Case No.
2403314/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr F Murray

Respondents: (1) North West Boroughs Health Care NHS Foundation Trust
(2) Ms E Mitchell
(3) Ms J Critchley
(4) Ms J Nakamuli

HELD AT: Liverpool **ON:** 20 November 2017

BEFORE: Employment Judge Horne

REPRESENTATION:

Claimant: In person

All respondents (for this hearing only): Ms J Connolly, counsel

RESERVED JUDGMENT FOLLOWING A PRELIMINARY HEARING

1. In this judgment:

   1.1. "Annex B" means Annex B to the case management order made on 6 September 2017.

   1.2. Numbered allegations (for example, "Allegation 5") refer to the corresponding allegation in Annex B.

   1.3. "the September amendment application" means the claimant's application, made at the preliminary hearing on 6 September 2017, to amend his claim so far as necessary to enable him to pursue the allegations in Annex B.

1.4. "the October amendment application" means the claimant's application dated 20 October 2017 to alter Annex B and/or amend his claim so as pursue the allegations set out in that application.

1.5. "the November amendment application" means the claimant's application dated 20 November 2017 to alter Annex B and/or to amend his claim so as to pursue the allegations set out in that application.

1.6. "EqA" means the Equality Act 2010 and "ERA" means the Employment Rights Act 1996.

2. It is recorded that the following parts of the September amendment application are no longer pursued:

2.1. Paragraph 15 of Annex B under the heading of Allegation 5 (direct sex discrimination relating to the course); and

2.2. Paragraph 34 of Annex B under the heading of Allegation 12 (trivialising the complaint about bank shifts).

3. The remainder of the September amendment application is allowed.

4. The October application is allowed to the following extent:

4.1. The claimant has permission to allege, under Allegation 2:

4.1.1. that the unfavourable treatment consisted (as well as Ms Mitchell refusing to address the claimant's grievance) of Ms Nakamuli telling Ms Critchley on 9 November 2015 that the claimant had memory problems;

4.1.2. that the unfavourable treatment (in both cases) was because of a mistaken perception that the claimant had memory problems; and

4.1.3. to allege that this mistaken perception amounted to direct discrimination.

4.2. The claimant has permission to allege, under Allegation 7:

4.2.1. that he was prohibited from *assisting* with medication, as opposed to *administering* medication; and

4.2.2. that this treatment was a continuing state of affairs for approximately 3 and a half years including August 2016.

4.3. The claimant has permission, under Allegation 12, to delete the words, "Occupational Health" and to allege, instead, that the following detrimental acts or failures were victimisation under EqA;

4.3.1. cancelling the claimant's counselling appointment for 25 May 2017

4.3.2. requiring the claimant to meet face-to-face with Ms Nakamuli on 16 June 2017; and

4.3.3. changing the time of the claimant's grievance/mediation meeting on 16 June 2017.

4.4. The claimant has permission to join Ms Mitchell, Ms Critchley and Ms Nakamuli as respondents and to contend that they are personally liable for the alleged breaches of the Equality Act 2010.

5. This paragraph relates to those parts of the October application that introduce a complaint that the facts set out in Allegation 10 amounted to a failure to make

reasonable adjustments. It is recorded that those parts of the October application are not pursued.

6. The remainder of the October amendment application is refused.
7. For the avoidance of doubt, the claimant does **not** have permission:
   7.1. Under Allegation 2, to allege that giving him a task sheet sometime between November 2013 and May 2014 was an act of discrimination;
   7.2. Under Allegation 5, to allege that it was direct sex discrimination to prohibit him from eating in the kitchen whilst permitting a female comparator to do so;
   7.3. to introduce a complaint of detriment contrary to section 47B of ERA alleging:
      7.3.1. that he made a protected disclosure on 25 May 2016 about health and safety;
      7.3.2. that because of a protected disclosure he was subjected to the detriments set out at paragraphs 29 to 31 of the October amendment application; or
      7.3.3. that any of the acts or failures to act set out at paragraph 4.3 above were done on the ground that he made a protected disclosure; or
   7.4. to join Mr Roscoe or Ms Sheard as respondents.
8. The tribunal will treat the November amendment application as including an application:
   8.1. to advance a complaint of detriment contrary to section 47B of ERA on the basis set out in the following Schedule; and
   8.2. to join Ms Hill, Ms Jones and Mr Fairhurst as respondents.
9. No determination has been made as to whether or not to allow those two applications.
10. The November amendment application is allowed to the extent that the claimant has permission to contend that Allegations 6, 7 and 8 amounted to direct discrimination because of disability in addition to the complaints originally set out in Annex B.
11. Subject to paragraph 9, the remainder of the November amendment application is refused.
12. For the avoidance of doubt, the claimant does **not** have permission:
   12.1. to introduce a complaint of detriment contrary to section 47B of ERA on the ground that he made a protected disclosure on 25 November 2016, or that he made a protected disclosure on 5 June 2017 that a criminal offence had been committed; or
   12.2. under Allegation 12, to allege that the respondent subjected him to a detriment either under EqA or section 47B of ERA by omitting to make any reference in the grievance outcome to the claimant's complaint about failure to refer him to Occupational Health.

An amended version of Annex B is attached to this judgment.

SCHEDULE

Complaint of detriment on the ground of protected disclosure, contrary to section 47B of ERA

1. The complaint set out in this Schedule is to be treated as being part of the November amendment application.
2. The claimant relies on disclosures made in a single document headed, "Re: Whistleblowing", which he says he gave to the respondent's director Ms Hill on 20 September 2017.
3. The basis upon which the claimant contends that the disclosures were protected is set out in the document itself.
4. It is the claimant's case that, on the ground that he made those disclosures:
   - 4.1 Mr Roscoe revealed the claimant's identity as a whistleblower to other members of staff;
   - 4.2 Ms Mitchell asked Ms Jones to investigate his allegation of a criminal act – this was wrong as it was treating the allegation the same as his grievance;
   - 4.3 Ms Mitchell's personal assistant asked Ms Jones to change a statement. Previously, the statement had read, "Doors must be locked for 72 hours". The proposed change was to read "Doors must be closed for 72 hours".
   - 4.4 Ms Mitchell e-mailed Ms Jones stating, "Don't give Mr Murray the terms of reference".
   - 4.5 The respondent deliberately failed to investigate the risk to health and safety posed by the electric light in the patients' bathroom in order to belittle the claimant's complaint and hide the danger.

ANNEX B

Annex B is amended to give effect to this judgment. The amendments are shown in *italics.*

Allegations

The factual allegations in the claim form for which the claimant seeks a remedy, and how he puts his case under the Equality Act 2010, are as follows:

Allegation 1

1. On 18 September 2015 the Ward Manager, Justine Nakamuli, told all staff that no-one would be allowed more than one hour to complete any learning. This gives rise to three complaints of disability discrimination.

2. The indirect discrimination complaint under section 19 is that this represented the application of a provision, criterion or practice ("PCP") which put disabled people at a particular disadvantage because they were likely to take longer than a person without a disability to complete learning.

3. The allegation is also put as direct discrimination because on 9 November 2015 Justine Nakamuli disclosed that the PCP had been introduced because she had been told that the claimant had taken 2.5 hours to complete some e-learning. This is alleged to be treatment of the claimant which because of disability is less favourable than how the respondent treated or would have treated a person without a disability.

4. Finally, the allegation is put as discrimination arising from disability contrary to section 15. The introduction of the policy was unfavourable treatment of the claimant (because it was more difficult for him to comply with) and it was because of something (him having taken 2.5 hours to complete e-learning) which arose in consequence of his disability (because his disabilities made him take longer).

Allegation 2

5. On 9 November 2015 the claimant was given a note by Ms Nakamuli requiring him to attend the office of Elaine Mitchell the following day. He says that the note was given to him in an abrupt and humiliating way, but that is background only.

5A. It is also the claimant's case that on 9 November 2015, Ms Nakamuli told Ms Critchley that the claimant had memory problems.

6. On 10 November 2015 he verbally raised a grievance with Elaine Mitchell about Ms Nakamuli telling Ms Critchley that the claimant had memory problems and that staff had to keep a list of matters he had to complete to check he had done them. That verbal grievance was dismissed by Ms Mitchell and no investigation was carried out.

7. The allegation is of discrimination arising from disability contrary to section 15. The unfavourable treatment is

> *(1) Ms Nakamuli telling Ms Critchley that the claimant had memory problems. This is because of something (Ms Nakamuli's perception of memory problems) that arose in consequence of the claimant's disability.*
>
> *(2)* The refusal to address the verbal grievance. That was because of something (Ms Mitchell taking Ms Nakamuli's word as true) which arose in consequence of the claimant's disability, in that *his disability caused Ms Mitchell to assume that the claimant had memory problems, making him* ~~the memory problems resulting from his disability made him~~ less likely to be believed.

7A. In the alternative this is said to be "discrimination by perception" which the tribunal takes to mean direct discrimination because of disability.

Allegation 3

8. The claimant attended an assessment with Occupational Health on 29 March 2016. He told Occupational Health he was not sure why he was there but Ms Nakamuli kept sending him for assessments. He was making an allegation that her conduct in doing so was disability discrimination. Ms Nakamuli received the report on 31 March 2016 and saw a reference to that. As a consequence of what she read she embarrassed the claimant. Having criticised other staff for leaving keys lying around, she called the claimant into her office to "give him a rollocking" over leaving the keys in his office. Staff could see that she was taking him to task in her office. It was humiliating.

9. This allegation is put as victimisation contrary to section 27. The protected act was the verbal allegation to Occupational Health at the assessment on 29 March 2016. The detrimental treatment because of that protected act was calling the claimant in to take him to task over keys.

10. Alternatively the claim is put as harassment contrary to section 26. The unwanted conduct was taking the claimant into her office to berate him. That was related to his disability because it was a consequence of what Ms Nakamuli had read in the Occupational Health report. The claimant alleges that the treatment violated his dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for him.

Allegation 4

11. On 12 May 2016 Ms Nakamuli prevented the claimant leaving work to attend a CT scan despite his immediate line managers being aware that he was about to do so.

12. This is put as discrimination arising from disability contrary to section 15. The unfavourable treatment was preventing the claimant attending the appointment. That was because of something (the claimant being restricted from carrying out C and R work) which arose in consequence of his disability.

Allegation 5

13. On 19 May 2016 Ms Nakamuli cancelled the claimant's attendance on a course the following day, and asked his wife to attend the course instead. A younger male colleague attended the course the following week.

14. This allegation is put as direct discrimination because of marital status contrary to section 13. The claimant says that the cancellation of his attendance on the course amounted to less favourable treatment because he was a married person. He seeks to compare himself with his wife or in the alternative a hypothetical comparator who is not married.

15. ~~The allegation is also pursued as direct sex discrimination contrary to section 13. The claimant says that the cancellation of the course was less favourable treatment because of sex than his wife received~~.

16. The allegation is also put as direct age discrimination contrary to section 13. The claimant was aged 61 at the time. The cancellation of the course is said to be

less favourable treatment because of age than the treatment of his comparator, Mark Crehan, who was in his early 30s.

Allegation 6

17. In August 2016 the claimant volunteered to do extra weekend shifts when the deputy manager was going to be away. Ms Nakamuli refused to allow him to do extra weekend work. This restriction went beyond the recommendations of the Occupational Health report.

18. This allegation is put as discrimination arising from disability contrary to section 15. He was prevented from working shifts because of something (a perception that he was less valuable than a member of staff without restrictions on his work) which arose in consequence of his disability (because his disabilities meant that he could not do C and R work).

18A. Alternatively, this is alleged to be an act of direct discrimination because he was disabled.

Allegation 7

19. ~~*During*~~ *For a period of approximately three and a half years including* August 2016 the claimant was not allowed to ~~administer~~ *assist with* medication, ostensibly because he was not able to do C and R duties. However, other members of staff not allowed to do C and R duties were permitted to assist with medication, including Paul Berry and Lee Gilbert.

20. The restriction on the claimant is said to be discrimination arising from disability contrary to section 15. The unfavourable treatment is preventing him from assisting with medication. This was because of something (a perception that he was of less value than a member of staff able to work without restrictions) which arose in consequence of his disability (because his disabilities meant he could not do C and R work).

20A. Alternatively, this is alleged to be an act of direct discrimination because he was disabled.

Allegation 8

21. Some years earlier a reasonable adjustment had been put in place allowing the claimant a fixed shift pattern to prevent variable shifts affecting his medication and his sleep pattern. A particular concern was a shift when he would finish at 9.00pm and start again at 7.00am the next day. For some four years he had been working fixed shifts between 7.00am and 2.30pm.

22. On 19 December 2016 he was informed that on Christmas Day he would be working 1.30pm to 9.00pm, with a 7.00am start the following day, and that on 2 January 2017 he would be working 1.30pm to 9.00pm with a 7.00am start the following day.

23. This complaint is pursued as a breach of the duty to make reasonable adjustments. The PCP was a requirement for staff in the claimant's role to work a variable shift pattern. That placed the claimant at a substantial disadvantage

compared to a person without his disability because variable shifts affected his medication and sleeping pattern. The claimant contends that the reasonable adjustment would have been to have allowed him to continue with the fixed shift pattern on 25 December 2016 and 2 January 2017.

23A. Alternatively, this is alleged to be an act of direct discrimination because he was disabled.

Allegation 9

24. On 21 December 2016 the claimant asked Michelle Downey to refer him to Occupational Health so that he could report the effect on him of the requirement to work different shifts on the two days in question. Ms Nakamuli failed to make that referral.

25. This allegation is put as victimisation contrary to section 27. The claimant relies on his verbal allegations made to Occupational Health on 29 March 2016 as the protected act. Ms Nakamuli subjected the claimant to a detriment in declining to make a further Occupational Health referral and did it because of his protected act.

26. In the alternative it is put as discrimination arising from disability contrary to section 15. Failing to make the referral was unfavourable treatment. This was because of something (a desire to conceal the failure to make reasonable adjustments) which arose in consequence of his disability (because the reasonable adjustments were required because of the disability).

Allegation 10

27. On 3 February 2017 Ms Nakamuli put the claimant's vitamin drink and hand cream in the bin.

28. This is put as discrimination arising from disability contrary to section 15. The unfavourable treatment is placing those items in the bin. This was because of something (a perception that the claimant was of less value than staff working without restrictions) which arose in consequence of his disability (because the restriction from C and R work was because of his disability).

Allegation 11

29. On 24 March 2017 Ms Nakamuli and Ms Critchley sent an email to staff indicating that those named as on security duties would be responsible for security matters even if due to the wrongdoing of others, and that staff could face discipline.

30. This allegation is put as indirect disability discrimination contrary to section 19. The PCP was the requirement in the email for staff working on security duties to take responsibility for the failings of others. This placed disabled people at a particular disadvantage because they were more likely to be undertaking security duties than staff who were not disabled and who were capable of the full range of other duties. The claimant was put at that disadvantage because he performed security duties more often than colleagues who were not disabled.

31. The allegation was also pursued as one of victimisation. The claimant relies on verbal allegations made to Angela Roberts on 18 March 2017 as his protected

act. He alleged bullying, harassment and victimisation. The circulation of the email amounted to a detriment to the claimant by reason of that protected act.

Allegation 12

32. On 20 May 2017 the claimant lodged a formal grievance which contained allegations of discrimination and was a protected act. As a consequence of his formal grievance he was subjected to victimisation in *three* ~~two~~ ways*:*

(1) cancelling the claimant's counselling appointment for 25 May 2017;

(2) requiring the claimant to meet face-to-face with Ms Nakamuli on 16 June 2017; and

(3) changing the time of the claimant's grievance/mediation meetings on 16 June 2017.

33. ~~The first was that Occupational Health appointments were made, changed or cancelled without him being informed. Further details of the appointments in question will be provided in the further particulars from the claimant.~~

34. ~~The second was that the claimant wanted to introduce a concern about a past removal of him from bank shifts but was not allowed to raise this in the course of the grievance. It was trivialised and omitted from the grievance. This was victimisation because of his protected act~~.

35. For clarity the claimant also alleges that the grievance investigation was selective and incomplete. Further particulars of that allegation will be supplied by the claimant. However, he does not allege that this failure to investigate his grievance properly amounted to unlawful discrimination: it is a matter relevant as background and which may go to remedy should his complaints succeed.

REASONS

The disputed decisions

1. Following a preliminary hearing on 6 September 2017, Employment Judge Franey caused this case to be listed for a further preliminary hearing which took place today. One of the purposes of the preliminary hearing was to determine "whether the claimant is to be permitted to amend his claim form by the inclusion of new matters in Annex B". Counsel for the respondent coined the phrase "the September amendment application" to describe this document. For convenience I adopt that definition.

2. By email dated 20 October 2017, the claimant sought to make a number of amendments to Annex B. To use counsel's label, this was the October amendment application. In the same document the claimant applied to add five further respondents to the claim.

3. Having reviewed the correspondence, Employment Judge Franey caused a letter dated 3 November 2017 to be sent to the parties. The letter indicated that the October amendment application and the application to add additional

respondents would both be considered at today's hearing. The claimant was invited to confirm in writing the involvement of each proposed respondent by reference to the numbered allegations in Annex B.

4. On the morning of the hearing, the claimant emailed to the Tribunal and the respondent a further detailed document setting out his case. The document went beyond attributing involvement by the additional respondents in the Annex B allegations. Further detail was supplied in relation to the allegations themselves, the legal basis upon which they were pursued, and new allegations that had not featured in Annex B at all. This, combined with the claimant's oral explanations at the hearing, was referred to as the "November amendment application".

5. With one exception, the parties consented to the November amendment application being determined at this hearing. The exception relates to the part of the November amendment application set out in the Schedule.

6. During the course of the hearing, it became clear that there was no dispute in relation to the September amendment application. The claimant having clarified his case as recorded in the Judgment, the respondent was content to allow the claimant to pursue his claim as set out in Annex B. Whether this was because the allegations were already present in the claim form or because the respondent consented to my giving permission to introduce them by way of amendment is somewhat academic.

The October amendment application in detail

Allegation 2

7. The first disputed part of the October amendment application related to Annex B, Allegation 2. As originally formulated, Allegation 2 identified one alleged act of unfavourable treatment. This was Ms Mitchell's "refusal to address the verbal grievance".

8. At paragraph 3 of the October amendment application, the claimant gave a narrative account of Ms Nakamuli having told Ms Critchley on 9 November 2015 that the claimant had memory problems. According to the claimant, this assertion was false: he does not in fact have memory problems. In his oral submissions, the claimant appeared to regard the very making of this remark as being unfavourable treatment. He also described it as "discrimination by perception", disavowing the suggestion in Annex B that the claimant had actual memory problems which had arisen in consequence of his disability.

9. So far as it was possible to tell, the genesis of these allegations was the following passage in the original claim form:

> "9/11/15 [Ms Nakamuli] informed [Ms Critchley] how she had caused me a detriment and why. [Ms Nakamuli] disclosed the practice policy or rule she made on the 18/9/15 was because of me. Direct discrimination".

10. The respondent did not seem to object to the claimant recasting this complaint as one of direct discrimination by perception, or for including an allegation that Ms Nakamuli had treated him less favourably by making the (allegedly) false

statement at the 9 November 2015 meeting. In the event that I have misunderstood the respondent's position in this regard, I deal with it in my conclusions below.

11. What appeared to be the real point of contention under Allegation 2 was the proposed amendment sought to be introduced by paragraph 4 of the October amendment application. Here, the claimant alleged a further act of unfavourable treatment, namely providing a "humiliating and degrading task sheet" sometime between November 2013 and May 2014. It was the respondent's case that to raise this allegation would be to introduce a substantially new area of factual enquiry. The focus of Allegation 2 would be shifted away from the meeting on 9 November 2015 and subsequent grievance towards events some 18 months earlier. For the first time, the Tribunal would have to ask itself why Ms Nakamuli gave the claimant the task sheet. Counsel for the respondent also pointed out that the statutory time limit was a powerful factor against allowing the amendment.

Allegation 5

12. The controversy under the heading of Allegation 5 relates to the complaint of direct discrimination because of sex. There is no dispute that the claimant can rely on the protected characteristics of age and marital status.

13. The October amendment application, at paragraphs 5 and 6, alleged, for the first time, that the claimant had been treated less favourably than a female member of staff in that he was prohibited from using the kitchen and she was not. This allegation was neither in Annex B nor in the claim form. The respondent contended that the amendment was out of time.

Allegation 12

14. According to Annex B, Allegation 12 was one of victimisation under EqA. The protected act was said to have been a formal grievance dated 30 May 2017. Two detriments were identified at paragraphs 33 and 34. At today's preliminary hearing, the claimant abandoned the latter of those two detriments.

15. At paragraphs 19 and 20 of the October amendment application, the claimant sought to clarify his position with regard the detriment at Allegation 12, paragraph 33. As recorded in Annex B, the alleged detriment was that Occupational Health appointments had been made, changed or cancelled. Paragraph 33 recorded that the claimant would provide further particulars of those appointments.

16. The claimant reminded the Tribunal of the original wording of his claim form, which was "since submitting the formal grievance [,] appointments have been made, changed or cancelled without informing me". At today's hearing, the claimant gave further details of which appointments had been handled in this way. They were not Occupational Health appointments at all. The allegation referred to two meetings that were scheduled to take place on 16 June 2017. It was alleged by the claimant that he had been required to meet face to face with Ms Nakamuli and that, when he attended the first of the meetings he was told they had been swapped around.

17. This part of the October amendment application needs to be viewed alongside an e-mail from the claimant to the tribunal dated 21 September 2017. In that e-mail the claimant did as he was bidden by Annex B and provided further particulars of the appointments. The relevant appointments were a counselling meeting on 25 May 2017 and two meetings on 16 June 2017.

18. I did not understand the respondent to be objecting to the claimant providing further detail about the appointments that had been made, changed or cancelled (Allegation 12), provided that these were under the heading of EqA victimisation.

19. The October amendment application also sought to introduce a complaint of detriment on the ground of a protected disclosure. The disclosure in question was said to have been made on 25 May 2016. On that date, the claimant allegedly informed Ms Critchley that he had "reported to several senior management of a serious breach of health and safety regulations (electric light switch in the patients' bathroom) without receiving any feedback". According to paragraphs 27 to 31 of the October amendment application, the claimant had been subjected to a series of detriments on the ground that he had made that disclosure. The dates of the alleged detriments ranged from 1 June 2016 to 15 February 2017.

20. It is worth pausing at this point to examine the wording of the original claim form. It referred to the claimant having "disclosed" substantially the same information on 25 May 2016 as was alleged to amount to the protected disclosure set out in the October amendment application. It was also alleged in the claim form that Ms Nakamuli started "victimising" the claimant after disclosing this hazard. What was not apparent from the claim form, however, was any suggestion that the claimant was bringing a complaint of detriment for having made a protected disclosure. Significantly, the claim form did not include any reference to "whistleblowing", "public interest" or "protected disclosure". The narrative section of the claim form was expressed in language drawn from EqA ("discrimination", "harassment", "victimisation", "reasonable adjustments"). There was no reference to the Employment Rights Act 1996. In section 8 of the claim form, the claimant had ticked the various boxes alleging that he had been discriminated against on the grounds of age, disability, marriage and sex, but he did not tick the box next to the sentence, "I am making another type of claim which the Employment Tribunal can deal with". Although there was a bare assertion of victimisation for having made the 25 May 2016 disclosure, none of the actual incidents set out in the October amendment application were referred to in the claim form.

21. The respondent's position was that an amendment was required and should be refused. It's objection was based on the extent of new factual enquiry and the statutory time limit. Time limits were a particular factor in this case because an extension of time could only be granted if it had not been reasonably practicable for the complaint to have been presented in time.

Addition of new Respondents – application and objections

22. Ms Mitchell, Ms Critchley and Ms Nakamuli objected to being joined as respondents. They recognised that the claimant could be left without a remedy if the respondent Trust succeeded in its statutory defence. Nevertheless, they

argued that it would not be in the interests of justice for them to be joined because of the late stage at which the claimant had applied to join them.

23. Mr Roscoe and Ms Sheard had an additional ground for resisting the claimant's application. This was, quite simply, that the claimant had not alleged that they were responsible for any of the contraventions of EqA set out in Annex B or the October amendment application. In this regard they drew support from the November amendment application which was specifically tailored towards identifying the involvement of individual proposed respondents in the alleged prohibited conduct set out in Annex B. The November amendment application did not suggest that they had been responsible for such conduct. Rather, that document alleged that Ms Sheard had "failed in her professional duty of care in processing data" and that Mr Roscoe had "failed to address the claimant's disclosure of suicidal thoughts, the disclosure of a criminal act, breaches of Trust policies".

The November amendment application in detail

24. Many of the allegations set out in the November amendment application either failed to identify any breach of a legal duty (for example, "failed to comply with the Trust's grievance policy") or alleged legal causes of action (for example, "negligence and breach of the Data Protection Act 1988") in respect of which the Tribunal had no power to grant any remedy. It was the respondent's fairly straightforward objection that there would be no point in allowing these allegations to be introduced by way of amendment, because the Tribunal would have no jurisdiction to determine them.

25. The November amendment application also sought to introduce further complaints of whistleblowing detriment. Aside from the detriment claim appearing in the Schedule (in respect of which the respondent reserved its position), the new whistle-blowing complaint appeared to be based on two new protected disclosures. The first referred to a "qualifying disclosure of breach of health and safety regulations" on 25 November 2016. This may well have been a mistaken reference to the disclosure allegedly made on 25 May 2016 according to the October amendment application. The second, as clarified by the claimant at the hearing, was made on 5 June 2017. According to the claimant, he said at a meeting on this date that the respondent had committed the criminal offence of instructing or inciting discrimination, contrary to the Public Order Act 2008. It was alleged by him that, on the ground that he made this statement, he had been subjected to three detriments. These were:

    25.1.1. Requiring the claimant to meet face to face with Ms Nakamuli on 16 June 2017;

    25.1.2. Changing the times of two meetings scheduled to take place on 16 June 2017; and

    25.1.3. Omitting from the grievance outcome any reference to a complaint that the claimant had made in his grievance about a failure to refer him to Occupational Health.

26. The respondent objected to this new part of the claim on the ground that it raised additional factual evidence and that the application to amend had been made after the expiry of the statutory time limit for the events in question.

Further relevant facts

27. There are few additional facts that need to be recorded here. Not already mentioned, however, are the following events

    27.1. On 5 June 2017 a meeting took place to discuss the claimant's grievance. The claimant has supplied me with a copy of minutes of that meeting. It is unclear who prepared those minutes. According to the minutes, the meeting was attended by Ms Mitchell, Ms Sheard, the claimant and his trade union representative. The notes of the meeting do not record the claimant having alleged that a criminal offence had been committed, or that anybody had instructed or incited anybody else to discriminate. There was no reference to the Public Order Act or any other statute; at any rate nothing that was recorded in the minutes.

    27.2. The claimant commenced early conciliation on 15 June 2017. He was provided with a certificate from ACAS on 30 June 2017. He presented his claim on 10 July 2017.

    27.3. It appears to be common ground that a further meeting took place on 16 June 2017 to discuss the claimant's grievance. Ms Nakamuli attended that meeting. According to the claimant the main purpose of the meeting was mediation. What is clear, however, is that the meeting did not achieve a successful outcome from the claimant's point of view. The formal grievance process resumed. I do not know for sure when the outcome was communicate to the claimant. As at 23 August 2017, when the ET3 response was submitted, the process was still ongoing. The respondent anticipated at that time that it would be concluded in October 2017.

Claimant's arguments

28. I asked the claimant a number of questions designed to address the factors to be taken into account in deciding whether to allow an amendment. I also gave him more general opportunities to put forward arguments in support of his application. By and large, the claimant's answers did not really engage with the argument. They tended to focus on how he had been treated and how he would like to put his case given the opportunity to do so.

Relevant law

<u>Whether amendment is required</u>

29. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

30. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the

> parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

31. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

32. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

Whether amendment should be granted

33. Guidance as to whether or not to allow applications to amend is given in the case of *Selkent Bus Company v. Moore* [1996] IRLR 661. The following points emerge:

33.1. A careful balancing exercise is required.

33.2. The tribunal should consider whether the amendment is merely a relabelling of facts already relied on in the claim form or whether it seeks to introduce a wholly new claim. (Technical distinctions are not important here: what is relevant is the degree of additional factual enquiry needed by the claim in its amended form: *Abercrombie & Ors v Aga Rangemaster Ltd* [2013] EWCA Civ 1148).

33.3. Where the amendment raises substantial additional factual enquiry, the tribunal should give greater prominence to the issue of time limits and whether or not the relevant time limit should be extended.

33.4. The tribunal should have regard to the manner and timing of the amendment.

33.5. The paramount consideration remains that of comparative disadvantage. The tribunal must balance the disadvantage to the claimant caused by refusing the amendment against the disadvantage to the respondent caused by allowing it.

34. Allowing an amendment to introduce a new claim does not necessarily deprive a respondent of the opportunity to argue at a later stage that the new claim is out of time: *Galilee v. Commissioner of Police for the Metropolis* UKEAT/0207/16. I prefer to follow this authority than the earlier cases of *Rawson v. Doncaster NHS Primary Care Trust* UKEAT/0022/08 and *Amey Services v. Aldridge* UKEATS/0007/16. Nevertheless there are still cases where it will be important to consider the question of time limits at the amendment stage: see *Galilee* at para 109.

Time limits under EqA

35. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

36. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

37. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

38. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA*

39. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

40. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

    40.1. the length of and reasons for the delay;

    40.2. the effect of the delay on the cogency of the evidence;

    40.3. the steps which the claimant took to obtain legal advice;

    40.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

    40.5. the extent to which the respondent has complied with requests for further information.

Time limits in whistleblowing detriment cases

41. By section 48(3), a tribunal must not consider a complaint of protected disclosure detriment unless the complaint was presented:

> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act

or failure is part of a series of similar acts or failures, the last of them, or

(b))within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

42. Whether a detrimental act was part of a "series of similar acts" is a fact-sensitive question. It is not the same as the test in discrimination cases of whether an act extended over a period. The tribunal must ask whether there is a link between the different acts and omissions that makes it just and reasonable to be considered as part of the same series. It is generally preferable for that question to determined at a final hearing after having heard the evidence. A tribunal may err in law by deciding the point on submissions alone. *Arthur v. London Eastern Railway* [2006] EWCA Civ 1358.

43. In deciding whether acts form part of the same series, the following factors are potentially relevant:

43.1. It is necessary to look at all the circumstances surrounding the acts.

43.2. Were they all committed by fellow employees?

43.3. If not, what connection, if any, was there between the alleged perpetrators?

43.4. Were their actions organised or concerted in some way?

43.5. Why did they do what is alleged?

43.6. It is not necessary that the acts alleged to be part of the series are physically similar to each other

43.7. It may be that a series of apparently disparate acts could be shown to be part of a series or to be similar to one another in a relevant way by reason simply of them all being on the ground of a protected disclosure (Lloyd LJ disagreed on this point).

October amendment application – conclusions

Allegation 2 – Ms Nakamuli's remark to Ms Critchley

44. The events of the meeting of 9 November 2015 (at which this remark was allegedly made) were clearly referred to in the claim form under the heading, "Discrimination by perception". In case I am incorrect in my understanding of the respondent's stance, and the respondent was in fact objecting to the claimant relying on this remark as an act of unfavourable treatment, my view is that no amendment is required and, if required, it would cause no disadvantage to the respondent in it being granted. Likewise, it appeared to me to be a consistent theme of the claimant's case both in the claim form and the October amendment application that the claimant was alleging "discrimination by perception". Unfavourable treatment based upon a mistaken perception based on a person's disability is hard to distinguish from direct discrimination based on a stereotype because of that person's disability. It appeared to me that if this allegation were to proceed simply as a complaint under section 15 EqA, it might fail for the technical reason that the wrong legal label had been attached to it. This risk was all the more likely in view of the claimant's express denial (October amendment

application paragraph 1) that he had any memory problems arising in consequence of his disability.

Allegation 2 – Ms Nakamuli giving the claimant a task sheet

45. This allegation requires an amendment. Although the claim form referred to Ms Nakamuli having confessed on 9 November 2015 to having "caused me a detriment", the alleged detriment appeared to relate to "a practice, policy or rule she made on 18/9/15". This is already the subject of Allegation 1. The alleged detriment could not reasonably have been interpreted as relating to the giving of the task sheet sometime between November 2013 and May 2014.

46. This new part of the claim would raise a new area of factual enquiry: Why did Ms Nakamuli give the claimant the task sheet? This factual issue is substantial enough, in my view, to make it important to consider the time limit. According to Annex B, the last in time of the alleged EqA contraventions were those under the heading of Allegation 12. Of these, as the claimant clarified at the preliminary hearing, the latest was on 16 June 2017. (There is one alleged later incident – failing to address a particular complaint in the grievance outcome – but this was not referred to in the October amendment application and, in any event, the claimant does not have permission to introduce this allegation.) Assuming, for present purposes, that the tribunal were to find that all the conduct in Annex B were part of a single ongoing state of affairs, and therefore an "act extending over a period", that period would have ended on 16 June 2017. Discounting 14 days for early conciliation, the last day for presenting a complaint for the new allegations would have been 29 September 2017. The October amendment application was not made until 20 October 2017. An extension of time would therefore be required.

47. In my view it would not be just and equitable to extend the time limit. To try and explain her actions, Ms Nakamuli would have to cast her mind back, potentially, as far as November 2013, over 4 years ago. The delay would adversely affect the cogency of the evidence. Another way of looking at it is that to allow the amendment would cause a considerable disadvantage for the respondents, because the delay has made it harder for them to defend the claim. In my view, this disadvantage outweighs the disadvantage that would be caused to the claimant in refusing the amendment.

Allegation 5 – the kitchen

48. The allegation of sex discrimination in relation to the kitchen requires the tribunal to embark on a new fact-finding exercise. Was the female comparator allowed to use the kitchen? If so, why? Was the claimant prohibited from using it? If so, was it because he is a man, or for some other reason?

49. For the same reasons as for Allegation 2, my view is that this new allegation was brought to the tribunal after the expiry of the statutory time limit. It would not be just and equitable for that time limit to be extended.

Allegation 12 – making, changing and cancelling appointments

50. The claimant and EJ Franey appear to have got their wires crossed when clarifying and recording Allegation 12. I should make clear that I do not imply any criticism of either the claimant or EJ Franey in this regard. From reading the claim form, the October amendment application and 21 September 2017 e-mail, however, it is clear that in Allegation 12, the claimant was not referring to

Occupational Health appointments, but to meetings more generally. To adopt the language of *Amin,* the details of those meetings provided on 21 September 2017, and at the preliminary hearing, were further particulars of an already-pleaded claim and did not require any amendment.

Whistleblowing detriment – disclosure on 25 May 2016

51. In my view, read as a whole, the claim form did not raise a complaint of detriment on the ground of protected disclosures contrary to section 47B. It is true that claimant did refer to having disclosed a breach of health and safety on 25 May 2016, and having been "victimised" afterwards. Nevertheless, in the absence of clear signposting towards a whistleblowing claim, a reasonable reader would have understood this as either a misplaced complaint of EqA victimisation, or one of the many allegations that was simply part of the background. I reach this conclusion because the surrounding passages were so clearly directed at discrimination under EqA. My view is reinforced by the fact that, at the preliminary hearing before EJ Franey, the claimant made no attempt to highlight any allegation that he had made a protected disclosure, what that disclosure was, or what detriment he had suffered as a result of it. An amendment is therefore required.

52. In my view, the *Selkent* principles point very clearly towards the amendment being refused. Even had this complaint been included in the original claim form, it would have been doomed to fail. According to paragraphs 29 to 31 of the October amendment application, the last of the detrimental acts done on the ground of this disclosure was on 15 February 2017. The final day for presenting the claim would therefore have been 14 May 2017. For this part of the claim, the claim form is 8 weeks out of time. The claimant has not put forward any reason to suggest that it was not reasonably practicable to present the claim within the three-month time limit.

53. In case I am wrong in my conclusion that an amendment was required, I had better record what I would have done if I considered that this detriment complaint was contained in the original claim form. In that event, I would have ordered that, at the preliminary hearing on 26 January 2018, the tribunal should determine the preliminary issue of whether this complaint had been presented within the time limit and, if not, whether the time limit should be extended. For the reasons I have given, it is likely that the preliminary issue would be decided in favour of the respondent.

Adding respondents – conclusions

54. In my view, the overriding objective favours the inclusion of Ms Critchley, Ms Mitchell and Ms Nakamuli as individual respondents. This should not come as a surprise, at least to the Trust, as the prospect was very clearly raised by EJ Franey following the preliminary hearing on 6 September 2017. The objection is that the claimant has applied late in the proceedings. I disagree. They were named within a month of the preliminary hearing and about two months after the Trust raised the statutory defence. There is still plenty of time before the final hearing for them to prepare and engage separate representation if that is what they wish. If I were to refuse permission to join these individuals as respondents, there would be a real danger of unfairness. The tribunal might find that they discriminated against the claimant, but that the Trust is not liable for it. That would leave the claimant without a remedy.

55. Mr Roscoe and Ms Sheard should not be joined as respondents. There is no disadvantage to the claimant in my refusing to join them. There are no allegations before the tribunal for which these two individuals could be personally liable. Their actions, as explained in the November amendment application, do not amount to a contravention of EqA.

November amendment application - conclusions

Whistleblowing detriment – protected disclosure on 25 November 2016

56. I can deal briefly with the allegation of a protected disclosure on 25 November 2016. The claimant has provided no detail about this disclosure, or at any rate, none that would distinguish it from the disclosure allegedly made on 25 May 2016. No additional detriments are alleged to have flowed from it. I suspect that this is a typographical error, but, in case it is not, I would refuse the amendment. If the amendment were to be allowed, the respondent would still be left not knowing the case it has to meet.

Whistleblowing detriment – protected disclosure on 5 June 2016

57. The newly-introduced allegation of a protected disclosure on 5 June 2016 would raise additional areas of factual enquiry: What did the claimant say at his grievance meeting? Did he believe that it tended to show that a criminal offence had been committed? Was that belief reasonable? Did the disclosure of a criminal offence that motivate the respondents to subject him to the alleged detriments?

58. It is arguable that this part of the November amendment application was made within the statutory time limit. The final detriment is said to have consisted of making a deliberate omission from the grievance outcome. Since that outcome was delivered sometime in October 2017, the November amendment application must have been made less than three months from that time. It is arguable that the grievance outcome and the earlier detriments were part of the same series of similar acts. Without hearing evidence it would be premature to conclude otherwise.

59. Nevertheless, I refuse the amendment. Here are my reasons:

    59.1. Refusing the amendment would cause little disadvantage to the claimant. He would struggle to show that it was reasonable for him to believe that what he said at the meeting on 5 June 2016 tended to show that a criminal offence had been committed. So far as I am aware, there is no Public Order Act 2008 and no offence of "inciting or instructing discrimination". Nothing in the minutes suggests that the claimant was reporting a crime. Even without a whistleblowing detriment complaint, the claimant can still pursue his allegation that the making, rearrangement and cancellation of appointments was because he had complained about discrimination. As a result of the October amendment application, this is part of his victimisation complaint.

    59.2. By contrast, allowing the amendment would put the respondent to a disadvantage. Witnesses would have to recall the precise words spoken at the meeting of 5 June 2016. Since nothing in the minutes of that meeting appears to refer to a criminal offence, they are likely to have to recall unminuted parts of the conversation. There is also a real danger of over-

complicating this claim, which will lead to a longer hearing and additional cost.

Allegation 12 – omission from the grievance outcome

60. We are concerned here with the claimant's allegation that the grievance outcome omitted a reference to his complaint about failure to make a referral to Occupational Health. This allegation plainly requires an amendment to the claim, since the grievance process had not reached a conclusion by the time the original claim form was presented. Time limits are not relevant for the reasons given at paragraph 58 above. But I do not think that the claimant will suffer a significant disadvantage by the amendment being refused. Paragraph 35 of Annex B records the claimant's view that the grievance investigation was "selective and incomplete". Yet he did not think that it was discriminatory at that time and did not want to include it as part of his claim. The newly-introduced allegation about the grievance outcome is, really, just another way of saying that the outcome was also "selective and incomplete". I struggle to see how an omission from the outcome letter could be victimisation if similar omissions from the investigation were not.

30 November 2017

_____

Employment Judge Horne

SENT TO THE PARTIES ON

12 December 2017

FOR THE TRIBUNAL OFFICE