Neutral Citation Number: [2026] EAT 100

Case No: EA-2023-001344-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 10 June 2026

Before:

MARCUS PILGERSTORFER KC
DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MISS DONNA HARDING

Appellant

- and -

ST GEORGE'S UNIVERSITY HOSPITAL NHS FOUNDATION TRUST

Respondent

- -
- -

MR SAUL MARGO (instructed via **Direct Access**) for the **Appellant**
MS ELEENA MISRA KC (instructed by **Bevan Brittan LLP**) for the **Respondent**

Hearing date: 10 June 2026

- -

JUDGMENT

SUMMARY

Practice and Procedure – Amendments to Notice of Appeal

The claimant was employed by the respondent NHS Trust in a senior HR role. She brought claims of race discrimination, victimisation and failure to make reasonable adjustments. The Employment Tribunal dismissed all her claims. On appeal, the claimant was permitted to pursue two grounds challenging the Tribunal's determination of the reasonable adjustment claims. Shortly before the Full Appeal Hearing, however, she accepted that those claims had also been dismissed on limitation grounds and applied to amend her Notice of Appeal to challenge the Tribunal's refusal to extend time. The principal issue before the EAT was whether that amendment should be permitted.

Held:

(1) The appeal, as originally formulated, was academic. On a fair reading of the Tribunal's reasons, the Tribunal had decided that the reasonable adjustment claims were out of time and had refused to extend time. Success on the existing grounds would not affect the outcome of the proceedings.

(2) The application to amend the Notice of Appeal was refused. The proposed amendment introduced a new ground directed to a different aspect of the Tribunal's decision, was made very late in the proceedings, would cause significant prejudice to the respondent, and was unsupported by an adequate explanation for the delay. Although the proposed ground was arguable, that factor did not outweigh the considerations pointing against amendment. **Khudados v Leggate [2005] ICR 1013** and **Deans v RBL Law Limited (in Liquidation) [2026] EAT 76** applied.

(3) The amendment having been refused, the remainder of the appeal was dismissed as academic.

MARCUS PILGERSTORFER KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. The Employment Appeal Tribunal has a discretion to permit an amendment to a notice of appeal at any stage of the proceedings. Generally speaking, permission will tend to be more difficult to obtain where applications are made very late in the day. Appellants should make such applications as soon as practicable. Nonetheless, in every case a fact-specific weighing of the relevant circumstances and factors is required for the proper exercise of the discretion.

2. In this particular case, the Appellant had been permitted to pursue two grounds of appeal against the rejection of her reasonable adjustment claims on the merits. However, when preparing for the appeal hearing, she came to appreciate that those claims had also been dismissed on limitation grounds. The Appellant therefore sought permission, when lodging her skeleton argument, to amend her notice of appeal to add a challenge to the limitation decision.

3. For the reasons that follow, I refuse permission to amend. The proposed amendment raised a new ground of appeal directed to a different aspect of the Tribunal's decision. It was advanced very late, after substantial preparation for the appeal hearing had already taken place, in circumstances where the respondent would be prejudiced, and in the absence of a satisfactory explanation for the delay. Even though the proposed ground had arguable merit, it was not appropriate to adjourn. In all the circumstances allowing the amendment would not accord with the overriding objective. That left grounds of appeal which were academic and which fell to be dismissed accordingly.

4. I shall refer to the parties as they were in the Tribunal below.

Procedural Background

5. On 6 May 2020, Ms Harding, the claimant, presented a claim form to the Employment Tribunal. She brought a number of claims: (i) direct race discrimination, consisting of various allegations of detriment done because of her race; (ii) victimisation, consisting of various allegations of

detriment because she had done protective acts, and (iii) failure to make reasonable adjustments to accommodate her disability.

6. The claims came before an Employment Tribunal at London South at a hearing on 11 to 19 September 2023. The Tribunal was comprised of Employment Judge Wright, Ms J Cook and Ms N Beeston. The Tribunal gave an oral judgment at the end of the hearing. Reasons were requested by the claimant and these were sent to the parties, with the formal judgment, on 5 October 2023.

7. The Tribunal dismissed all of the claimant's claims. The judgment reads as follows:

> *"It is the unanimous Judgment of the Tribunal that the claimant's claims under the Equality Act 2010 (EQA) are not well founded, they therefore fail and are dismissed."*

8. Aggrieved by that decision, Ms Harding appealed to the Employment Appeal Tribunal by a notice of appeal sealed on 16 November 2023. It was considered on the sift by HHJ James Tayler. He was justifiably critical of the way the notice had been prepared by the claimant, even though she was acting in person. He observed that she had made no attempt to comply with the **Practice Direction of the Employment Appeal Tribunal 2023** (see now the updated 2024 iteration) ("the Practice Direction"). The grounds were not easy to follow and did not clearly identify numbered points of law. Most of the 27 grounds appeared to be attempts to reargue matters of fact. The judge considered no reasonable grounds for bringing the appeal were disclosed.

9. Ms Harding applied under Rule 3(10) of the **Employment Appeal Tribunal Rules 1993** (as amended) ("the EAT Rules") and, at a hearing acting in person, persuaded HHJ Auerbach that

there was arguable merit in two grounds[1] which were accordingly set down for a full appeal hearing today.

10. The two grounds relate to the way that the Tribunal determined and dismissed the claimant's reasonable adjustment claims. It follows that there is no live appeal against any other aspect of the judgment. The two grounds (as set out in Mr Margo's skeleton argument) are as follows:

> *"**Ground 1**: In respect of a provision, criteria or practice ("PCP") of requiring the claimant to be fully office-based, the ET erred:*
>
> > *(i) in determining that the reference in an OH report dated 13 March 2019 to the claimant working at home for one day a week did not relate to her health but related to her being unhappy in the workplace and that there was no evidence from the claimant that this aspect of the report related to her health; and,*
> >
> > *(ii) in not considering whether the respondent should at least have permitted a trial of this arrangement having regard to the provisions of its own Disability Policy.*
>
> ***Ground 2:** The ET erred in dismissing the reasonable adjustments claim based on a PCP of requiring the claimant to work 9:30 to 5:30. In particular, the Tribunal erred in concluding that this was not a PCP in circumstances where:*
>
> > *(i) it was common ground that the claimant was required to work 9:30 to 5:30 for the bulk of the period from 15 April 2019 until 6 January 2020; and,*
> >
> > *(ii) the ET failed to consider what light the fact that the claimant's hours were adjusted to 10:00 to 6:00 for the full working week from 6 January 2020 onwards shed on the respondent's case that the same adjustment could not be accommodated for two days per week in the earlier period because the service was busier in the mornings."*

11. On 6 March 2025, the respondent filed an answer to the appeal indicating that it would be resisted. Ms Harding had represented herself before the Employment Tribunal and before HHJ Auerbach at the Rule 3(10) hearing. In a witness statement prepared for this hearing, she explains that she sought *pro bono* representation through Advocate. Her papers were triaged by that organisation and she was informed on 24 October 2025 that Mr Margo had agreed to represent

[1] In respect of the first ground, HHJ Auerbach said in his reasons that the reasonable adjustment sought by the claimant had been to be permitted to work from home for <u>two</u> days per week. It is, in fact, clear from the list of issues before the Tribunal that the case the claimant ran below was that the reasonable adjustment was to work <u>one</u> day per week from home "due to sleep disturbances". In his skeleton argument before me, Mr Margo rightly followed the case as it had been run below.

her. The evidence is that Mr Margo had the papers from that point. Skeleton arguments for this hearing were then exchanged and filed on 26 May 2026.

12. Mr Margo's skeleton raised, for the first time, the question of whether the appeal had in fact become academic because of the Employment Tribunal's decision on time limits and its refusal to grant an extension of time. Today he formally conceded the point and accepted that the correct reading of the Employment Tribunal's decision was that it had found the reasonable adjustment claims were out of time, such that the appeal as presently formulated was academic. I shall return to that in a moment.

13. Mr Margo's skeleton was accompanied by an application to amend the grounds of appeal to include two new grounds. The application was on the form set out in Annex 2 of the Practice Direction and was accompanied by draft amended grounds of appeal. Today, Mr Margo limited the application to amend to the second of the proposed new grounds, which is numbered ground 4. Ground 4 reads as follows:

> *"The ET erred at para 131 of the Reasons in determining that time should not be extended on the basis that 'the claimant has not suggested any reason at all, never mind a credible reason, why it would be just and equitable to extend time' and that the time limits would have been 'well known' to the claimant. This amounts to an error of approach by the ET because:*
>
> > *(i) The ET's discretion to extend time is broad and unfettered and the ET should have considered all factors relevant to the question of whether to exercise that discretion irrespective of the claimant not advancing positive reasons for the extension.*
> >
> > *(ii) The only relevant factor considered by the ET was that, in its view, the time limits would have been 'well known' to the claimant. Accordingly, the ET has left significant factors out of account in determining whether to exercise its discretion. In particular, it has not considered, and has drawn no distinction between, the extent to which different claims have been brought out of time and has given no consideration to the question of whether the delay has prejudiced the respondent."*

14. In accordance with directions given by the EAT, the respondent filed notice of objection on 3 June 2026 and, in response to that, Ms Harding filed the witness statement to which I have already referred.

15. I heard argument on the application to amend as a preliminary question. Before turning to that, I shall say something about the issues that were before the Tribunal and its judgment in this case.

The List of Issues

16. The Tribunal commenced its reasons by referring to an agreed list of issues which had resulted from an earlier case management hearing in November 2021. It appended this to its judgment. Given the scope, and potential scope, of this appeal, I can confine my consideration to the relevant parts.

17. The list identified the reasonable adjustment claim at paragraph 3. At paragraph 3.1, the question was posed whether the claimant was a disabled person. At paragraph 3.2, the PCPs that were alleged were set out (insofar as material to this appeal) as follows:

> *"3.2.1 A requirement to work full-time on site rather than at home.*
>
> *3.2.2 A requirement to work between the hours of 9.30 and 5.30 until January 2020."*

18. At paragraph 3.3 the question was posed whether the PCPs put the claimant to a substantial disadvantage compared to non-disabled persons because she suffers with *"fatigue and reduced concentration (depression, anxiety, insomnia, was menopausal)"*. The issue of the respondent's actual or constructive knowledge was identified at paragraph 3.4. At paragraph 3.5 the Tribunal recorded that it had to decide whether the respondent failed to take reasonable steps to avoid the disadvantage. The relevant adjustments contended for by the claimant were then listed as follows:

> *"3.5.1 On 15 April 2019, to allow the claimant to work one day a week from home due to sleep disturbances.*
>
> *3.5.2 On 15 April 2019, to work for two days a week from 10am to 6pm instead of 9.30am to 5.30pm due to sleep disturbances."*

19. Paragraph 4 of the list of issues was headed *"Time/limitation issues"*. At paragraph 4.1 the question was asked whether the claimant can prove that *"in respect of each of the particular claims"* there was conduct extending over a period to be treated as done at the end of the period. At that point the list stated:

> *"The respondent contends that any part of the claimant's claim for discrimination occurring on or before 6 December 2019 is time-barred."*

At paragraph 4.2 the question was asked whether any complaint had been presented within such other period as the Tribunal considers just and equitable.

The Tribunal Hearing and its Findings

20. At the hearing, the Tribunal heard live evidence from the claimant, Celia Oke, a workforce delivery and inclusion manager, and four witnesses on behalf of the respondent. The respondent's witnesses were: John Wall, the claimant's line manager until he left on 3 April 2020; Shilpi Sahai, divisional HR manager; Jacqueline McCullough, deputy director of HR; and Harbhajan Brar, director of HR. The Tribunal also considered a bundle of over 2,000 pages. The Tribunal was unimpressed that the claimant had failed to comply with case management orders and had failed to prepare a witness statement. It also noted that Ms Oke's statement was late. Nonetheless, the Tribunal treated the claimant's 38-page particulars of claim as her evidence in chief and there was cross-examination of all witnesses.

21. The Tribunal's written reasons commence with an introductory section about the claims that had to be decided and various procedural matters, including non-compliance on the part of the claimant with orders the Tribunal had made. The Tribunal then set out a section entitled *"Observations"*, followed by one entitled *"Findings of fact"*. In these parts of the judgment, the following relevant findings were made:

i) The claimant was employed by the respondent as an HR professional, initially on a fixed term basis from 18 April 2017 but, after a successful application, her role was made permanent from 6 November 2017. She was employed at senior band 7 and reported to Mr Wall. She also undertook work for Ms Sahai's division.

ii) The claimant's job description stated that a key result area was:

> *"To support the Divisional HR Managers in preparatory work related to Employment Tribunal claims, including preparation of Notices of Appearance and liaising with managers involved in the case to produce draft witness statements for use at the Employment Tribunals."*

Based on the claimant's own evidence, the Tribunal found that she had drafted grounds of resistance for ET claims and that she had a diploma in personnel and development through which she *"gained extensive knowledge of a range of subjects including employment law."*

iii) The respondent's unchallenged evidence was that the HR team constituted a small department. It was difficult to recruit to permanent posts and extremely difficult to recruit to fixed term positions.

iv) The claimant was ambitious and wished to progress quickly to the next band, Band 8a. The Tribunal considered the speed at which she expected to progress was overly ambitious and this was reflected by the timeframe in which she started making Band 8a applications. The Tribunal found that she was *"fixated with her Band 7 status"* and took exception to carrying out duties she perceived to be a Band 6 HR adviser or lower. The Tribunal found that she considered that she should be able to pursue every development opportunity she thought relevant and was not prepared to practice and consolidate her Band 7 skills. This led her to the view that her managers were not being kind or, in the alternative, were being harsh

or unfair. That, in turn, led to a range of allegations of discrimination and victimisation being before the Tribunal. It is not necessary for me to say more than that they were dismissed.

v) From October 2018 the claimant was placed on an informal action plan as the respondent considered she was underperforming in her role. This was discontinued on 20 June 2019 but resulted in the claimant making allegations about being placed on the plan (and related treatment) and in respect of the way her complaints were dealt with. Again, the Tribunal dismissed those allegations of discrimination and victimisation.

vi) The claimant was on long-term sickness absence from 19 December 2018 to 15 April 2019. When she returned from that absence, she was found to be a disabled person for the purposes of section 6 of the **Equality Act 2010** ("EqA"). The Tribunal reached that finding based on a concession made by respondent in closing submissions that the claimant was disabled by reason of depression. It considered that it was not proportionate in those circumstances to go on to consider other conditions the claimant contended were disabilities; in any event, the claimant advanced no documentary evidence in respect of those other conditions.

The Relevant Reasonable Adjustment Claims

22. After identifying the PCPs contended for by the claimant in accordance with the list of issues, the Tribunal then set out its findings on the relevant reasonable adjustment claims as follows:

> *"116. There was a requirement to work on site, rather than from at home. Due to the needs of the service provided by a small HR team, the respondent needed the team to be available for impromptu, face-to-face, drop-in sessions. The HR team were not provided with laptops or remote access. Mr Wall required the two band 7 Senior HR Advisors to be on site.*

117. Occupational Health's email of 13/3/2019 in respect of this issue said (page 772): 'The option of working from home for a day was raised and as a coping strategy, due to the condition in the workplace not being helpful and please consider whether this is an option open to her.'

118. Although this comment is not entirely clear, it does not appear to relate to the claimant's health, rather than her being unhappy in the workplace. There was no evidence from the claimant that this related to her disability. The claimant also relies upon this allegation as a detriment as a result of her doing a protected act relying upon the protected characteristic of race. On the claimant's case therefore the refusal to work from home was motivated by wanting to disadvantage her due to her disability and also, wanting to punish her for raising concerns about race discrimination. The Tribunal finds the more likely and accepted explanation, is that the respondent could not accommodate the claimant working from home for operational and non-discriminatory reasons.

119. In those circumstances, the Tribunal does not accept this was a reasonable adjustment which the respondent was required to make.

120. The claimant's working hours had changed on numerous occasions. She had a phased return to work following long-term sickness absence in April 2019 (page 750).

121. Then on the 24/9/2018 the claimant's hours were changed to 10am and 6pm for that week (page 451).

122. On 12/10/2018 her hours were a continued trial of 9.30am to 5.30pm (page 526).

123. There was not a requirement that the claimant work the hours of 9.30am to 5.30pm from an unspecified date until January 2020. In fact the claimant's hours were changed following a flexible working request, by Mr Wall to 10am to 6pm on 23/12/2019 to start on the 6/1/2020 (page 988).

124. The standard office hours were 9am to 5pm. If that was a PCP it was varied for the claimant."

23. The Tribunal then dealt with another claimed PCP (which is not relevant to this appeal), before returning to the allegations of direct discrimination, finding that the claimant's evidence had been insufficient to transfer the burden of proof on the question of whether detriments were because of a protected characteristic. It accepted the respondent's non-discriminatory explanations and concluded the claimant had been the subject of reasonable management decisions taken in light of the particular circumstances of the claimant, including her underperformance.

Time Limits

24. The Tribunal then addressed time limits. Earlier in the judgment, at paragraph 37, the Tribunal had noted that ACAS early conciliation had taken place between 6 March and 6 April 2020, and that the claim had been presented on 6 May 2020 *"such that in any event prior to 7 December 2019 was out of time"*. Then, from paragraph 129 of the judgment, the Tribunal said this:

> *"129. In respect of extending time, the claimant said in paragraph 4 of her particulars of claim (page 35):*
>
> > *'I notified ACAS of my claim on 6 March 2020. It is my contention that any complaints pre-dating 7 December 2019 are in time on the basis that they are in part of a continuous course of conduct related to incidents that are plainly in time. That notwithstanding, in any event, it is my contention that it would nevertheless be just and equitable to hear my claims.'*
>
> *130. The claimant could have sought to persuade the Tribunal that for example, some of the allegations were linked. There were several allegations against Mr Wall in relation to meetings. It would have been open for the claimant to suggest that in relation to meetings, those allegations formed conduct extending over a period of time. The claimant named four individuals and again, she made no attempt to suggest that either each individual was somehow linked so that the entirety of the conduct about which she complains was conduct extending over a period. Or, in the alternative to suggest that each individual's conduct was such.*
>
> *131. The claimant has not suggested any reason at all, never mind a credible reason, why it would be just and equitable to extend time. The Tribunal is mindful of the recent authority of Owen v Network Rail Infrastructure Limited [2023] EAT 106. The time limits are short in the EQA. They are however well-known and would particularly be so to a HR professional who was supported by her Trade Union representative. To extend time in these circumstances, absent any persuasive factor that was either expressly raised or which could be inferred, would result in by-passing the time limits. That cannot be the purpose of s.123 EQA. The allegations are out of time."*

The Law and Conclusions

25. The next section of the Tribunal's judgment was headed *"The Law"*. Here the Tribunal extracted a number of statutory provisions, including sections 20, 21, 123(1) and 123(3)(a) EqA. It also referred to a number of cases, but none in relation to the determination of the reasonable adjustment claims.

26. Finally, beneath the heading *"Conclusions"*, the Tribunal stated its conclusions by reference to the list of issues *"[n]otwithstanding the findings in respect of time, the burden of proof and for direct discrimination in respect of comparators"*.

27. In relation to paragraph 3 of the list of issues, the Tribunal said this at paragraph 142:

> *"3.2.1 There was a requirement the HR team work on site. The team was not set up for home working at the time. There was nothing to link the request to the claimant's disability.*
>
> *3.2.2 This was not a PCP."*

28. The Tribunal did not deal expressly with paragraph 4 of the list of issues when stating its conclusions.

Is the Appeal Academic?

29. The Employment Appeal Tribunal will not entertain an appeal that is academic. But is that the case for this appeal? The answer turns on whether the Tribunal decided that the two claims of reasonable adjustments, which are the subject of the grounds permitted to proceed to this hearing, are out of time. If it did, and if it refused to extend time, then, subject to the amendment application, the appeal would be academic because whatever view is formed on grounds 1 and 2, the claims would still ultimately fail for those time limit reasons.

30. On behalf of Ms Harding, Mr Margo conceded that on a proper and fair reading of the Tribunal's reasons as a whole, the Tribunal did decide that the reasonable adjustments claims were out of time. That was also the position of Ms Misra KC on behalf of the respondent.

31. I confess in my pre-reading to having entertained some doubt as to whether the Tribunal did, in fact, reach a decision in relation to limitation in respect of the reasonable adjustment claims. That doubt stemmed from it being clear that there were some allegations before the Tribunal that on any analysis, including the Tribunal's own analysis at paragraph 37, were in time: see, for example, the allegations recorded at paragraphs 1.1.7 to 1.1.9, 2.3.5 to 2.3.9, and 2.3.11 to 2.3.14

of the list of issues. The statement at the end of paragraph 131 (made after dealing with extensions of time) that *"[t]he allegations are out of time"* cannot therefore be taken to refer to all the allegations in the case. However, the Tribunal does not spell out in its judgment which allegations it was referring to by that statement. I was also troubled that the provisions of section 123 EqA that directly concern limitation in respect of a claim for reasonable adjustments, namely sections 123(3)(b) and (4), were not cited or seemingly applied by the Tribunal. Nor were relevant authorities referred to, such as **Kingston upon Hull City Council v Matuszowicz [2009] ICR 1170**, see paragraphs 15, 19 and 21; **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194**, see paragraphs 15-16; and **Fernandes v Department for Work and Pensions [2023] EAT 114**, paragraph 16.

32. Having had the benefit of submissions from both Mr Margo and Ms Misra KC on this point, I am, however, entirely satisfied that Mr Margo's concession is well-made. Briefly:

    i) On a fair reading of the judgment the Tribunal was identifying all those events (whether acts or omissions) occurring prior to 7 December 2019 as being out of time (see paragraph 37).

    ii) The Tribunal noted that the claimant did not suggest that some of the allegations were linked or formed conduct extending over a period of time (see paragraph 130).

    iii) In respect of the reasonable adjustments claims, Ms Misra KC submitted that the respondent had argued below that the claims accrued when the respondent had decided against making the adjustments sought. I was taken to an email written by Mr Wall on 16 April 2019, which set out the phased return to work which would apply to the claimant and dealt with the occupational health recommendations. That email stated in terms:

> *"Working a day from home. Shilpi and I have discussed and considered the needs of the service. HR operational jobs require us to be present on site and so we are unable to agree to this advice.*
>
> *Working 2 days a week from 10 to 6. Declined. Considered the need of the service. Busier the morning rather than in the evening. So we are unable to agree to this advice."*
>
> That was, on the face of it, a clear decision in April 2019 not to make reasonable adjustments in respect of the two PCPs identified in grounds 1 and 2 of this appeal. There was no argument below by the claimant that a different analysis should apply. Given that this was an event which predated 7 December 2019, in my judgment, the Tribunal is rightly to be taken to have decided that the two relevant reasonable adjustments claims were out of time.

33. It follows that I consider Mr Margo's concession is well-made and that, unless the amendment application succeeds, the appeal is academic and would fall to be dismissed.

The Amendment Application

34. I turn then to the amendment application.

35. In the EAT, there is no right to amend a notice of appeal or the grounds on which an appeal is advanced: see paragraph 3.8.8 of the Practice Direction. Permission to amend must be sought. The EAT has a wide discretion whether or not to allow an amendment of a notice of appeal. The discretion falls to be exercised in accordance with the overriding objective of dealing with cases justly (see rule 2A of the EAT Rules) and in light of paragraph 8.2 of the Practice Direction, which, amongst other things, requires applications to be made as soon as practicable and with a draft of the amended notice of appeal.

36. In **Khudados v Leggate [2005] ICR 1013**, this Tribunal set out a non-exhaustive list of factors which may be relevant to the exercise of discretion. These appear at paragraph 86 of the judgment given on behalf of the Appeal Tribunal by HHJ Serota QC:

"…We consider that, without wishing to set out an exhaustive list of considerations, the following are among the matters to be taken into account in determining whether or not an amendment should be allowed.

(a) Whether the applicant is in breach of the Rules or Practice Directions; in our opinion compliance with the requirement in para 2(6) of Practice Direction (Employment Appeal Tribunal: Procedure) 2002 [2003] ICR 122, that an application for permission to amend a notice of appeal be made as soon as the need for amendment is known, is of considerable importance. The requirement is not simply aspirational or an expression of hope. It does not set a target but is a requirement that must be met in order to advance the efficient and speedy dispatch and conduct of appeals.

(b) Any extension of time is an indulgence and the appeal tribunal is entitled to a full honest and acceptable explanation for any delay or failure to comply with the 1993 Rules or 2002 Practice Direction, as Mummery J observed in United Arab Emirates v Abdelghafar [1995] ICR 65.

(c) The extent to which, if any, the proposed amendment if allowed would cause any delay. Clearly proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, are much more likely to be allowed than wholly new grounds of perversity raising issues of complex fact and requiring consideration of a volume of documents, including witness statements and notes of evidence. Such amendments if allowed are bound to cause delay and extra expense. The latter class of amendments should be contrasted with the first. In many cases in the first category the party against whom permission to amend is sought will be in no worse position than if the amended grounds had been included in the original notice of appeal.

(d) Whether allowing the amendment will cause prejudice to the opposite party, and whether refusing the amendment will cause prejudice to the applicant by depriving him of fairly arguable grounds of appeal. We recognise that a party cannot be prejudiced in point of law simply because an argument is raised by way of amendment that saves what would otherwise be an unsustainable appeal. We also would suggest that the prejudice caused by refusing permission to amend to an applicant who seeks permission to amend by adding fairly arguable grounds, but who has failed in a significant way to comply with the Rules or Practice Direction, or who has delayed excessively, is likely to carry less weight than in the case of an applicant who has not delayed and has acted in accordance with the 1993 Rules and 2002 Practice Direction.

(e) In some cases it may be necessary to consider the merits of the proposed amendments, assuming they can be demonstrated to cross the appropriate thresholds we have mentioned earlier; that is to say as a general rule they must raise a point of law which gives the appeal a reasonable prospect of success at a full hearing.

(f) Regard must be had to the public interest in ensuring that business in the appeal tribunal is conducted expeditiously and that its resources are used efficiently."

37. The EAT has recently considered the test for amendment in **Deans v RBL Law Limited (in Liquidation) [2026] EAT 76**. HHJ James Tayler explained that the factors in **Khudados** will

generally be relevant but their comparative importance will vary considerably from case to case (see paragraph 42). At paragraph 43 he continued as follows:

> *"43. It may be helpful to draw out a few points:*
>
> *(1) deciding whether to grant an amendment involves the exercise of a discretion that should not be fettered*
>
> *(2) the starting point is the overriding objective*
>
> *(3) the nature of the proposed amendment is of considerable importance – there is a spectrum between proposed amendments that raise a crisp point of law closely related to existing grounds of appeal, or offering limited particulars that flesh out existing grounds, as opposed to wholly new grounds, particularly grounds that assert perversity, potentially raising issues of complex fact and requiring consideration of a volume of documents, including witness statements and notes of evidence*
>
> *(4) if a proposed amendment does nothing more than clarify an existing ground of appeal, the amendment may assist the respondent in answering the ground, and the EAT in deciding the point of law, so that refusing the amendment could be self defeating*
>
> *(5) delay may weigh heavily against permitting an amendment, but that will usually depend on what, if any, prejudice has been caused by the delay – unfortunately the EAT currently has significant backlogs so the picture is no longer as rosy as that painted in* ***Khudados***
>
> *(6) the prejudice caused by delay to respondents and the efficient conduct of business in the EAT, is not linear, there are points at which respondents will generally suffer increased prejudice such as when they have responded to a Notice of Appeal and taken significant steps to prepare for a hearing, such as drafting a skeleton argument*
>
> *(7) delay is likely to weigh less in the balance where existing grounds are clarified as opposed to where new grounds are introduced, particularly if their introduction may delay the appeal and potentially result in the vacation of a hearing which will prejudice the respondents and other parties who are awaiting the hearing of their appeals*
>
> *(8) the merits of proposed amended grounds may be relevant*
>
> *(9) if the indulgence of an amendment is sought the proposed amendment should be pleaded so as to comply fully with the requirements of the* ***EAT Practice Direction***
>
> *(10) a full, honest and acceptable explanation is generally required, particularly if the amendment raises new points, as opposed to clarifying and simplifying existing grounds"*

38. In the present case, the following relevant factors are present.

39. The nature of the proposed amendment. Here, the nature of the proposed amendment is to introduce an entirely new ground of appeal criticising a different part of the decision (limitation) from that which was the subject of consideration and permission at the Rule 3(10) hearing (the substantive reasonable adjustments decision). The points the appellant now wishes to make are qualitatively different from, and entirely unrelated to, those currently permitted to proceed (and, indeed, those contained in the original notice of appeal). This is not a case merely clarifying existing grounds.

40. Delay. In my view delay is a very significant and weighty factor in the circumstances of this case. The amendment application was made on the day that skeleton arguments were exchanged and lodged, around two weeks before the final appeal hearing. It came long after the Rule 3(10) hearing, long after the respondent had prepared its answer to the appeal, after the bundle of documents for the appeal hearing had been prepared, and after the respondent had undertaken the substantive preparation of its skeleton argument for the appeal. As I shall explain below, it was not made "as soon as practicable" as required by paragraph 8.2.1 of the Practice Direction.

41. Prejudice. A factor related to delay is prejudice. Were permission to be granted, the respondent would face a brand new ground of appeal at today's appeal hearing. This would, in my judgment, give rise to significant prejudice to the respondent. The respondent would not have had an opportunity to produce an answer to the new ground; nor would it have been able carefully to consider what other material should now be before this Tribunal and construct written and considered oral arguments by reference to that material. That exercise may well have required consideration of additional documentation, including notes of the evidence or submissions made to the Tribunal on limitation and the question of a just and equitable extension of time. Notes of the hearing below would need to be considered in order to review how the relevant points were advanced below, including points made below by the claimant who was then acting in person. The respondent would also, in my judgment, be denied the opportunity to consider whether to

apply for an order under the **Burns / Barke** procedure to clarify the Tribunal's reasoning on the limitation/extension of time issues. That may have been an application that the respondent wished to make given the nature of the challenge in proposed ground 4, and in light of paragraph 131 of the Tribunal's judgment, set out above. The fact that in general terms the point that is the subject of proposed ground 4 is relatively confined and on a well-trodden area of law does not, in my view, significantly ameliorate that prejudice.

42. Counsel for the respondent and, indeed, the wider respondent legal team, were not available, for good reason, during much of the short period between the application and this hearing. That will have further reduced the time for the respondent fairly to respond to the application and underscores the prejudice I have described. A person making a last-minute application cannot expect their opponent simply to be waiting to receive it

43. Potential adjournment/costs, the overriding objective and impact on other cases. Prejudice can in appropriate circumstances be reduced or eliminated by the adjournment or postponement of an appeal accompanied by suitable directions to ensure the appeal (including new grounds added by amendment) are ready for hearing when the case returns. In addition, the EAT has powers to make costs orders in defined circumstances which can also ameliorate the prejudice suffered. However, as HHJ James Tayler noted in **Deans**, the EAT is now unfortunately experiencing significant backlogs and the EAT must keep in mind the impact of delay and adjournments on other cases in the system along with the factors referred to in the overriding objective. The reality is that a postponement of this hearing would be for a significant period of time. That is particularly important in this case given that the allegations concern events of many years ago, back as far as 2019. Making an order adjourning this appeal to a later date is not an attractive course of action and would not be in accordance with the overriding objective. It would cause further delay, it would add to expense, and it would have an adverse knock-on effect on other cases pending before the EAT.

44. Explanation for the delay. The application to amend was not, in my view, made "as soon as practicable", as required by paragraph 8.2.1 of the Practice Direction. It is properly characterised as a "last-minute" application. Nor, in my judgment, has a full and acceptable reason been offered for the delay. There is no reason in principle why the new point could not have been identified at the time the original notice of appeal was drafted or, at the latest, at the time of the Rule 3(10) hearing before HHJ Auerbach.

45. The explanation for the delay offered by the appellant in her witness statement is: (i) that she was not aware of any potential problem whilst she was acting in person and the point is not straightforward; (ii) that she sought to obtain the services of a barrister through Advocate from 14 February 2025; (iii) that Mr Margo agreed to undertake the work and received the papers on 24 October 2025; and (iv) that she remained unaware that there was a potential problem until the point was identified by Mr Margo in the course of preparing his skeleton argument on Friday 22 May 2026.

46. Whilst I have no reason to doubt the veracity of that explanation, it is not, in my view, a good one. As the Supreme Court made very clear in **Barton v Wright Hassall LLP [2018] 1 WLR 1119**, whilst a person's lack of representation will often justify making allowances when making case management decisions and in the conduct of hearings, it will not usually justify applying to litigants in person a lower standard of compliance with the rules, practice directions or orders of the court (see paragraph 18). There, Lord Sumption explained that the balance struck by procedural rules and practice directions would be disturbed if an unrepresented litigant were entitled to greater indulgence as compared to a represented opponent. His Lordship explained:

> *"Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."*

47. Here the Practice Direction requires an amendment application to be made "as soon as practicable" (para 8.2.1). The attention of appellants is specifically drawn to the Practice Direction when they complete and sign their notice of appeal. The standard notice of appeal form (T444 Form 1) includes the following above the space for the appellant's signature:

> *"Before submitting a Notice of Appeal, you should read and consider the relevant sections of the Appeal Tribunal Practice Direction. If you decide to submit an appeal, you must comply with the sections of the Appeal Tribunal Practice Direction relevant to each step you take in the appeal. You must also comply with the overriding objective and communicate with the Appeal Tribunal and the other party or parties in a respectful and appropriate manner."*

48. I bear in mind the findings of the Tribunal in relation to this appellant's experience with employment law. Whilst she is clearly not a lawyer, she has more experience with employment law matters than many litigants do. It is also right to say, as Ms Misra KC did, that she had extensively considered the judgment when she initially filed her notice of appeal and put forward 27 grounds. It is, however, common ground before me that the original notice of appeal makes no complaint or criticism of the judgment to which this new ground 4 can be tied. Given that the new points were not taken as they could have been in the original notice of appeal, the application to amend ought to have been made soon after. Certainly it was practicable to have brought it by the time of the Rule 3(10) hearing.

49. Furthermore, although Ms Harding obtained representation on 24 October 2025, the application was not made until 26 May 2026. Mr Margo explained that he was instructed *pro bono* only to deal with the points that had been permitted to proceed and, therefore, the point did not arise until the drafting of the skeleton. That does not, in my view, take away from the personal responsibility that the claimant had either to raise the matter or seek specific advice in relation to it. Mr Margo also argued that the application was made as soon as practicable after the issue was identified at the point of drafting the skeleton. For the reasons I have given, that is not, in my

view, the correct starting point to assess the delay. I conclude that there has been no acceptable explanation provided for why the application was not made much sooner.

50. I should say Mr Margo relied on the failure of the respondent to point out the futility of the two existing grounds of appeal in its answer to the appeal. He suggested that this was either a tactical decision made consciously by the respondent or, to the extent that the point was not appreciated, that underscored the reasonableness of the claimant's position of not appreciating the need for an amendment until the skeleton was drafted. I do not consider that these submissions assist the claimant. It was not for the respondent to take points which would have helped the claimant realise the need to apply for an amendment. That responsibility lay on her throughout.

51. Merits. Ms Misra KC submitted that it was relevant for me to consider the fact that the late amendment application, if granted, would have the effect of avoiding the EAT sift process. As the authorities I have cited make clear, there is no doubt that the merits of the proposed amended grounds may be relevant on an application to amend. At paragraph 86(e) of **Khudados**, this Tribunal made clear that generally the merits of the proposed amended ground(s) would need to cross the appropriate threshold for permission to appeal: there would need to be a reasonable prospect of success at a full hearing. The fact that the merits are assessed in this way when determining an application to amend reduces much of the force of Ms Misra's point about bypassing the sift. Nonetheless the discretion to allow an amendment is unfettered and it cannot be excluded that in an appropriate case the EAT may allow an amendment irrespective of merits where there are other compelling reasons to do so.

52. In this case, Mr Margo argued that proposed ground 4 did have merit. He submitted that the Tribunal did not say in terms that it took from the case of **Owen v Network Rail Infrastructure Limited [2023] EAT 106** that the absence of a reason advanced by the claimant in support of an extension is not an absolute bar to the exercise of the just and equitable discretion. I am doubtful,

given the contrast thrown up by the first two sentences of paragraph 131 of the reasons, whether that submission can ultimately be made good. However, in my view, Mr Margo is on much firmer ground when he submits that the Tribunal failed to take into account, when exercising the discretion in relation to the reasonable adjustment claims, the extent of the delay and whether any prejudice was caused to the respondent. Those are factors which "are almost always relevant" on the authorities: see **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194** at §19.

53. Ms Misra argued that the Tribunal can and should be taken to have considered the relevant factors into account, including all those that were raised before it. She rightly reminded me that this Tribunal takes a fair approach to an Employment Tribunal's reasons, eschewing a pedantic or needlessly technical analysis. Nonetheless, in my view, I am willing to accept that ground 4 would pass the threshold requirement of being a reasonably arguable ground of appeal which, had it been considered at the sift, could have proceeded. However, I do not consider that this conclusion, or the fact that refusing the amendment would consequently cause prejudice to the claimant in the form both of (i) not being able to pursue that new argument and (ii) not being able to pursue the existing two grounds also certified as arguable, outweighs the other factors pointing away from allowing the amendment.

54. Conclusion. Pulling the threads together, in this case we have a very late application, not made "as soon as practicable" but a short period before the EAT's final hearing. It is an application to introduce an entirely new ground on a different aspect of the Tribunal's judgment. In my view, the respondent would be significantly prejudiced, as I have described above, by being forced to deal with that today. Further and alternatively, an adjournment would not further the overriding objective and would have knock-on adverse effects in terms of the listing of other appeals. Whilst I have weighed in the balance the prejudice to the claimant, I have concluded that the proper exercise of my discretion is to refuse the amendment.

55. It follows that the application to amend is dismissed.

Disposal

56. Given the parties' positions, the remainder of the appeal is academic and also falls to be dismissed.

57. In concluding, I thank both advocates for their clear submissions. This Tribunal also records its gratitude to Mr Margo for acting *pro bono* on behalf of Ms Harding.