allegations fall to be considered as part of a series and/or there was a successful application to extend time.

121. In the proposed amendment, there are three new disclosures pleaded, and five further detriments. In relation to the disclosures, they all occurred long before the ET1 was submitted, and the claimant was obviously aware of all three.

122. In relation to Det 1, this was from December 2020 and, if this is a new allegation, then it would clearly be out of time.

123. In relation to the remaining matters, it is said in the letter of 20 August 2024 (page 91) that the remaining detriments were only known to the claimant following receipt on 23 October 2023 of the response to her SAR.

124. Whilst her proposed amended ET1 (paras 85-86, page 145) suggest that there were a number of different SARs, and it was only at the end of the last one (on 28 June 2024) that she saw 'the pieces of the jigsaw puzzle', she does not state that the detriments were in subsequent SARs.

125. The proposed para 87 (page 146) suggest that it is 'the' SAR that gave rise to the amendment, meaning the 23 October 2023 one. Further, in her witness statement (para 4), the claimant refers the amendments back to that SAR.

126. It is important to remember that the Employment Rights Act 1996 draws a distinction between the 'act' that constitutes the detriment, and the detriment itself. Time will run for the purpose of the legislation from the former, even when the claimant is unaware of any detriment (or of the act itself).

127. The fact that the detriment may be ongoing does not mean that that act, which may be a discrete event, is.

128. However, the fact that the claimant did not know, and could not have known, about the act is a relevant factor to the question of extension of time, and to whether it would be reasonably practicable for her to have submitted the claim in time.

129. This does mean that a claimant will not have 3 months from the discovery of the act. There is an obligation to bring the claim 'within such further period as the tribunal considers reasonable'.

130. I remind myself again that I am not dealing with an argument on strike out based on time limits, but it is of assistance to identify these timeframes.

131. Time limits for the second detriment would have expired on or about 07 November 2023, and for the third determent on or about 09 February 2024.

132. It appears that the second detriment was in the October 2023 SAR. In those circumstances, the claimant would have had to have acted swiftly to be in time. As it is, this is out of time by 14 months.

133. However, the third detriment is said to be an email on 10 November 2023, which could not have been in the October 2023 SAR. It appears that it was not in the last SAR (28 June 2024), but the claimant has not confirmed which one it was in (20 December 2023, 21 March 2024, 03 May 2024 or 14 June 2024).

134. Irrespective of which SAR it was, time would have expired around 09 February 2024. On that basis, if lodged as a new claim on 11 January 2025, then it would have been 11 months out of time. If this had not been discovered until 28 June 2024 then, at that point, the claim was already out of time and an application to amend should have been made urgently.

135. With the above three detriments, I do not consider that it could be said to have been reasonable to have waited three months from date of knowledge to make the application. Whilst it need not be lodged the same day, a delay of more than a couple of weeks would not appear (absent a proper explanation) to be reasonable.

136. The fourth detriment is said to be the threat to send the letter to the FCA. The act is the threat, which was in the email of 29 July 2024 (irrespective of when the letter was subsequently sent to the FCA). On that basis, time would have expired on 28 October 2024, and the amendment application, had it been presented as a fresh claim, would have been out of time by nearly 3½ months.

Detriment 5 – when was the letter sent to the FCA (the act)?

137. I then consider the question of when that letter was sent to the FCA by the respondent. I can see the force of Mr Nicholls's argument that an inference should be drawn that it was sent by the respondent to the FCA on, or shortly after, 29 July 2024 based on the regulatory regime.

138. I remind myself of what was said in ***Arthur v London Eastern Railway*** about the approach at a preliminary hearing. No evidence was called by either party. Whilst that does not mean that I cannot make findings of fact, and then draw legal conclusions on this question, it seems to me that this does mean that I should be cautious to do so.

139. However, in this case I am not dealing with a litigant in person. Both sides are represented by leading counsel and have had a full opportunity to put forward such evidence as they wish as to the issues at the hearing. In addition, the claimant has submitted a witness statement that has been drafted by solicitors in which she has had an opportunity to put forward anything that she would wish to.

140. In those circumstances I consider that Mr Nicholls was right to 'push back' against my suggestion at the hearing that the question of exactly when the letter was sent to the FCA should be reserved to a final hearing. Both parties have put in front of me that which they wished me to have, knowing that findings of fact may be made, and I agree with Mr Nicholls that I should make findings of fact on the material that I have.

141. It may be that if this was a strike out on the question of time limits, rather than an application to amend, then I would be more cautious in doing so. However, the question of time limits is just one piece (albeit it a large one) of the overall picture.

142. I do consider that it is significant that the claimant sent the FCA the letter shortly after receipt of the 29 July 2024 email as part of a complaint about the respondent's behaviour. It appears that she assumed at that point that the FCA had the letter. There is no evidence to say that she received a response to indicate that that was the first time that they had seen the letter.

143. The communication to the FCA was not in the bundle. I agree with Mr Nicholls that the regulatory regime would require that the matter was communicated swiftly, certainly weeks (if not days) rather than months from 31 July 2024.

144. It is also notable that the claimant presumably formed that view as she had forwarded the letter to the FCA herself in August 2024. That is not determinative, but is supportive of Mr Nicholls's case.

145. It is also significant in that there is no evidence to suggest that the FCA taken by surprise by the disclosure from the claimant. Nor did the respondents write back to state that the FCA should not consider the attachment as they had not sent it to the FCA.

146. At the end of the hearing there was discussion as to whether the letter should be submitted as evidence after the hearing. Neither party invited me to withhold my decision until then.

147. In light of the evidence presented to me, I consider that the only conclusion that I could reach on the balance of probabilities is that the letter was sent by the respondent substantially before 31 October 2024, and certainly before 10 October 2024.

Conclusion on time limits

148. For the above reasons, if this was a question of time limits, then I would consider that the acts that all five alleged detriments are based on occurred more than 3 months before 11 January 2025.

149. In light of that, I do not consider that it is necessary to grant permission to amend but withhold the question of whether the five detriments (or some of them) are 'part of a series of similar acts', as the last of them would, in any event, have been out of time if pleaded as part of a new claim.

A series of similar acts

150. I will consider the question of what the fourth and fifth detriments are in more detail below but, if I am wrong on the question of the timings of the fifth detriment and

on the claimant's case that the fifth detriment was in time, then I consider whether a Tribunal would conclude that they form part of 'a series of similar acts'.

151. In relation to the first three, whilst they relate to allegations against the same respondent, it does not seem to me that they could properly be said to be similar in nature, or part of a chain of events given the differences in time and content.

152. However, I would find that the fourth and fifth detriments were a series.

Extension of time

153. For those allegations that would have been out of time, it is then necessary to consider the two pronged test as contained in s48(3)(b) ERA.

154. Bearing in mind that the test is as set out there, rather than the one in the Equality Act 2010, it seems to me that the claimant would have great difficulties in showing that it was not reasonably practicable for any of those claims to have been presented in time.

155. The claimant is familiar with the Employment Tribunal process and has previously brought a Tribunal claim that was heavily litigated. That had ended with her claim being struck out on procedural grounds on 05 January 2021.

156. That would have made it clear to her, if she was not aware before, of the importance of complying with time limits, and the fact that there was a need to act promptly.

157. In relation to the first detriment, it is not explained why she did not raise this in the year before the amendment application. There does not appear to be any good reason for not having raised it earlier.

158. I consider that this applies equally to all the detriments. The claimant is an intelligent woman, with some legal knowledge, who was either involved, or had recently been involved, in Employment Tribunal proceedings.

159. Shortly after the first SAR disclosure she had started these sets of proceedings and there is again no good reason why an application was not made promptly at that point in relation to those disclosures.

160. In the lead up to 22 August 2024 the claimant was then represented and the case was being prepared for a Preliminary Hearing. She has provided nothing by way of evidence to satisfactorily explain why it is that it was not reasonably practicable for her to have raised these matters earlier than she did

161. It is the case that as of 19 August 2024 the claimant was aware that the FCA had the letter (as she had sent it), and it seems to me that from that date, she was aware of there being a cause of action. It does not seem that the email of 31 October 2024 would have taken it much further in her mind.

162. I bear in mind that the claimant forwarded the email shortly after the letter containing a notice of an application to strike out, and shortly before the case was listed for a Preliminary Hearing, so she would have had the question of ET proceedings very much in her mind.

163. There is no good reason why that application to amend could have been made at that time. Certainly, by the end of August 2024 the claimant was aware that the threat had been made, and that that letter was in the hands of the FCA. Everything was in place for that detriment to have been pleaded as an amendment. Notwithstanding that, she waited 4½ months to do so.

164. I consider that this was put beyond doubt by the contents of the email of 22 August 2024. This makes it clear that she was intending to provide ‘further information’ which must include the matters that she seeks to put forward now. By that point, she was aware of all of the first four disclosures. She had had the benefit of legal advice.

165. In those circumstances, it was clearly reasonably practicable for her to have brought it at that point. The delay after that cannot be considered to be reasonable. It may be that if the amendment application was lodged at the end of August 2024

(after she had obtained legal advice), then those that were out of time could be overlooked, but the period of time is substantially longer than that.

166. For those reasons, were this a time limits application I would have ruled that all five detriments should be struck out as being out of time.

What is the detriment in the fourth and fifth detriments?

167. The claimant's case at the hearing was that there were two separate detriments in relation to the email of 29 July 2024. The threat made in the email to forward the letter to the FCA was one detriment, with the second being the actual dissemination of the message.

168. Mr Nicholls argued that whatever occurred on 31 October 2024, it cannot be considered to be a detriment.

169. This is pleaded at paras 101-102 of the proposed amendment. I agree with Mr Nicholls that, read properly, this is not an allegation of a detriment on 31 October 2024.

170. Whilst 'detriment' is not defined in the legislation, it is capable of having a wide meaning even (as in this case) post-employment.

171. Mr Mitchell submits that the detriment pleaded in Detriment 5 is wider than in Detriment 4, in that it includes 'and that, further there had been conduct issues' (para 101), and therefore it can be properly concluded that there are two separate detriments.

172. In relation to this I note that at para 99 (under the heading of the fourth detriment) it is pleaded that 'Stating to the regulator that there were performance or conduct issues …'.

173. I do not agree with Mr Mitchell that there is a significant difference between paras 95 and 101 of the proposed amended claims to indicate that the letter of 31 October 2024 was a separate matter.

174. It is less clear whether a threat to do something is a detriment and, if anything, there is one detriment contained in Determent 4 and 5, which is the passing of the letter to the FCA. It is then a question of fact as to when that occurred.

Conclusion on time limits

175. In conclusion, I find the following on the question of time limits :

- The application to amend was made on 11 January 2025.
- All the acts that constitute any alleged detriment occurred more than 3 months before then.
- It was not reasonably practicable for the first and second detriment to have been presented with three months of those acts occurring.
- Taking the date of the 28 June 2024 as the date of knowledge of the claimant (as being the date most favourable to her) of the third detriment, it was not reasonably practicable for the third detriment to have been presented with three months of that act occurring.
- However, the time that passed from when it was reasonably practicable to have pleaded those acts by way of an application to amend, to when the application was lodged, was not reasonable.
- It was reasonably practicable for the fourth and fifth detriments to have been presented within three months of those acts occurring.

The factors for and against amendment

176. I shall set out further points in relation to the balancing exercise separate to the question of time limits.

177. The claimant has been legally represented since August 2024. In addition, she is a qualified lawyer, holding an LLB, a PGDL and an LLM. Although she is not practicing as a lawyer, nor is she someone who has worked as employment law specialist, or in the employment law context, this is still a factor of significance.

178. From her studies, and her experience with her previous Tribunal claim, she is aware of the importance of time limits and the need to act promptly.

179. The question of the timing of the application is different to the time limits associated with the application, although it is closely linked. Here, many of the same principles apply.

180. The delay in making the application from the time that the requisite knowledge applied to the application being made is long – from somewhere just under 2½ months, up to 14 months, depending on the matter under consideration. Those delays are very lengthy, particularly in the context of litigation such as this.

181. In particular, by mid-August 2024 the claimant had full knowledge of all the matters that she now seeks to pursue (even the one that she places as occurring on 31 October 2024). At that point, three of the claims were substantially out of time. Notwithstanding that, she then delayed until the beginning of January 2025 before making this application.

182. Against that, whilst there was the delay referred to above, it is the case that the current application was foreshadowed in August 2024 and a draft sent to the respondent in December 2024.

183. Mr Nicholls was frank in that the question of prejudice was not his strongest point given that there was no final hearing set. However, if the amendments were to be granted it is inevitable that the respondents would be put to more expense and inconvenience.

184. Some of this could be dealt with by an application for costs, although there is no application put forward at this stage. I have not been given details of her means.

185. There is also the question of prejudice to the claimant. Clearly, refusing the application will mean that she would not be able to have these allegations determined (in the course of this claim at least), which will be a hardship to her. That is an important point, although it will always be the case in an unsuccessful application to amend.

186. I agree with Mr Mitchell that the nature of the allegations in this case is a factor. Here, there is a wider public interest over and above the interest to the claimant,

in having these allegations (that involve a large and well-known financial institution) being aired in public.

187. The matters are now old, dating back to 2020 in relation to one instance.

188. Although the parties in the proposed amended claim are the same, the claim as now presented is a very different one to that presented in the original ET1. It clearly goes well beyond a relabelling or redrafting of that claim and can properly be considered to be entirely new factual allegations which fundamentally change the basis of the existing claim.

189. It was not suggested that there are any further factors to take into account.

Conclusion on the balancing exercise

190. No one factor can be determinative of an application to amend. In this case there are a number of different factors that do not point the same way.

191. It seems to me that the most significant points are that what is being sought to put forward is a substantially different claim to that in the ET1. It goes well beyond redrafting, or an addition of a new allegation following a recently discovered fact. Instead, it is effectively a replacement of the originally pleaded claim with a new one.

192. That claim is out of time in relation to all allegations. Coupled with that, there is a lengthy delay in bringing the amendment. There is no satisfactory explanation for this.

193. It seems to me that taking those together with the prejudice that would be caused to the respondent in dealing with this allegation is sufficient to outweigh the prejudice and hardship to the claimant (even having regard to the importance of the issues at stake).

194. For that reason, I refuse the application to amend.

Conclusion

195. For the reasons set out above, I find that the application to amend the ET1 should not be granted.

Employment Judge Bunting

DATE: 13 March 2025

Sent to the parties on:

21 March 2025

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For the Tribunal Office:

……..……..