Case No: 3311149/2024

EMPLOYMENT TRIBUNALS

Claimant: Ms A Joseph

Respondent: Ministry of Defence

Heard at: Reading (by video) **On:** 23 April 2025

Before: Employment Judge Shastri-Hurst

Representation
Claimant: in person
Respondent: Mr McCrossan (counsel)

RESERVED JUDGMENT

1. The claims of unfair dismissal and whistleblowing under the Employment Rights Act 1996 are struck out as the Tribunal does not have jurisdiction to deal with them.

2. The claimant's application to amend the claim to include race discrimination is rejected.

3. The claimant's application to amend the claim to include further allegations of victimisation is rejected.

4. The claim of victimisation under s27 of the Equality Act 2010 was not presented within the applicable time limit. It is not just and equitable to extent the time limit. The claim is therefore dismissed. .

REASONS

Introduction

1. The claimant commenced serving in the Armed Forces on 3 December 2023 as a recruit in the Royal Logistics Corps. On 13 March 2024, the respondent applied for her discharge; the respondent says this was due to the claimant being unsuitable for Army service. The claimant was duly discharged on 20 March 2024. The claimant has presented to the respondent two service

complaints, one pre- and one post-discharge, on 14 and 25 March 2024 respectively.

2. The claimant commenced the ACAS early conciliation process on 18 September 2024: that process concluded on 23 September 2024. The claim form was then presented on 16 October 2024.

3. The claim form presented claims of unfair dismissal and whistleblowing under the Employment Rights Act 1996 ("ERA"). There was however also mention of "victimisation" within the narrative of the claim form, giving rise to a question as to whether the claimant intended to pursue a claim of victimisation under s27 of the Equality Act 2010 ("EqA").

4. In its response to this claim, the respondent raised the following issues:

   4.1. The Tribunal does not have jurisdiction to deal with claims brought under the ERA when those claims are made by members of the Armed Forces;

   4.2. The Tribunal does have jurisdiction to deal with a victimisation claim brought by a member of the Armed Forces, subject to the claim being presented within the time limit provided by s123(2) EqA. The respondent says that the claim in its entirety is out of time.

5. For clarity, the primary time limit for a claim under the EqA to be presented to the Tribunal is six months less a day – s123(2) EqA. Taking the act of discharge on 20 March 2024 to be the last act of which the claimant could complain, this provides a time limit of 19 September 2024 for presenting the claim. The legal framework on this point is set out further below.

6. This preliminary hearing was listed to deal with both the above-referenced matters of jurisdiction.

Today's hearing

7. At the hearing today, having set out my understanding of the issues to be dealt with, I checked with the respondent that I had understood its position correctly (as now set out at paragraph 4 above). I then explained to the claimant that the law under the ERA (as set out below) means that the Tribunal simply does not have jurisdiction to deal with ERA claims for members of the Armed Forces: I have no discretion on this point.

8. I then explained that I wanted to better understand her potential claim for victimisation. I gave the claimant the opportunity to explain in free-flow, uninterrupted narrative, her account of her victimisation claim. She went through her entire time with the Armed Forces, setting out the full history for me. This took around 1 hour 20 minutes. I appreciated Mr McCrossan's patience with me in asking the claimant to perform this exercise; I wanted to enable the claimant to feel she had told me her full account without constraints.

9. At the end of the claimant's narrative, I asked her a few specific questions shaped in order to address the legal issues that a tribunal has to consider in a victimisation claim. I have set out this conversation more fully in my Findings of Fact below.

10. Having gone through the claimant's complaint with her as set out above, it was clear to me that the complaint as relayed to me today was much wider than the claim form had suggested. I proposed a way forward for the remainder of the hearing, which was to hear from both sides firstly in relation to what was essentially an application to amend the claim to include any claims mentioned today that were not in the claim form (particularly victimisation and race discrimination). Then secondly, I wished to hear from both sides on the time limit issue; in other words, the point that the claims are out of time, and therefore whether I should exercise my discretion to extend time limits under the EqA. I would then reserve my decision on these matters and provide a reserved decision in order to be able to give all aspects due consideration and the time they deserve. I also wanted time to re-read the documents, particularly the claimant's two service complaints.

11. Prior to asking both sides to set out their positions, I set out the process and legal tests for both amendment applications and time limit arguments under the EqA. In terms of the amendment application, I asked the claimant a series of questions to elicit from her the information relevant to an application to amend the claim. I then heard submissions in response from the respondent. I then went back to the claimant to ask her questions to elicit information relevant to the question of whether I should extend time for her EqA claim. Once more, I asked Mr McCrossan then for his submissions on this issue.

12. At the end of his submissions, Mr McCrossan raised a point that had been highlighted by the respondent in its correspondence to the Tribunal: namely the matter of a stay. The respondent asked me to consider staying any claim that survived the preliminary hearing today until the outcome of the service complaints. Apparently, the decision on the complaint is due in the next few weeks, although evidently the outcome of that may lead to an appeal process which would mean the complaint procedure was still live.

13. My suggestion, to which both parties acquiesced, was that, following this decision, I would list the matter for a further case management video preliminary hearing, which would give the respondent time to complete the service complaint. That hearing would be aimed at making case management orders to move the case forward to a final hearing. If, for some reason, the respondent remained of the view that it was necessary to stay the matter, it would be able to apply for a stay and to vacate the preliminary hearing.

14. At the end of the hearing, I gave the claimant one last opportunity to say anything more she wished to say on any matter we had discussed during the hearing. She asked me to consider the medical issues that she is facing and had told me about during her narrative. She explained that she had previously been a very physical person. However, now she has chronic back pain meaning she can hardly move, and cannot work. She has also regrettably lost custody of her child, as she is unable to care for her.

15. For parity, I likewise gave Mr McCrossan a final chance to add anything: he declined to do so.

Findings of fact

The existing claims in the ET1

16. The claimant presented her claim form on 16 October 2024. In that claim form, in Box 8 ("type and details of claim") the claimant ticked the box for unfair dismissal and whistleblowing. The detail provided in Box 8.2 is limited:

> "I was unfairly discharged, barred from medical attention after being downgraded from fit to unfit. My medical appointments were also cancelled in Pirbright after reporting an issue of fraternising with other recruits in training. I also reported that a corporal walked in on the male and female together in bed and after reporting this issue I was victimised and abused. Then in 6 days discharged from the Army".

17. From that detail in the ET1, the following claims are clear on the face of the claim form:

    17.1. Whistleblowing – the claimant says that her reporting sexual fraternising, and her subsequent reporting that a colleague (Corporal Thompson) knew of this fraternising and condoned it, were protected disclosures under s43B ERA;

    17.2. Victimisation – the claimant says that her reporting of sexual fraternising, and her subsequent reporting that a colleague (Corporal Thompson) knew of this fraternising and condoned it, were protected acts under s27 EqA;

    17.3. As a result of that alleged protected disclosure/protected act, the claimant was dismissed – automatic unfair dismissal under s103A ERA and victimisation under s27 ERA;

    17.4. As a result of that alleged protected disclosure/protected act, the claimant suffered detriments – public disclosure detriments under s47B ERA and victimisation under s27 EqA:

        17.4.1. Being barred from medical attention;
        17.4.2. Having her medical appointments cancelled.

18. In terms of the claimant's assertion that the reporting of sexual fraternising against the respondent's policy could be a protected act, the claimant has told me nothing today that could lead to such a conclusion. A protected act is defined as follows in s27 EqA:

> (2) Each of the following is a protected act –
>
> (a) Bringing proceedings under this Act;
>
> (b) Giving evidence or information in connection with proceedings under this Act;
>
> (c) Doing any other thing for the purposes of or in connection with this Act;
>
> (d) Making an allegation (whether or not express) that A or another person has contravened this Act.

19. I find that it is highly unlikely that the report made by the claimant could fall within any of the four definitions of a protected act at s27(2). The report contains no allegation, whether implicit or express, that could be connected with the EqA. However, this is the nature of the presented victimisation claim on the face of the claim form.

Claims sought to be added by amendment

20. There is no written amendment application before me today. The need for an amendment application to be made has arisen due to the claimant's narrative of her complaint given to me today. This narrative went far beyond the details within the claim form.

21. Taking from the claimant's narrative the possible claims for which this Tribunal would have jurisdiction, it appears that the claimant is seeking to add claims of victimisation and direct race discrimination.

22. For completeness, I set out immediately below the legal framework for victimisation and direct discrimination:

> s27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because –
> a. B does a protected act, or
> b. A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act –
> a. Bringing proceedings under this Act;
> b. Giving evidence or information in connection with proceedings under this Act;
> c. Doing any other thing for the purposes of or in connection with this Act;
> d. Making an allegation (whether or not express) that A or another person has contravened this Act;
>
> S13 Direct discrimination
>
> (1) A person (S) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> (2) …
>
> (3) …
>
> (4) …
>
> (5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> (6) …

23. In the claimant's free-flow narrative, the only time she mentioned something that could be direct race discrimination was her allegation that Sergeant Martin said "you don't even belong here, you should feel lucky you are still here, go to Jackson's company and work fucking hard". The concept of "belonging" could depending on the evidence, be connected to the claimant's race.

24. In that same free-flow narrative, the claimant told me nothing about any complaint that could be a protected act at law. The complaints that she told me about in that initial narrative all related to the reporting of fraternising and the treatment she suffered as a result of that reporting. As set out above, these type of complaints have little (if any) prospect of amounting to a protected act under s27 EqA.

25. When I then asked the claimant questions focused on eliciting the necessary facts for the purposes of a victimisation claim, I was told that the claimant made the following complaints about discrimination (whether express or implied):

    25.1. Her first service complaint (seen only by Sergeant Herbert-Fraser) - the claimant wrote that Sgt Martin had said "you don't belong here", which she considered to be racist:

    25.2. In conversation with Sgt Herbert-Fraser – explaining that the other training recruits were all white and they had not been punished like she had been, and that the claimant considered this to be discrimination and racist. She also explained that Sgt Martin had said "you don't belong here";

    25.3. In conversation with Regimental Sergeant Major Vincent – the claimant told him that "I felt what it means to be black".

26. From that detail, I understood that the possible protected disclosures were made to Sgt Herbert-Fraser and RSM Vincent.

27. I then asked the claimant about any detriment that she considered had been inflicted on her by Sgt Herbert-Fraser and RSM Vincent as a result of those alleged protected acts. The claimant stated that she did not consider that Sgt Herbert-Fraser had treated her badly.

28. In terms of RSM Vincent, the claimant considered that he had been in a position to say that the claimant had been unfairly punished. When I asked the claimant what she considered RSM Vincent could or should have done differently, she explained that he could have informed the OC and looked into the matter further.

29. In relation to the first service complaint, the claimant said that the only person who knew of the content of the service complaint was Sgt Herbert-Fraser: the claimant did not inform anyone else. I asked the claimant whether she considered that the raising of the service complaint had led to her suffering any detriment. She said that she would not make that allegation, given it was only Sgt Herbert-Fraser who had known about the service complaint.

30. It therefore appears that, to the extent any protected acts were made as set out in paragraph 25 above, the only possible detriment that could be said to be *caused by* a protected act is RSM Vincent's alleged omissions at paragraph 28 above

31. I then asked the claimant what acts/omissions she said had been race discrimination, other than Sgt Martin's comment "you don't belong here". The claimant explained that she was punished more harshly than her white colleagues in response to her reporting of fraternizing and Cpl Thomson's knowledge of that fraternizing. In referring to her white colleagues, the claimant was referencing those colleagues who were guilty of the fraternization of which she complained. Their punishment was just to be moved, but their training was not interrupted. The claimant says that her punishment for reporting fraternization was to be ostracized from her colleagues and subjected to a catalogue of poor treatment, culminating in removal from the training program and discharge. Therefore, the alleged acts of direct race discrimination sought

to be included by way of amendment are:

31.1. Sgt Martin's statement "you don't belong here"; and

31.2. A catalogue of alleged poor treatment which arose following the claimant reporting fraternization. This treatment was meted out by numerous of the claimant's colleagues, over several weeks.

Details in service complaints

32. I note that in the claimant's first service complaint, she used the word "discrimination" as a broad term on [80] and again on [83]. Likewise, the claimant alleges at [83] that she was "victimized".

33. Other than that, specific facts that could allege facts necessary for victimisation or race discrimination are as follows:

33.1. [81] – the claimant records saying to RSM Vincent "Sir, I have felt what it means to be black". This could be argued to amount to a protected act;

33.2. [82] – the claimant records "I was told by Sgt Martin I am lucky to be here, I don't even belong here, …". This could arguably be an allegation of an act of race discrimination;]

34. There is no complaint of discrimination or victimisation made within the claimant's second service complaint.

35. The terms of reference for the claimant's service complaint(s) at [106/107] reference discrimination based on race, meaning that the respondent understood the complaint(s) to include an allegation of race discrimination. This is recorded in relation to three specific matters:

35.1. Captain Pritchard "who you allege chose to wrongly punish you for refusing to pass on a video recording you had";

35.2. Sgt Martin – six specific acts are listed; and,

35.3. Discrimination by members of Keogh Platoon.

Matters relevant to amendment and time limits

36. Almost the entirety of the facts that the claimant disclosed in her narrative today are new and not found in the claim form. I have set out the limited claims that are identifiable in the claim form at paragraph 17 above.

37. I asked the claimant various questions to elicit information relevant to the amendment application. I gleaned the following information.

38. The claim of race discrimination does not appear on the ET1. This is a mistake: the claimant told me she thought that she had ticked the race discrimination box in Box 8.1 of the ET1. She only became aware that it was not ticked on receipt of the preliminary hearing bundle yesterday. When completing her agenda in advance of this hearing, the claimant included reference to a

victimisation and race discrimination claim in that form.

39. The service complaint of 14 March 2024 is the first one she had ever produced. The claimant told me that she completed the form quickly, without sufficient thought to all the information she may retrospectively have included. I have set out a summary of what discrimination/victimisation allegations are found in the service complaints at paragraphs 32 to 35 above.

40. The claimant has had some limited advice from a lawyer, but only after the ET1 had been entered. She is in contact with him again at the moment. She completed the ET1 on her own.

41. I asked the claimant what facts she relied upon to say that she was treated less favourably because of her race. She again referred me back to the difference in the punishment of her white colleagues who were guilty of fraternizing, and her own punishment for reporting them and Cpl Thompson.

42. In terms of any hardship of not being able to pursue the claims subject to the amendment application, the claimant told me of her situation since being discharged. She explained that she has been unemployed since her discharge; as a result she cannot afford to look after her daughter, who has had to go elsewhere. The claimant is living on charity, having lost her home, and her mental health is suffering as a result of the treatment she says she suffered within the Armed Forces. She is also suffering physically, with injuries that arose during her time in the Army, and as a result of what she says was the respondent's failure to provide her with medical assistance and rehabilitation for her back, knees and ankles. She is physically unable to undertake even a minimum wage job.

43. In terms of the reason for the delay in presenting the claim, the claimant explained on my questioning that the reason she had not presented her claim earlier was that she was holding on for someone within the respondent to help her, both with her complaints and her medical issues. She told me that she arrived at the conclusion that this was not going to happen and so approached ACAS to go through the early conciliation process. The tipping point that prompted her to go through the ACAS early conciliation process was when her therapist said to her, sometime in September, "if [the respondent] is not helping you, you have to do something to help yourself". This prompt must have occurred at the latest on 18 September 2024, when the claimant started ACAS early conciliation, this being notably one day before the expiry of the primary time limit.

44. The claimant was unable then to explain why there was a delay between 18 September 2024 and 16 October 2024. The claimant made reference to needing some medical attention, but this evidence was vague and she provided no further evidence on this point. In terms of the claimant's knowledge of the Tribunal process and time limits, she told me that she started to do some research a few weeks after her discharge: someone from the Army Speak Out Team told her what areas to research. The claimant said that she saw something about time limits: specifically she mentioned "something less a day" but she did not understand it.

Relevant legislation

Regarding the Employment Rights Act 1996

45. The following legislation under the ERA is relevant to this matter:

> 191 Crown employment
>
> (1) Subject to sections 192 and 193, the provisions of this Act to which this section applies have effect in relation to Crown employment and persons in Crown employment as they have effect in relation to other employment and other employees and workers.
>
> (2) This section applies to –
>
> a. …
> b. Part V, apart from section 45 (*whistleblowing*),
> c. …
> d. …
> e. Part X, apart from section 101 (*unfair dismissal*),
> f. …

46. In terms of the wording of s192, the notes to s192 in the ERA state as follows:

> "As s31 of the Trade Union Reform and Employment Rights Act 1993 has not come into force before the commencement of [the ERA], [the ERA] shall have effect until the relevant commencement date as it for section 192 there were substituted the words expressed in Schedule 2 Part II paragraph 16(1) of [the ERA]. The relevant commencement date is defined by Schedule 2 Part II para 16(2) of [the ERA]".

47. Therefore, the relevant version of s192 is as follows, from Schedule 2 Part II paragraph 16(1) of the ERA:

> 192 Armed forces
>
> Section 191 –
>
> (a) Does not apply to service as a member of the naval, military or air forces of the Crown, but
>
> (b) Does apply to employment by an association established for the purposes of Part XI of the Reserve Forces Act 1996.

48. In summary, the legislation as it currently stands means that members of the Armed Forces cannot bring claims for unfair dismissal or for whistleblowing.

Regarding the Equality Act 2010

49. The following legislation under the EqA is relevant to this matter:

> 120 Jurisdiction
>
> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to –
>
> a. A contravention of Part 5 (work);
> b. A contravention of section 108, 111 or 112 that relates to Part 5.
>
> 121 Armed forces cases

(1) Section 120(1) does not apply to a complaint relating to an act done when the complainant was serving as a member of the armed forces unless –

a. The complainant has made a service complaint about the matter, and
b. The complaint has not been withdrawn.

50. The claimant entered two service complaints, one on 14 March 2024, one of 25 March 2024 – at [76] and [86] respectively. As such, she had a live service complaint at the time of presenting her claim form, which remains live and has not been withdrawn.

51. As such, the claimant satisfies the exception within s121 EqA, meaning that the Tribunal has jurisdiction to deal with any complaint the claimant has under the EqA, subject to time limit issues. As to the law on time limits, see further below.

Amendment applications

52. The rule dealing with amendment applications is rule 30 of the Employment Tribunal Procedural Rules 2024:

(2) 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.

(3) The particular powers identified in these Rules do not restrict that general power.

(4) …"

53. The power to make or allow an amendment to a claim falls within this general case management power.

Time limits under the Equality Act 2010

54. In terms of time limits, the following sections apply:

121 Time limits

(1) …

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

a. The period of 6 months starting with the date of the act to which the proceedings relate, or
b. Such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

a. Conduct extending over a period is to be treated as done at the end of the period;
b. Failure to do something is to be treated as occurring when the person in question decided on it.

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

a. When P does an act inconsistent with doing it, or

b. If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

55. The claimant was discharged on 20 March 2024; I therefore take this date as the last date on which any victimisation can be said to have occurred. As such, the claimant should have presented her claim by 19 September 2024.

56. Although the claimant entered into the ACAS early conciliation ("EC") process prior to this date, the extensions given as a result of the ACAS EC process that usually apply to claims under the EqA specifically exclude claims brought by members of the Armed Forces. See s140B:

> 140B Extension of time limits to facilitate conciliation before institution of proceedings
>
> (1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

57. By virtue of expressly stating its application to s123(1)(a) (non-armed forces claims), s140B excludes claims which fall under s123(1)(b) (armed forces claims). As such, engagement in the ACAS EC process does not assist the claimant in terms of time limits for any EqA claim.

58. As such, the victimisation claim contained within the claim form was presented outside the primary time limit, meaning I need to consider whether to extend time under s123(2)(b).

Relevant case law

Amendment

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

60. The Employment Appeal Tribunal ("EAT") has recently reviewed the case-law on amendments in the case of MacFarlane v Commissioner of Police of the Metropolis 2023 EAT 111. In that case, the EAT confirmed that the three relevant factors are:

    60.1. the nature of the amendment;
    60.2. the applicability of time limits; and,
    60.3. the timing and manner of the application.

61. The overarching principle is the balance of injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT highlighted that the focus must be on the substance of the amendment, not its legal form. In terms of time limits, these should not be determinative, however the further away in substance the new claim is from the original claim, the more weight a tribunal may attach to the issue of time limits.

Nature of application

62. The case of Selkent Bus Co Ltd v Moore [1996] IRLR 661 sets out a non-exhaustive list of factors (not to be treated as a checklist, but as guidance) to consider in relation to an amendment application, the first being the nature of the amendment. At paragraph (5)(a), the EAT held:

> "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 determine whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action".

63. In determining which type of application the Tribunal is dealing with, the EAT has provided helpful guidance in the case of Foxtons Ltd v Ruwiel UKEAT/0056/08 at paragraph 12, as follows:

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

Time limits

64. Once the nature of the amendment has been determined, the Tribunal must also consider the applicability of time limits. Only in a case of an amendment that changes the basis of the existing claim are time limits relevant.

65. An application to amend must be considered on the facts and circumstances as they stood as at the date of the application - Selkent. In turn, this means that the question of time limits must be considered with reference to the date of the application, as opposed to the date of the original claim form.

66. If the date of the application leads to the conclusion that the amended claim is, on the face of it, out of time, the Tribunal may need to consider whether the relevant extension provisions apply. In the case of Galilee v Commissioner of Police of the Metropolis [2018] ICR 634, it was held that the Tribunal need not decide whether time limits should be extended at this stage of proceedings. It is possible to permit an amendment, subject to the time limits issue which can be determined at a final hearing – Galilee, followed by Reuters Ltd v Cole UKEAT/0258/17 and Szymoniak v Advanced Supply Chain (BFD) Ltd EAT 0126/20.

Timing and manner of application

67. The Tribunal needs then to consider the timing and manner of the application and, in particular, why the application was not made earlier. In Martin v Microgen Wealth Management Systems Ltd EAT 0505/06, the EAT held that the longer the delay in making the application, the greater the likelihood that the balance of injustice and hardship will weigh in favour of rejecting the application. However, case-law makes it very clear that there will be cases in which amendment applications will be delayed, and yet should be permitted to proceed – for example, Ahuja v Inghams 2002 ICR 1485 CA.

68. The EAT in Ladbrokes Racing Ltd v Traynor EATS 0067/06 set out factors for the Tribunal's consideration regarding the timing and manner of amendment applications – paragraph 20:

    68.1. The reason why the application was made when it was, and not earlier;

    68.2. Whether the timing of the application means that there will be delay in the litigation and whether additional costs are likely to be incurred due to that delay, or due to the need for a longer final hearing. The risk of additional costs is particularly relevant if a party is unlikely to recover them;

    68.3. Whether any delay would impact the ability of the respondent to obtain the relevant evidence to defend the new claim, or the quality of that evidence.

Balance of injustice and hardship

69. Ultimately, the key issue is the balance of injustice and hardship in allowing or refusing the application – In Vaughan v Modality Partnership [2021] IRLR 97, EAT (paragraph 21):

> "Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding".

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

Time limits

71. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the Tribunal.

72. It is well established that, despite the broad scope of the "just and equitable" test, it remains the case that time limits should be applied strictly, and to extend time remains an exception to the rule – Robertson v Bexley Community Centre [2003] EWCA Civ 576. The burden is therefore on the claimant to demonstrate to the Tribunal that time should be extended.

73. However, HHJ Tayler, in the case of Jones v Secretary of State for Health and Social Care 2024 EAT 2, remarked that the comments from Robertson are often cited out of context by respondents. He held that Robertson in fact is authority for the principle that the Tribunal has a wide discretion when it comes to the "just and equitable" test; Auld LJ's comments in Robertson should be reviewed within that framework and not taken out of context.

74. The Tribunal's discretion is wide: the Court of Appeal ("CA") commented in recent years that "Parliament has chosen to give the employment tribunal the widest possible discretion" - Abertawe Bro Margannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

75. The EAT in the case of Miller and ors v Ministry of Justice and ors EAT 003/15 held that the prejudice suffered by the respondent in having to answer an otherwise time barred claim is of relevance to the Tribunal's decision.

76. The accepted approach to be taken to exercising the Tribunal's discretion is to take into account all the factors in a particular case that the Tribunal considers relevant, including the length of and reasons for delay – Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – Lupetti v Wrens Old House Ltd 1984 ICR 348.

77. The Tribunal must consider the balance of prejudice to the parties if the extension is granted or refused – Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.

78. In terms of ignorance of rights as reason for delay, this will only weigh in favour of an extension of time being granted where the ignorance is reasonable. This requires the Tribunal to consider not whether the claimant in fact knew about her rights, but whether the claimant ought to have known about her rights (and associated time limits) – Porter v Bandridge Ltd 1978 ICR 943.

79. In terms of the existence of an internal process being a reason for delay, this has been considered in relation to consideration of the ERA time extension provisions of whether it was "not reasonably practicable" to present the claim in time. In that context, an internal process that is yet to be exhausted is not sufficient reason on its own to permit an extension of time – Palmer and anor v Southend-on-Sea Borough Council [1984] ICR 372, CA. When looking at time limits through the prism of the EqA "just and equitable" provisions, the existence of an internal process is a factor that may be placed into the melting pot of factors for the Tribunal to consider.

Conclusions

Employment Rights Act 1996 jurisdiction

80. As set out above, the current law does not enable the Tribunal to determine cases under the ERA brought by members of the Armed Forces.

81. In other words, the Tribunal does not have jurisdiction to deal with the claimant's complaints of unfair dismissal and whistleblowing under the ERA. These claims will be struck out for lack of jurisdiction.

Amendment application – race discrimination

82. In terms of the complaint as put forward by the claimant today, the only claim that could be subject to an amendment would be a direct race discrimination claim on the basis that the claimant suffered less favourable treatment because she is black, that unfavourable treatment being:

82.1. Sgt Martin's statement "you don't belong here"; and

82.2. A catalogue of alleged poor treatment which arose following the claimant reporting fraternization. This treatment was meted out by numerous of the claimant's colleagues, over several weeks. The precise details are still not quite clear to me.

Nature of the amendment

83. This is a new claim on the face of the claim form as it was presented to the Tribunal. There is nothing in the detail within the original claim form that would suggest that a race discrimination claim was intended to be presented.

84. As such, this is, in the words of the EAT in Selkent, "the making of entirely new factual allegations which change the basis of the existing claim". As such, time limits become relevant (see below).

Time limits

85. The application to amend the claim was made at the hearing today, as a result of me explaining that, in order to complain about all the matters said to be race discrimination the claimant revealed today, she would have to formally make an application to amend such a claim.

86. This hearing is taking place over a year after the claimant's discharge on 20 March 2024. Given that the time in which one must raise a claim against this respondent is six months, and taking 20 March 2024 as the last possible date on which any unlawful act could have happened, any amended claims would be approximately 7 months out of time as of today's date.

87. There is no good explanation for this delay. The claimant was perfectly able to set out a narrative of complaints within her service complaints in March 2024, and again orally to me today. It is not clear why that detail was not set out within the ET1 at the time of its presentation in April 2024.

88. I do not have sufficient evidence before me to determine the issue of time limits: namely, whether it would be just and equitable to extend the time for serving a claim in order to permit the claimant's claim of race discrimination to continue. As it stands, the claim is out of time, subject to that issue.

89. If I were to allow the amendment, the issue of time limits would remain live at the final hearing, and would need to be determined at that point. The fact that this claim was presented outside the primary limit is relevant to my assessment of the merits of the claim. If I consider that there is little chance of the claimant satisfying the Tribunal that time should be extended, then this would weigh against permitting the amendment.

Timing and manner of the application

90. As set out above, the application was made at today's hearing, following my indication that the claimant would need to apply to amend her claim to include a claim of race discrimination if she sought to include such a claim.

91. The application is not clear. The specific acts that are said to have been done on the basis of the claimant's race and the identity of the alleged perpetrator of each act, are not clear, other than the allegation against Sgt Martin stating words including "you don't belong here".

Balance of injustice and hardship

92. First I consider the hardship and injustice to the claimant if her application is not permitted. The claimant, in that scenario, would be prevented from pursuing a claim of race discrimination, meaning that she would also lose the possibility of being awarded a sum of money for injury to feelings, and any financial losses flowing from the discrimination. However, it is at this stage that I can take into account the prospects of a tribunal extending time limits to allow this claim to proceed. I consider that there is little chance of a tribunal extending those limits and accepting jurisdiction. As such, the claim has low prospects on the time limits point alone. There is little prejudice in being prevented from pursuing a claim that has little merit. The chance of being awarded any sum of money if the claim were permitted to proceed is a relatively slim one on the sole basis of the claim being out of time.

93. Furthermore, the claimant has a live service complaint. If the complaint is upheld, the claimant has a possible route to claim some financial compensation as a result of that outcome.

94. I next consider the hardship and injustice that would be experienced by the respondent if the amendment were to be permitted. The facts of the alleged race discrimination do have some cross-over with the claimant's service complaint, which I understand is concluding in a few weeks. The respondent will therefore have had to investigate the allegations in some form during the life of that service complaint. The respondent's representative conceded that he could not say that the respondent was not aware of some of the issues involved in this race allegation.

95. However, the respondent says that the complaint of race discrimination made today is vastly different to that contained within either of the two service complaints. It is, today, put as a systemic race claim, in which many people are implicated. The claim as it is now put is not simply a copy of the service complaint.

96. It is therefore the position that the respondent would need to do further investigation, provide further instructions to its legal team, and present more evidence (both documentary and oral evidence) to the Tribunal at the final hearing. The addition of a race discrimination claim also expands the issues which a tribunal would need to consider and determine, meaning that submissions would need to be more detailed and the hearing would inevitably take longer than without the amendment. Therefore, the respondent will incur more costs in defending this claim. Those costs are very unlikely to be recoverable from the claimant given her personal circumstances.

97. Taking all the above matters into account and weighing up the balance of hardship and injustice, I conclude that the balance favours rejecting the application to amend to include a race discrimination claim.

Amendment application – victimisation

98. In terms of victimisation, the only victimisation claim that is apparent on the claim form is as follows:

    98.1. One alleged protected act – the claimant's reporting of sexual fraternising, and her subsequent reporting that a colleague (Corporal Thompson) knew of this fraternising and condoned it;

    98.2. Three alleged detriments:

        98.2.1. Being barred from medical attention;
        98.2.2. Having her medical appointments cancelled; and
        98.2.3. Discharge.

99. From the narrative and answers given by the claimant today, the only matter that could be said to be a victimisation claim requiring amended is one protected act giving rise to one detriment as follows:

    99.1. Protected act – verbally saying to RSM Vincent "Sir, I have felt what it means to be black"";

    99.2. Detriment – an omission by RSM Vincent, in failing to inform the OC of the claimant's poor treatment, and in failing to look into the matter further.

100. Although the claimant informed me of other matters which could potentially amount to protected acts, no detriment is said to have arisen from them.

Nature of amendment

101. There is already a victimisation claim on the face of the claim form. However, the suggested amendment is an entirely new factual allegation. As such, I consider this amendment would be one within the Selkent description that requires the consideration of time limits, being an entirely new allegation.

Time limits

102. The same issues arise in respect of the victimisation claim as they do for the race discrimination claim set out at paragraphs 85 to 89 above.

Timing and manner of application

103. As for the race discrimination claim, the application to amend was made today. The factual basis of the victimisation claim was new today, and was not provided in writing. Following the claimant's narrative and answer to my questions, I have framed the facts of the proposed claim into the most suitable legal framework.

Balance of hardship and injustice

104. The above paragraphs 92 to 93 apply to the proposed amendment to include this victimisation claim in terms of the hardship to the claimant if the application were to be rejected.

105. In terms of hardship to the respondent if there application were to succeed,

this claim is fairly discrete, unlike the race discrimination claim. However, given that the factual basis of the claim is new, the respondent would be required to explore the allegation, and again provide further evidence and submissions to meet this amended claim. This would lead to more costs being incurred by the respondent.

106. I conclude that the balance of hardship and injustice weighs in favour of rejecting the application.

Time limits

Length of delay

107. This point is relevant to the victimisation claim that is apparent on the claim form as set out at paragraph 98 above. That claim form was presented on 16 October 2024. As above, taking the last date on which any detriment can be said to have occurred as the date of discharge (20 March 2024), the claim should have been presented by 19 September 2024. As such, the claim is just short of one month out of time.

Reason for delay

108. In terms of the reason for the delay, I have been given no good reason for the delay in presenting the claim. The claimant explained that she approached ACAS to complete early conciliation when she came to the conclusion that she was not going to get any help internally from the respondent; the ultimate catalyst being a comment from her therapist. However, this argument makes little sense, given that, at that time, the claimant had two live service complaints that were still in the process of being determined. It is therefore not the case that she had a negative answer from an internal process that prompted her to start the ACAS process, or indeed to present the claim form: she had not yet had any answer to her complaints. This is not a case analogous with the scenario in which a claimant is waiting for the outcome of an appeal and then presents their claim once their appeal is rejected. In other words, it is unclear to me what changed and prompted the claimant to approach ACAS, and then what prompted her to enter the claim form when she did.

109. I further note that, if the claimant had presented the claim form on 18 September, the time at which she says she decided that the respondent was not going to assist her, her claim would have been in time.

110. There is before me no good explanation as to the delay between 18 September (ACAS early conciliation start date) and 16 October 2024 (date of presentation of the ET1). The claimant made reference to needing some medical attention, but I have no further evidence on this point. In any event, she was well enough to produce two detailed service complaints and go through the ACAS early conciliation process before the expiration of the relevant time limit.

111. The claimant to some extent relies on a lack of knowledge of the Tribunal procedure and specifically time limits. She told me in answer to my questions that she had seen reference to “something less a day”, but did not understand it. To see information about time limits, and not take any further steps to understand what those time limits are, is not reasonable. There is copious

information available on the internet regarding time limits for those who take reasonable steps to explore that information. As such, I conclude that the claimant's ignorance of time limits was not reasonable. On obtaining knowledge of the existence of time limits, she ought to have taken steps to better understand the meaning and relevance of those time limits.

112. I therefore conclude that there was no reasonable impediment preventing the claimant presenting her claim form within the primary time limit, before 16 October 2024.

Balance of prejudice

113. Considering the balance of prejudice, the claimant will obviously suffer the prejudice of not being able to pursue a claim before the Tribunal if time limits are not extended on this victimisation claim. It is the only claim that, following my decisions on jurisdiction and amendment, could survive.

114. However, as above, the claimant does have the possibility of some financial recompense if her service complaint is upheld. I also consider that the claim has little merit, given that the alleged protected act (reporting fraternising and a corporal knowing of that fraternising) does not fall within the definition of protected act under s27(2) EqA. As I have explained above, there is little prejudice in not being able to pursue a claim with little merit.

115. In terms of prejudice to the respondent if time limits were to be extended, the respondent suffers the prejudice of having to defend a claim to which it has a legitimate limitation defence. That prejudice is true in every claim which is presented out of time, but still holds weight.

116. Taking all the above matters into account, I consider that the balance of prejudice weighs in favour of refusing to extend the primary time limit.

Summary conclusion

117. As a result of the findings and conclusions above, the claimant has no live claims left before this Tribunal. Her claims are struck out in their entirety as set out in the above judgment.

Approved by

Employment Judge Shastri-Hurst

Date 21 May 2025

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

8 July 2025

FOR EMPLOYMENT TRIBUNALS

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