Neutral Citation Number: [2025] EAT 114

Case No: EA-2024-001020-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 8 August 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

CX

Appellant

- and –

SECRETARY OF STATE FOR JUSTICE

Respondent

- -
- -

Declan O'Dempsey (instructed through **Advocate**) for the **Appellant**
Iraani Shrivastava (instructed by **TLT LLP**) for the **Respondent**

Hearing date: 26 June 2025

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Amendment

Following her dismissal for the given reason that she had failed her probation, the claimant presented a tribunal claim. There were complaints of unfair dismissal (but the claimant lacked qualifying service) and of detrimental treatment and/or dismissal by way of direct discrimination and/or harassment, relating to sex and belief (veganism), and of victimisation. There were two preliminary hearings at which the specific complaints were discussed and confirmed, and at one of which an amendment was allowed adding overlapping whistleblowing dismissal and detriment complaints.

Following disclosure, the claimant applied to amend to introduce complaints of discrimination arising from disability and failure of reasonable adjustment, by reference to depression and anxiety. She relied on a disclosed OH report and HR advice, which indicated that she was likely in law to be regarded as disabled, and could seek to complain of disability discrimination. The tribunal accepted that she had not appreciated previously that mental ill health could in law amount to a disability. The tribunal refused the application to amend. The claimant appealed against that decision.

The tribunal did not err by failing to conclude that the proposed amendment would involve no more than a mere relabelling. It reached proper conclusions that allowing it would expand the legal and factual enquiry, and as to the associated hardship to the respondent. It also did not, wrongly, hold that the claimant should have applied to amend sooner, despite accepting that she had not been aware that mental ill health could amount to a disability. Rather, it properly took into account how she had previously advanced her factual case compared with the factual basis of the proposed amendment. The tribunal's reasons also sufficiently explained that it had considered the claimant's explanation for the delay in putting forward her application to amend, following disclosure, but that it did not regard that explanation as good reason for the delay. Finally, the tribunal did not err by failing to take into account the disadvantage to the claimant of losing the opportunity to secure a declaration that she had been the victim of disability discrimination, were the amendment not to be allowed.

HIS HONOUR JUDGE AUERBACH:

Introduction and Litigation History

1. I will refer to the parties as they are in the employment tribunal, as claimant and respondent. The claimant appeals from the decision of EJ Shastri-Hurst, in a video-case management hearing at Reading, refusing the claimant's application to amend her claim. The relevant background is this.

2. The claimant was employed by the respondent as a prison officer from 16 November 2020 until her dismissal on 6 December 2021 for the given reason that she had failed her probation.

3. On 19 March 2022 the claimant presented her tribunal claim, acting as a litigant in person. In section 8.1 of the claim form, concerning the type of claim being made, she ticked the boxes for unfair dismissal, sex discrimination and religion or belief discrimination. She also ticked "another type of claim". She set out, in the narrative box relating to this, an account of what she said had happened during her employment which began with the words: "Sexual Harassment & Bullying by staff members". In the narrative box in section 8.2, for "background and details of your claim", she gave an account which was substantially, though not entirely, the same as that given in section 8.1.

4. The Government Legal Department (GLD) entered a response defending the claim. They requested further particulars. In response, on 20 August 2022 the claimant sent the GLD an email, running to 30 pages, setting out a detailed narrative account of events.

5. There was a case-management hearing before EJ Manley on 6 December 2022. The matter was listed for a further case-management hearing in April 2023. The final hearing was to take place in March 2024. Directions were given. The claimant had claimed sex and religion-or-belief discrimination. She had also claimed unfair dismissal but lacked qualifying service. However, she had suggested that the claim form also contained a claim for automatic unfair dismissal for making protected disclosures; and, if that was pursued, whether that was right would need to be considered. The 30-page particulars raised matters not raised in the claim form, and did not identify which factual

allegations were the subject of substantive complaints, or proposed complaints, and which were relied upon as background. Directions were given for the claimant to give further particulars in a format intended to clarify this. In January 2023 the claimant sent a 19-page email in response.

6. On 25 April 2023 there was a second case-management hearing before EJ Manley. She identified that the claimant was now indeed also seeking to bring complaints of detrimental treatment and automatically unfair dismissal on grounds/by reason of protected disclosures. All the complaints which the claimant now sought to pursue, and the issues to which they gave rise, were discussed and identified. In so far as the claimant required permission to amend her original claim, that was granted. The minute included an agreed list of issues, setting out, by reference to each type of legal complaint, the factual complaints made, as well as time issues. The number of days allocated to the full merits hearing in March 2024 was increased. Directions were given, including permission to the respondent to table an amended response, and for lists of documents to be exchanged by 31 October 2023, a bundle to be agreed by 21 November and witness statements to be exchanged by 16 January 2024.

7. On 6 June 2023, as permitted, the respondent tabled an amended response.

8. Jumping forward to 2024, on 16 January the claimant sent her witness statement to the GLD and the tribunal. In her covering email she noted that she had applied for the parties to be allowed longer to do so. On 17 January the GLD emailed. They gave an account of the extensive exchanges there had been in relation to disclosure of documents and the bundle. They too noted that the claimant had sought an extension of time to exchange witness statements to 16 February 2024. They asked the tribunal to grant such an extension. In the meantime, they had not accessed the claimant's statement, which she had sent the day before, as they had not yet sent her their witness statements.

9. On 12 February 2024 the tribunal gave the parties notice of a preliminary hearing to take place on 8 March 2024.

10. The GLD sent the respondent's witness statements to the claimant on 16 February 2024, and,

at that point, accessed her witness statement. In her witness statement the claimant referred to a document that had been included in the respondent's disclosure, being a note of 24 November 2021 from the respondent's HR department to the prison governor. I interpose that this note stated that it had been prepared for the purposes of a formal performance review meeting, at which a decision was to be taken as to whether to dismiss the claimant at the end of her probationary period, following a first written performance warning on 17 August.

11. This note from HR also referred to an Occupational Health (OH) report of 24 August that was described as having stated that she was suffering from personal and work issues that were impacting on her emotional health and general wellbeing and that she also had a history of poor mental health and was likely to be considered as disabled. It noted that her absence from work had been dealt with separately in accordance with the attendance management process. The note went on to identify a number of possible options, including dismissal and other alternatives to dismissal, such as extending probation or an internal move. It noted that, if dismissed, the claimant could claim unfair dismissal, although she lacked qualifying service, and might seek to claim disability discrimination.

12. In her witness statement the claimant observed that, from this document it was "quite clear that, had I understood the process properly and the claims available to me, I could also have made claims for (i) disability discrimination (for failure to make reasonable adjustments) and (ii) unfair dismissal." She made further points about that, and stated that, if possible, she would like these additional claims to be taken into consideration by the tribunal, as (she argued) they should have been flagged or made clear to her by the respondent or its HR department.

13. In an email of 4 March 2024 to the tribunal and the claimant, the GLD referred to the claimant having indicated her wish to amend her claim to introduce new claims for disability discrimination and unfair dismissal. They indicated that the respondent resisted inclusion of any new matters not in the agreed list of issues, or the addition of new claims, for reasons that they set out. On 7 March they sent an email which included submissions relating to the issue of amendment.

14. The notified case-management hearing took place on 8 March 2024 before EJ Postle. There was discussion of whether, for other reasons which are not relevant to this appeal, the full hearing might have to be put off. The position was unclear, so the judge listed a further hearing for 15 March 2024. It was noted that the claimant had also raised an application to amend, which, if pursued, would need to be considered at that next hearing. She was encouraged to get legal advice in that regard.

15. On 14 March 2024 the claimant emailed the tribunal referring, among other things, to her application to amend. She advanced arguments as to why it should be permitted.

16. There was a further case-management hearing before EJ Tynan on 15 March 2024. The record noted that, for other reasons, it had been agreed that the final hearing listed for later that month could not proceed. It discussed the application to amend, noted that particulars of it had yet to be provided, and set out some guidance deriving from relevant authorities. The claimant was directed to send a marked-up copy of her original claim, highlighting the proposed amendments, by 5 April 2024, and the respondent to respond by 3 May. A further case-management hearing was listed for 23 May 2024.

17. On 28 March 2024 the claimant wrote asking for an extension of time to table her amendment application to 19 April 2024. She attached an email from the Equality and Employment Law Centre (EELC), recommending that she seek this extension to enable it to assist her. In further communications she agreed that the GLD could then table their response by 17 May.

18. On 19 April 2024 the claimant tabled the application to amend, drafted by the EELC. It applied to add complaints of discrimination arising from disability and failure to comply with the duty of reasonable adjustment, as set out in a further document headed "Further and Better Particulars of Claim". It made submissions in support. A proposed list of issues relating to the proposed new complaints was also tabled. The claimed disability was identified as depression and anxiety.

19. The matter then came before EJ Shastri-Hurst at the hearing on 23 May 2024. The claimant

represented herself. The respondent was represented by Ms Shrivastava of counsel. The minute of the hearing and orders was signed on 28 May 2024, although it was not sent out until 10 July 2024. That minute records that the judge relisted the full merits hearing for March 2025. It identified that, for reasons that she had given orally at the hearing, the judge had refused the claimant's application to amend. That is the decision from which the claimant appeals. The judge also made some orders relating to anonymity of certain individuals and gave other directions.

20. The claimant presented her notice of appeal, acting as a litigant in person, on 12 August 2024. Upon considering it in January 2025, I noted that she had referred to having emailed the employment tribunal on 18 July 2024 requesting written reasons. She had provided an image of such an email to the EAT. Following enquiries from the EAT about that, the tribunal had replied at the direction of the employment judge that no such email had been found in the tribunal's inbox, the judge was not made aware of any request, and so no reasons had been given. I considered that the EAT would be assisted by sight of written reasons and so these were requested from the judge. My order was sealed on 24 January 2025. The judge then provided written reasons which were sent on 31 January 2025.

21. The appeal was thereafter considered by a judge of the EAT on paper who was of the opinion that it did not raise any arguable grounds. However, at a rule 3(10) hearing, at which Declan O'Dempsey of counsel appeared under the ELAAS scheme, permission was given for four amended grounds, tabled by Mr O'Dempsey, to proceed to a full appeal hearing. At the hearing of the appeal before me Mr O'Dempsey appeared for the claimant and Ms Shrivastava for the respondent. I was told that the full merits hearing of the existing complaints had taken place in the employment tribunal in May 2025 and the tribunal's reserved decision was awaited.

The Tribunal's Decision

22. In her written minute and orders, the judge noted that at the hearing on 8 March 2024 the claimant had raised that she was considering an application to amend, and that this had first become apparent to the respondent on reading her witness statement on or around 16 February 2024. It then

referred to the judge having rejected the application for reasons given at the hearing.

23. In her written reasons, prepared in January 2025, the judge noted that the tribunal no longer had all of the documents in storage. She had accessed the claim, response and other documents on the case-management system, but she did not have the bundle that had been provided to her at the hearing on 23 May 2024, nor the parties' written submissions. She set out the procedural history. She gave herself a detailed self-direction as to the law relating to applications to amend, citing passages from a number of pertinent authorities. I interpose that the grounds of appeal do not take issue in any respect with that self-direction, and it appears to me to have been entirely sound.

24. The judge then set out her conclusions. She began:

> **"32. I scrutinised the original ET1 claim form, which the claimant had helpfully highlighted in order to indicate the parts that she said demonstrated that there was already a disability claim within the ET1. She therefore submitted that this was a relabelling exercise.**
>
> **33. In relation to the proposed s15 EqA claim, I compared the proposed List of Issues with the original claim form. I considered that the only possible "unfavourable treatment" that could be said to be within the ET1 was the dismissal itself. The other specific alleged acts of unfavourable treatment within the proposed List of Issues were not within the ET1. Regarding the "somethings" arising in consequence of the claimant's disability, again there is mention in the ET1 of the first "something", the disability related absence, although it is not given that label. The second "something", "exercising poor judgement and being prone to making errors", is not within the ET1.**
>
> **34. In the ET1, the claimant alleged that she was "fired for not completing targets set by the time, despite the fact I had not been at work and was therefore unable". In other words, the failure to meet targets was said to be because the claimant was off sick and not at work.**
>
> **35. Therefore, the only s15 claim that could possibly be said to be present in the ET1 would be as follows: "I was dismissed because I could not meet targets, and I could not meet targets because I was off sick".**
>
> **36. That claim is not the claim set out in the proposed List of Issues, that the claimant was dismissed because of sickness absence. I was therefore not satisfied that the s15 EqA claim was there to be seen in the ET1.**
>
> **37. In terms of the ss20/21 EqA claim, and taking first the alleged provisions, criteria or practices ("PCPs"). The only PCP that may be apparent on the face of the ET1 was Number 11 on the proposed List of Issues: "a requirement that individuals improve their performance despite being absent from work".**
>
> **38. The respondent pointed out to me that the substantial disadvantage is more complex than just the allegation that the claimant was dismissed. Counsel's submission was that it must be that the claimant was saying she was more prone to being off work than someone not disabled, and so was more likely not to be able to comply with the PCP, and so was more likely to be dismissed.**
>
> **39. I was not satisfied that the failure to make reasonable adjustments claim was present in the original ET1, given the specific way in which it was now pleaded in the proposed List of**

> **Issues compared to what is written within the ET1.**
>
> **40. I therefore concluded that the amendments sought fall within the "Selkent 3" category of being wholly new claims. As such, it was therefore necessary for me to consider the effect of the statutory time limits for presenting claims to the Tribunal."**

25. The judge then considered the impact of time limits. She held that the earliest it could be said that the amended claim was presented was at the time of the original application on 14 March 2024, so the application would be significantly out of time – by some two years and three months, or slightly less, in so far as it related to the claimant's internal appeal against dismissal. The judge did not seek to resolve the issue of whether it would be just and equitable to extend time, as she said she was not required to do so. However, this jurisdictional hurdle was a factor that could weigh in the balance.

26. The judge then considered the timing and manner of the application. She said this.

> **"44. The claimant explained that she made the application as soon as she understood that her depression could amount to a disability at law. This became clear to her at the time of disclosure of the Occupational Health reports in November 2023. Up until that point, the claimant told me that she did not understand that she could bring a claim based on her depression.**
>
> **45. Despite informing the Citizens Advice Bureau of her depression, the adviser did not pick up on the potential claims when assisting the claimant with her ET1 form.**
>
> **46. The claimant had, by this time, taken part in several preliminary hearings at which the issues and her complaints were discussed. She did not raise that she wished to complain about treatment she suffered related to her depression. The claimant told me that this was because she did not understand that she could just say to a Judge something along the lines of "what about this part of the ET1, you have not dealt with that".**
>
> **47. As set out above, the possibility of this application was first mentioned in the preliminary hearing with Employment Judge Postel on 8 March 2024, some four months after the relevant Occupational Health disclosure was given to the claimant. When asked why she had not raised the matter earlier, after the November 2023 disclosure, the claimant told me that she had various matters going on in her personal life. She was balancing those matters with the need to progress this litigation and deal with matters of evidence around the end of last year.**
>
> **48. I accepted that discrimination claims can be extremely difficult for litigants in person to grapple with and formulate: this is true for many legal professionals as well. The nature of the legislation does not always make it easy for a litigant in person to formulate their claims. I further accepted that the claimant may well have thought that the Judges she has dealt with, as well as the respondent, were better placed than she was to label her complaints with the relevant legal tags.**
>
> **49. However, the claimant has been very good at setting out in detail her complaints. She had done so in numerous pages before the Tribunal in this claim. Yet, despite mentioning her sickness absence and various other nods to sick leave, she had not raised in any of the first three preliminary hearing that she thought she had suffered certain treatment in relation to or caused by her depression.**
>
> **50. I further accepted that the claimant was not aware that depression could be a disability under the EqA until November 2023. However she then left it four months before making an**

> **application to amend.**
>
> **51. I was not satisfied that there was a good reason for the delay in bringing the application, when the requisite knowledge was obtained by the claimant approximately four months before the application was made."**

27. The judge continued her reasons under the heading "Balance of injustice and hardship". She noted that all directions for the final hearing had been complied with, the bundle had been finalised, subject only to needing some redactions, and witness statements had been exchanged.

28. At [53] – [58] the judge considered the injustice and hardship to the respondent were the amendment to be permitted. If, to accommodate the amendment, the six-day listing had to be increased to nine days, the relisting could still be in Spring 2025. However, the respondent submitted that the issue of disability would need to be addressed, further witness statements would be needed, and up to three additional witnesses called. The new claims would still add three days to the final hearing and the issue of disabled status would probably need to be addressed at a preliminary hearing, and further disclosure required, at least of medical evidence. Witnesses' memories would fade. The judge accepted that more work would need to be done and she accepted the cogency of the argument regarded witness memories, as, although there was some factual cross-over, not all of the allegations that were the subject of the amendment would have been previously discussed with them, and they would, for the first time, be recollecting matters "through the prism of disability discrimination."

29. As to the hardship and injustice to the claimant of refusing the amendment, the judge said:

> **"59. Conversely, in the event the application was refused, what would the real prejudice to the claimant be? In the words of Tayler J, would the amendment be necessary to advance an important part of her claim?**
>
> **60. The claimant argued that she should be permitted to raise and argue her claims relating to depression. The practical effect would be that she would be able to seek another route to remedy via a disability claim.**
>
> **61. With the claims as they currently stand, the claimant has various discrimination, victimisation and whistleblowing claims. If those are found by the Tribunal to be well-founded, she will receive an appropriate remedy by way of financial award. The existing claims relate to dismissal, however due to the nature of her claims, the claimant's remedy is not limited to the statutory cap. She therefore already has the ability to claim the types of sums that may be awarded in disability discrimination claims, as well as the ability to claim an award for injury to feelings.**

> **62. I understand that, when a claimant considers that they have been treated badly by their ex-employer because of several factors, and one of those factors is not dealt with by the Tribunal, that is a form of injustice and hardship. However, this amendment is not necessary to enable the claimant to fully argue her existing claims.**
>
> **63. I therefore accepted that there is no more prejudice beyond the standard prejudice to a claimant being refused the ability to argue all their complaints before the Tribunal."**

30. The judge concluded that, weighing the factors for and against permitting the application, the balance weighed in favour of rejecting the application.

The Grounds of Appeal, Discussion, Conclusions

31. Before turning to each of the grounds of appeal I remind myself of two things. First, the tribunal's decision involved the exercise of a judicial discretion, by an evaluation of all the relevant circumstances, and a weighing of the balance of hardship or prejudice to each party of deciding either way. There is no criticism of the tribunal's self-direction as to the law. The EAT can only intervene if it nevertheless plainly did not apply it, reached a perverse decision, took into account an irrelevant factor, overlooked a relevant factor, or contradicted itself; or if it failed to give sufficient reasons.

32. Secondly, the tribunal's reasons are to be read fairly as a whole, including in light of its self-direction as to the law. In this case I also bear in mind that reasons were given orally at the time, and that the judge, as described, did not have access to all the original materials when producing her written reasons many months later, in response to a request to assist the EAT.

Ground 1

33. Ground 1 contends that the tribunal erred in concluding that the proposed amendment did not involve a relabelling exercise, as the ground puts it, "*per* Selkent 2". It contends that, having regard to the terms of the claim form described in the tribunal's reasons at [33] – [37], the tribunal should have concluded that the proposed amendment was (merely) a new classification of the cause of action, linked to, or arising out of, the same facts as were raised by the original claim. It is contended that, as a result, the tribunal also erred in weighing the balance of hardship.

34. In **Selkent Bus Co Limited v Moore** [1996] ICR 386 the EAT listed three particular, non-exhaustive, relevant factors, when a tribunal is deciding an application to amend a claim, being the nature of the amendment, the applicability of time limits and the timing and manner of the application. In relation to the first, it noted that applications may range from those involving the correction of clerical or typing errors, addition of further factual details to existing claimed facts, or relabelling of already-pleaded facts, to the making of entirely new factual allegations which will change the basis of the pleaded claim. The EAT continued that the tribunal will have to decide whether the amendment sought is one of the minor matters or a substantial amendment pleading a new cause of action.

35. But it is clear that these examples were not, and could not be, rigid categories. They were given as illustrative of the "range" of applications to amend which "are of many different kinds". As the EAT said earlier in the same decision, the tribunal should always "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." This has been repeated a number of times in the three decades following, by both the EAT and the Court of Appeal. As part of his discussion of the same point in **Abercrombie v Aga Rangemaster Ltd** [2013] EWCA Civ 1148; [2014] ICR 209 at [48] Underhill J (Kitchin LJ and the Chancellor concurring) said:

> **"… the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."**

36. A number of more recent EAT decisions have again emphasised this point. The danger of the approach of formal classification is that whether, for example, the proposed amendment involves the introduction of a new cause of action may not necessarily be a reliable guide to what the practical impact of it would be on the scope of the substantive enquiry and the future conduct of the litigation. In the present case the tribunal did consider that this proposed amendment was, as it put it, in the category "Selkent 3" – so not, as this ground of appeal would have it, "Selkent 2". But in its self-direction the tribunal recognised the overarching principle of the balance of hardship or injustice, and

the need to focus on the substance of the amendment, not its legal form. Similarly, what matters on appeal is whether the tribunal was wrong in its appraisal of the practical implications of allowing the amendment for the litigation.

37. Mr O'Dempsey submitted that in the present case the essential factual territory had already been pleaded. The original claim form conveyed the claimant's case that she had not made targets because she had been off sick. That was the factual essence of the section 15 complaint that she was now seeking to introduce, and of the corresponding reasonable-adjustment complaint.

38. The tribunal, he contended, had wrongly relied on a poorly-expressed part of the proposed additional list of issues, rather than focussing on the pleadings. That led it, wrongly, to treat the premise of this proposed new claim as being that the claimant had been dismissed for poor attendance. Further, the tribunal was already going to have to decide what were the reason or reasons for the dismissal, in order to determine the other live complaints. Adding a new cause of action would not have materially widened the factual enquiry in that respect. The proposed reasonable-adjustment claim relating to dismissal was also in the same factual territory as the proposed section 15 claim.

39. My conclusions are as follows.

40. First, I do not think the tribunal was led astray by focussing on the proposed list of issues relating to the proposed new claims, rather than the terms of the amendment itself. These were drafted and presented as a pair, and the latter appears to me to have substantially reflected the former.

41. Secondly, the tribunal correctly recognised at [35] that the original claim form included a factual complaint that the claimant was dismissed because she had not met targets within time, and she could not make her targets because she had been off sick. But it also correctly identified that the proposed section 15 complaint sought to rely upon two matters as "something arising" from disability, because of which she had been subjected to unfavourable treatment, expressed as "disability related-absence" and "exercising poor judgment and being prone to making more errors and mistakes".

42. The distinction between being dismissed because of a poor record of absence (which may be claimed to have arisen in consequence of disability) and because of failing to meet performance targets on time (which may be said to have arisen in part because of absence which arose in consequence of disability) was one of real substance, as is the distinction between failing to meet performance targets within time, and other criticisms of an employee's substantive performance. The respondent's case was that the claimant was not dismissed because of her absence record, but because of conclusions about issues to do with aspects of her performance during her probation period, including following an earlier performance warning. What the tribunal said at [36] was supported by the proposed new list of issues having identified one of the matters amounting to "something arising" as being "disability-related absence", which in turn reflected the terms of the proposed amendment.

43. That said, the PCPs which the claimant sought to rely upon for the purposes of the proposed reasonable-adjustment claim were expressed as including not only "a sickness absence policy which fails to discount absences which arise in consequence of disability" but also "a requirement that individuals improve their performance despite being absent from work." However, the tribunal did take on board specifically this strand of the proposed reasonable-adjustment complaint at [37]. But it also properly identified at [38], that a further potential issue in relation to that complaint would be whether the claimant was more prone to absence on account of mental ill health. In relation to the reasonable-adjustment complaint that would go to the "substantial disadvantage" issue. In relation to any similar section 15 complaint that would go to an "arising in consequence" issue.

44. Having regard to that, I do not think that the tribunal materially erred in its appraisal of the overall extent to which the proposed amendment departed from the original pleadings, in a way that would, were it allowed, take the parties and the tribunal into materially new factual and legal territory.

45. Even in relation to the factual proposition – which, as the tribunal recognised, was in the original claim form – that the claimant was dismissed because she failed to meet performance targets

on time, and that she was unable to do so because of sickness absence, it does not follow that the tribunal erred by not concluding that the addition of section 15 and reasonable-adjustment complaints in that regard would not have materially enlarged the legal and factual enquiry.

46. That is, in particular, because the claimant was seeking to add complaints of disability discrimination for the first time. That immediately gave rise to a potential issue as to whether she was at the relevant times a disabled person. Further, hitherto the thrust of the factual complaint had been that treatment by the respondent had itself adversely affected the claimant's mental health (which the tribunal had identified as potentially going to remedy, should some or all of her complaints succeed). The amendment, however, sought to contend, further, that she had a long-term underlying mental-health disability dating back to well before she started with the respondent. The respondent had specifically raised that this would give rise to a need for further disclosure of the claimant's medical records, and require further hearing time to determine, possibly at a preliminary hearing.

47. More generally, the respondent had raised that these proposed new complaints were not confined to the dismissal; and they would give rise to further issues about whether, or when, if the claimant *was* disabled, the respondent knew or ought to have known this, what impact her disability (if found) had on her absence and/or the matters of performance on which the respondent claimed to have relied; and factual, and knowledge-issues, in relation to causation and/or disadvantage.

48. In light of all of that, it appears to me that the tribunal properly concluded, at [53] to [58], that permitting the proposed amendment would have a significant impact on the litigation, and cause material disadvantage to the respondent, in terms of the legal and factual enquiry, having regard to its impact on disclosure, the scope of witness evidence, the need for additional witnesses, the problem of fading memories, and the implications in terms of time and cost that would need to be spent in further investigation, preparation and hearing time. These conclusions were not perverse and the tribunal properly regarded these as all being factors weighing on the respondent's side of the scales.

49. Ground 1 therefore fails.

Ground 2

50. Ground 2 contends that the tribunal erred by failing to take into account a material factor relating to the timing of the amendment application, being the claimant's explanation for the delay between late 2023, when she became aware of the possibility of a disability discrimination complaint, and March 2024, when the amendment application was tabled. Alternatively, it is said to have failed to give sufficient reasons in this regard. While the tribunal did refer, at [47], to the claimant having spoken of "various matters going on in her personal life", Mr O'Dempsey argued that it erred by failing to set out what these were, and/or what weight it had or had not attached to them.

51. In argument, Mr O'Dempsey also submitted that it was not quite right that this period of delay had been as much as four months. In particular, his understanding from the claimant was that, while lists of documents had been exchanged in November 2023, and an electronic bundle provided on 15 December, she had only been able to consider, and appreciate, the significance of the HR memo, and the OH report, when she got the hard copy documents on 19 December 2023. However, despite the efforts of both counsel before me, to piece together what EJ Shastri-Hurst may have been shown or told about this aspect, I do not think I can safely consider this ground other than on the basis of what her reasons record about the understanding that she had.

52. Returning to the ground itself, Mr O'Dempsey set out in his skeleton argument a list of factors explaining the delay, which the claimant had told him she had also conveyed to the tribunal judge at the hearing. He acknowledged in oral submissions that, in the absence of a note or record from the judge, he could not invite me to rely upon the claimant's recollection; but his point remained that it was the lack of a list along such lines in the judge's own reasons which meant that they were defective.

53. What is clear from [47] is that the claimant was indeed given the opportunity to put forward an explanation for the delay in raising the application, and that she did put forward such an

explanation. The judge described that overall explanation as "various matters going on in her personal life" and also that she was balancing these matters with "the need of progress this litigation and deal with matters of evidence around the end of last year". The content of this paragraph therefore shows that the tribunal did register, and consider, the claimant's explanation.

54. Further, I note that the tribunal's broad description of that explanation does appear to me to be apt to cover the particular matters that Mr O'Dempsey set out in his skeleton that the claimant recalled having raised. Most, if not all, of these can fairly be described as matters "going on in her personal life"; and he also referred there to her "battling" to get evidence included, having sent the respondent "numerous emails" from 15 December 2023 and, over the Christmas period, "28 emails". That would appear to me to be covered by the tribunal's reference to her reliance on having also needed (as she saw it) to "deal with matters of evidence around the end of last year".

55. True it is that a stranger reading the decision, and who had not been present at the hearing, would not know more about the particular factors relied upon by the claimant than the tribunal had set out at [47]; but the first audience for the decision were the parties themselves, who were present or represented at the hearing, and so did know what she had relied upon; and the decision conveyed that the judge had not overlooked to consider that explanation.

56. Nor do I consider that the reasons were flawed because they failed to say more about what weight the judge attached to the explanation. It is clear from paragraphs [47] – [51] that the judge did not consider that it was a good reason for the delay, having duly taken into account the difficulties that litigants in person may face in articulating their complaints in legal terms, but also the degree to which this claimant had been able in the past to set out the detail of her complaints. That conveyed that the judge was not persuaded that the explanation had material weight, and why. That was sufficient and proportionate in the context of this being just one strand of the overall decision.

57. Ground 2 therefore fails.

Ground 3

58. Ground 3 contends that the tribunal erred by taking into account an irrelevant factor in relation to the timing of the application, at [49] of its reasons, being that the claimant had not applied to amend to add complaints of disability discrimination at either of the preliminary hearings in December 2022 or April 2023. The ground contends that that should have been regarded as irrelevant in light of the tribunal's acceptance, at [50], that she had not appreciated prior to her sight of the disclosure documents, that a mental health impairment could be relied upon in law as a disability.

59. As to that, in principle the tribunal would have been entitled to weigh in the balance not merely whether the claimant had previously failed in fact to appreciate that mental ill health can amount, in law, to a disability, but whether she had been reasonably ignorant of that fact prior to seeing the disclosure documents, having regard to what the tribunal might make, for example, of her ability to research and grasp such matters, or to obtain *some* form of advice or assistance at earlier stages. I note, however, that Ms Shrivastava indicated that she did not contend that the tribunal had, in effect, also found that the claimant's ignorance of the possibility hitherto was unreasonable.

60. But in any event, it appears to me that this ground proceeds on a reading of this part of the tribunal's decision that is not quite right. The relevant passage, at [44] to [51], was the section of the tribunal's reasoning in which it considered the "timing and manner of the application". For these purposes "timing" is different from "time limits" (which is what the tribunal had considered in the previous section). It may embrace such matters as what stages the litigation had gone through, or had yet to go through, when the amendment was raised, in terms of case-management and hearings; and how much preparation for the final hearing had been completed, and how much was yet to come.

61. The fact that there had been previous preliminary hearings at which the scope and nature of the claims had been actively considered (and at which some amendment had been permitted) was not only potentially relevant to whether there had been a reasonable opportunity to make this application

sooner. It also provided some general context, in terms of the extent of the time and resource, of both the tribunal and the parties, that had been allocated to this particular case thus far, when weighing up the balance of hardship in allowing an amendment that would require additional time and resource to be invested, in respect of a case that had, subject to that, reached the point of being fully prepared.

62. Importantly, and in any event, I do not think it is a correct reading that the tribunal as it were, held against the claimant that she had not specifically sought at the earlier hearings to add a complaint of disability discrimination, notwithstanding its acceptance that she had not appreciated earlier that mental ill health could amount to a disability. Rather, its point, in particular at [46] and [49], was (once again) that it had not previously been the thrust of her *factual* case, that she had suffered certain treatment, by way of bullying or harassment, as an individual who had an underlying longstanding mental health vulnerability, despite her having set out lengthy accounts of what she said had happened to her, and why it was wrong, and having shown herself capable of doing so.

63. This must, it seems to me, be set in the context of the claimant's broad case having been that the alleged treatment, culminating in the dismissal, had caused a deterioration in her mental health (in respect of which she produced significant post-dismissal medical evidence) rather than being meted out in a context of longstanding mental vulnerability. I appreciate that the claimant's wider position would be that these things were entangled, and that multiple episodes of ill treatment steadily exacerbated and eroded her already poor and vulnerable mental health. But the issue raised by this ground of appeal is whether what the tribunal said at [49] was *inconsistent* with what it said at [50] to the point of error. Ultimately, I am not persuaded that, on a fair and correct reading, the tribunal erred by taking an approach at [49] that was contrary to the conclusion that it then reached at [50].

64. For these reasons this ground also fails.

Ground 4

65. Ground 4 contends that the tribunal erred in failing to take into account a material factor in

the balance of hardship, being the significance or value to the claimant of obtaining a declaration in relation to a discrimination complaint. That is because, contends the ground, at [61] and [62], it confined its consideration to financial issues relating to remedy.

66. The paragraphs in question must be read, and understood, in the context of the passage in which they appear, at [59] – [63], in which the tribunal assessed the overall hardship and injustice that the claimant would suffer were the amendment application to be refused, and which in turn alluded to the tribunal's own earlier self-direction as to the law. In this passage, although the reasoning is somewhat compressed, the tribunal touched upon a number of asepcts.

67. First, sometimes a claimant's difficulty is that the original claim did raise the cause of action, but not all the factual elements necessary to establish it. This, I apprehend, was the point to which the tribunal was alluding at [59], having earlier cited HHJ James Tayler's reference in **Vaughan v Modality Partnership** [2021] ICR 535 at [22] to the question of whether, if the amendment is not permitted, the party concerned will not get what they "need", as opposed to merely what they "want". But the tribunal (correctly) considered, as it said in the course of [62], that in this case the amendment was "not necessary to enable the claimant to fully argue her existing claims." She had existing complaints properly up and running, but was seeking to add new ones.

68. Further, so far as the remedy of compensation was concerned, the tribunal correctly noted that those existing complaints, if successful, would enable the claimant to be compensated for the same heads of non-pecuniary loss as would be available in respect of a disability discrimination complaint, and without the application of any statutory cap [60] – [61]. That, of course, was not necessarily a complete answer, because the claimant might, potentially, fail in her existing complaints, in circumstances where she could still have succeeded in her proposed new complaints. However, the tribunal recognised at [62] and [63], that if one of the "factors" that a party says was at work is not dealt with by the tribunal "that is a form of injustice and hardship"; and the prejudice inherent in a claimant "being refused the ability to argue all their complaints".

69. Having regard to all of that, I do not agree that the tribunal failed to take on board that the hardship to the claimant of not being permitted to amend included the loss of the chance of a decision upholding her complaint that she had been the victim of disability discrimination, in and of itself, even if such a decision might not result in her receiving any additional compensation.

70. For these reasons ground 4 also fails.

Outcome

71. The appeal is dismissed.