EMPLOYMENT TRIBUNALS

Claimant: (1) Samuel Inyang (2) Alick Sakala

Respondent: Network Rail Infrastructure Limited

HEARD AT: Cambridge: 21 March 2019

BEFORE: Employment Judge Michell (sitting alone)

REPRESENTATION: For the Claimant: Mr Andrew Otchie (Counsel)
For the Respondent: Mr Jason Braier (Counsel)

RESERVED JUDGMENT

1. By consent, the Respondent's name is amended to Network Rail Infrastructure Limited.

2. The First Claimant's application under r38(2) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 to set aside the order dismissing his claim is rejected.

3. The Second Claimant's application to amend his claim is rejected, and (pursuant to the Respondent's application) his claim is dismissed as having no reasonable prospects of success under r37(1)(a) of Schedule 1 to the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013.

REASONS

BACKGROUND

1. By two separate ET1s presented to the tribunal on 20 March 2018, the two Claimants (below, "Mr Inyang" and "Mr Sakala") brought claims alleging race discrimination against the respondent, following an incident on 25 February 2017 ("the incident")

which led to them both receiving sanctions (whilst contract workers) for alleged misconduct. Liability is denied.

HEARING

2. This hearing was listed by the tribunal on 27 December 2018 to determine (amongst other things) whether Mr Inyang's claim (which, as will be seen below, had been struck out for non-compliance with an unless order) out to be reinstated and whether Mr Sakala's claim ought to be struck out. I was given a 346 page bundle for use at the hearing. Both Counsel gave oral submissions. Mr Braier also provided a detailed and helpful 18 page skeleton argument, and bundle of authorities, for which I was grateful. I have adopted where appropriate some text from that skeleton argument, below.

3. Both Claimants were present at tribunal. I gave Mr Otchie the opportunity to call one or both of his clients to give live evidence. Having taken instructions, he did not seek to do so.

4. The Respondent had prepared a provisional List of issues and List of Facts for today. However, following discussion with the parties' representatives at the commencement of the hearing, and upon perusal of the bundle -which includes a witness statement dated 1.3.19 (and another statement, in identical terms, dated 12.3.19) prepared by Mr Cornelius Ebirilem of the Claimants' solicitors SLA Solicitors ("**SLA**")- it became clear that the legal issues to be determined today required updating and refinement. In particular:
    a. It was confirmed by Mr Otchie that the latest act of alleged race discrimination his clients relied on in support of their claims was 21.12.17 (i.e. the rejection of the Claimants' appeal against the imposition of sanctions).
    b. It was agreed between the parties that, taking into account the 'stop the clock' effect of the early conciliation process and s207B(3)&(4) of the Employment Rights Act 1996 ("**ERA 1996**"), the primary deadline for submission of the claims had been 28 March 2018 and that any act occurring after 28.11.17 was in time for Equality Act 2010 ("**EA 2010**") purposes.
    c. It was accepted by the Respondent (and I agreed) that in the light of Mr Ebirilem's statement:
        i. Both claims had been presented by hand to the London Central employment tribunal on 20 March 2018 (rather than 21 March 2018, as suggested by the stamp on the face of each ET1). Hence, even ignoring the effect of the early conciliation process, the claims had been presented in time.

ii. What Mr Ebirilem describes in his witness statement as "particulars of compliant" [sic] ("**POC**") had in each case been presented by hand to London Central employment tribunal on 11.4.18.

5. The parties also agreed that I ought to determine the following issues:
   a. In the case of **Mr Inyang**:
      i. Ought the unless order made on 14.7.18 be set aside under r38(2) of Schedule 1 to the ET Regs 2013 ("**the ET Rules**"), on the basis that it was in the interests of justice to do so?
      ii. Did the POC simply amount (as Mr Otchie argued) to further and better particulars of the claim ("FBPs"), requiring no amendment? Otherwise, if amendment was required, applying **Selkent** principles ought an amendment to be allowed?
      iii. (If amendment was necessary, amongst other things it would be relevant to note that the POC were presented to the tribunal after the expiry of the primary deadline.)
      iv. Ought the claim to be struck out on the basis that it had no reasonable prospects of success (whether or not an amendment was necessary, and was allowed)?
   b. In the case of **Mr Sakala**:
      i. Ought the claim to be struck out on the grounds of unreasonable conduct and/or for non-compliance with the rules for which the ET Rules make provision?
      ii. The issues set out at (ii)-(iv) above in relation to Mr Inyang and amendment/strike out also fell to be considered in Mr Sakala's case.

FACTS

The incident and its aftermath

6. Mr Inyang is a black Nigerian national. Mr Sakala is a black Zambian national. On the night of 25.2.17, the Claimants were part of a team of six men carrying out electrical earthing and bonding works at Blackhorse Road Station. Three of the other four operatives were white, the fourth was black British.

7. All operatives working on or near the track are required to have attained a level of competence in Personal Track Safety. Both Claimants at the time held that competence but also a more senior and rigorous competence as Controllers of Site Safety ("**COSS**"), which qualified them for bearing responsibility for ensuring compliance with Safe System of Work requirements when working near rail infrastructure. Neither of them was working in the COSS role on the night of 25.2.17,

as the work it was intended to undertake that night did not in principle require a COSS. The Claimants were the only two operatives who held the COSS competence.

8. For reasons set out in detail in a Local Investigation Report, the team with whom the Claimants were with that night worked on lines that were open to trains without appropriate supervision and without a Safe System of Work pack. The team's actions caused sufficient concern for a site supervisor for Volker Fitzpatrick Ltd ("VFL"), Valentina Popa, to file an accident incident report on 28.2.17 detailing the events. His report included the Claimants both walking down the trackside in contravention of safety requirements after the team had become aware that the tracks were being used by freight trains rather than being safeguarded. (Safeguarding refers to a track that is in full possession of the works team and that is not in use by trains other than engineering trains.)

9. Following Mr Popa's report, a (local) investigation took place That investigation commenced with the taking of witness statements. Mr Inyang gave two witness statements, on 28.2.17 and 2.03.17.

10. The investigation report identified contraventions of safe working by six members of the team including the Claimants. The contraventions are set out at section G of the report, with two unsafe acts identified against Mr Inyang and one against Mr Sakala.

11. The investigation report set out a number of local actions to be taken. Those actions included:

    a. attendance at a PTS recertification course by the 4 team members other than the Claimants before they could work on or near the line;
    b. all personnel to attend an interactive cultural safety workshop; and
    c. line managers to consider disciplinary action against Mr Inyang and two other team members (not including Mr Sakala) for providing false witness statements at the start of the investigation.

12. The Claimants' contraventions were referred to Sentinel Investigations, Network Rail in accordance with the Sentinel Rules. In making that referral, it was made clear that both Claimants held PTS and COSS competences.

13. The investigation team members signed off on the report between 10.6.17 and 16.5.17.

14. The Sentinel Rules extant at the time of the referral and review set out a non-exhaustive list of breaches, including:

d. infringement of any health and safety rules; and
e. any event of negligence which causes, or has the potential to cause loss, damage or injury.

15. The Sentinel Rules provide for outcome guidelines which indicate that for deliberate breach in either form set out above, the guideline scheme outcomes are take down of competences and suspension. There is a limited right of appeal upon submission of new information or mitigating circumstances that were not available at the formal review stage.

16. By formal review outcome letters dated 22.8.17, the following outcomes were determined to apply to the Claimants:

f. Mr Inyang – 9-month suspension until 21.5.18; not allowed to how supervisory safety critical competences until 21.5.19;
g. Mr Sakala – PTS and COSS competences taken down; a need to retake PTS initial in order to hold the PTS competence again; COSS taken down until 21.8.18.

17. Those outcomes are explained in greater detail in Sentinel Misconduct Decision of Sanction forms. The Summary of Events sections of both forms make clear that given the Claimants held the COSS competence, they knew the requirements of COSS and of Safe System of Working. The form for Mr Inyang noted that he also falsely declared during the incident that he was the appointed COSS/Lookout, that his first witness statement was false, and that he told the team with whom he was working to give false statements. I have no evidence before me which asserts or suggests this was incorrect.

18. The Claimants both appealed against the outcome. The appeal letter, drafted by the Claimant's previous solicitors ("Adams"), complains principally that the review panel was not suitably independent and that it was biased towards those holding managerial or supervisory positions. It also complains that the Level 2 investigation was predetermined. The appeal letter's principal assertion is that the Claimants:

"… have been treated unfavourably as a result [of] their protected disclosures about their managers [and that] the Panel was not independent but it was bias (sic) towards the managers against whom they have made protected disclosures".

19. The appeal letter made no mention of race discrimination.

20. An appeal hearing in each Claimant's case was held on 4.12.17. Both Claimants asserted that they had been "victimised", though Mr Inyang made no reference to discrimination (and instead appeared to suggest a link between his treatment and "protected disclosures"). Mr Sakala at his hearing asserted that he felt "victimized and discriminated", and that he and Mr Inyang had been "used as scapegoats". He (for the first time) posed the question: "he hates to say it but is the unfair treatment because of his ethnicity?". The question was not apparently answered, and not pursued further at the time.

21. By an outcome letter dated 21.12.17, the decisions were upheld and the appeals rejected.

Procedural Background to the claims

22. By at least 26.2.18, the Claimants had instructed SLA. On that date, SLA wrote to the Respondent, asserting that SLA was "collating further evidence… against your company for possible discriminatory act, breach of contract and/or constructive dismissal". No mention of race discrimination was made.

23. On 27.02.18, the Claimants notified ACAS of potential claims, and certificates were issued the following day (with Day B being the following day).

24. On 1.3.18, SLA wrote a letter before action which in largely repeated the wording of the appeal letter sent by Adams, save for the conclusions section. Once again, the letter made no mention of race discrimination.

Presentation of the claims

25. SLA subsequently filed with the tribunal the Claimants' ET1s which are stamped as presented to the Watford tribunal on 21.3.18, but (as I have said which were apparently received by London Central employment tribunal on 20.3.18. In section 8 of both ET1s, race discrimination was the only box ticked. In section 8.2 was written: "THE BACKGROUND AND DETAILS OF THE CLAIM TO FOLLOW".

26. As Mr Braier points out, the tribunal would have been fully entitled to reject both claims under r12(1)(b) of the ET Rules. However, notwithstanding the lack of any particularisation, both claims were accepted by the tribunal.

27. On 11.4.18, Mr Ebirilem apparently hand delivered POCs in both cases to the London Central employment tribunal. His witness statement explains this. But he gives:
    a. no reason why, given his firm was instructed by at least 26.2.19, the POCs were not lodged with the ET1s at the same time;

b. no explanation as to why, though the POCs were presented (late) to the tribunal, they were not also sent by SLA to the Respondent:
    i. at (at least) the same time as the POCs were given to the tribunal;
    ii. after receipt in May 2019 of the ET3s (which flagged up in clear terms in the Grounds of Resistance ("**GoR**") the non-receipt of any POCs);
    iii. within 14 days of the 14.7.19 'unless' order (described below); or
    iv. at any time thereafter until at least September 2018.

28. In the POC, each of the Claimants asserts they were "singled out along with another Black man , when other rail operatives (that were in the main, all white) … committed the same conduct, yet were not similarly disciplined". Those other operatives included a black British operative, as mentioned above. No reason is given in the POC as to why the combination of their colour and non-British nationalities somehow might have led to the Claimant's being singled out for 'discipline'.

29. On 22 & 23.5.18, the Respondent presented ET3s without sight of the POC. In each GoR:
    a. The name, address and other contact details of the Respondent's solicitors ("**Dentons**") are given.
    b. The Respondent notes that prior to receipt of the ET1s it was unaware of any allegation of race discrimination[1] and that in the absence of any particulars it was "unable to sensibly respond to the Claimant's claim" (using the words in r.12(1)(b) of the ET Rules).
    c. The Respondent sought review of the Tribunal's decision to accept the claims, or alternatively applied for strike out due to failure to comply with ET rules and abuse of process and on grounds of no reasonable prospects of success due to the omission of particulars.

30. On 29.06.18, the tribunal wrote to SLA in respect of Mr Sakala's case saying no details of claim had been received and seeking an explanation within 14 days, and explaining that the matter would be referred to a Judge to consider an application by the Respondents for review of the decision to accept the claim and/or for strike out.

31. SLA wrote to the Tribunal on 2.7.18, listing both Claimants' claim numbers, asserting that the ET1s were presented on 20.3.18 and asserting that the POC were not submitted at that time "because we instructed counsel [whom Mr Otchie identified to me as himself] to draft the details and upon our receipt of his drat [sic], it was submitted on the 11 of April". Copies of the tribunal's receipt of the POC was provided

[1] This is not entirely correct. Cf the question posed by Mr Sakala at his appeal hearing, as noted above.

"for easy of reference" [sic]. However, neither the 2.7.18 letter nor Mr Ebirilem in his witness statement explains:

a. when counsel was instructed;
b. when counsel provided SLA with the draft POCs (which each amount to only about 3.5 pages of text, and which are substantially identical);
c. what (if any) good reason there was for any delay by SLA and/or Counsel; and
d. why (if at all) SLA and/or Counsel thought it permissible or appropriate to submit a POC separately and/or so much later.

32. SLA's letter was not copied to the Respondent, in breach of r.92 of the ET Rules. It was subsequently sent to the Respondent's solicitors by the Tribunal (as well under cover of a letter of 5.9.18.

The unless order (Inyang)

33. On 14.7.18, an unless order was made the Tribunal's own initiative in Mr Inyang's case, providing:

"*Unless the claimant provides full particulars of his claim to have suffered unlawful discrimination on the grounds of race to the Respondent and to the Tribunal by 4pm on 23 July 2018 his claim will be struck out for lack of particularisation*" (underlining added).

34. No particulars were received by the Respondent by 23.7.18, and accordingly Dentons by an email dated 24.7.18 asked the tribunal for both cases to be referred to a Judge and struck out.

35. No unless order was made in Mr Sakala's case, for reasons which are not wholly clear. But on 5.8.18, a strike out warning was sent in respect of his case. It warned that the tribunal was considering striking out his claim due to lack of reasonable prospect of success, failure to comply with the 29.6.18 direction, and on the basis that it had not been actively pursued.

36. The following day, SLA wrote to the Tribunal to object to the proposed course of action, referring to SLA's 2.7.18 letter, asserting that the tribunal's 29.6.18 direction had been complied with, that the prospects of success were 'overwhelming', and that the claim had been actively pursued. The POC were again enclosed with the letter. Once again, in breach of r.92 of the ET Rules, this letter was not copied by SLA to Dentons.

37. Of course, SLA was right to say that the tribunal had in fact received the POCs in both cases. Hence the tribunal acted on a false factual premise when saying that it had "not received details of the claim" in the Sakala case in the 29.6.18 letter, and was wrong to make an unless order in the Inyang case on the basis that the tribunal had not received the POC.

38. Extraordinarily, though, despite the very clear wording of the unless order (which, whilst it was extant, still required compliance), SLA still did not send the POC to Dentons. As set out above, even now, no explanation has been given for this failing.

39. On 5.9.18 the Tribunal sent to the parties notice of dismissal of Mr Inyang's claim for failure to comply with the unless order. At the same time, the Tribunal apparently sent Dentons a copy of the POC in both Claimants' cases.

40. Pursuant to ET Rules r.38(2), SLA was entitled to apply to the tribunal in writing within 14 days of the date that notice was sent (i.e. by 19.9.18). On the same day, SLA emailed the Tribunal to ask for the dismissal order to be set aside. Once again, this was not copied to Dentons, in breach of ET Rules r.30(2) and 92.

41. SLA's 5.9.18 email asserts "all directions in this matter have been complied with". That assertion was obviously incorrect, for the reasons set out above.

42. On 18.9.18, Dentons applied for the claims (if not already struck out) to be struck out for want of jurisdiction for being brought out of time and because the claims had been presented in a "scandalous and unreasonable" manner given (i) the "deliberate" omission of details of claim, and (ii) consistent failure to copy the Respondent into correspondence with the Tribunal in breach of ET Rules r.92.

43. On 20.9.18, SLA sent Dentons the POC and correspondence with the tribunal from which Dentons had previously been excluded.

44. By a letter dated 24.9.18 (copied to Dentons) and submitted to the tribunal on 25.9.18[2], SLA sent a fuller application to set aside the dismissal order in Mr Inyang's case. As Mr Braier says, the letter was sent "outside of the 14-day period since the notice of dismissal was sent". However, the 5.9.18 email -imperfect though it was- was sent within that time period. In my judgment, therefore, there was compliance by SLA with r.38(2)- albeit it is unclear to me whether or not SLA (again) failed to copy Dentons into this correspondence with the tribunal. I tentatively assume for present purposes that it did so.

[2] See SLA's 25.9.18 email to Dentons, which confirms the application was "submitted to the Tribunal toady" [sic].

45. SLA asserts in the 24.9.18 letter (amongst other things) that Mr Inyang's claim was struck out "as a result of administrative and/or procedural impropriety". This is not an accurate summary, for reasons already explained.

46. This PH was originally due to be held on 22.10.18 but was postponed due to lack of allocated time (it had been given a 2-hour time estimate).

MATERIAL LAW

Unless orders

47. The power to make an unless order specifying that a claim will be dismissed without further order upon failure to comply is set out under ET Rules r.38(1).

48. In **Wentworth-Wood & Others v Maritime Support Ltd** [2016] (UKEAT/0316/15/JOJ), HHJ David Richardson made clear [paras 4-7] that there are three stages to the unless order procedure:

    a. the decision to impose the order and the terms of imposition;
    b. the decision to give notice of dismissal for failure to comply – this simply requires the Tribunal to form a view as to whether there has been material non-compliance with the unless order; and
    c. whether it is in the interests of justice to set the order aside.

49. The leading employment case on guidance for what should be considered at the third stage is **Thind v Salvesen Logistics Ltd** [2010] (UKEAT/0487/09/DA) where Underhill P said this at [para 14]:

    "… The law as it now stands is … straightforward. The tribunal must decide whether it is right, in the interests of justice and the overriding objective, to grant relief to the party in default notwithstanding the breach of the unless order. That involves a broad assessment of what is in the interests of justice, and the factors which may be material to that assessment will vary considerably according to the circumstances of the case and cannot be neatly categorised. They will generally include, but may not be limited to, the reason for the default, and in particular whether it is deliberate; the seriousness of the default; the prejudice to the other party; and whether a fair trial remains possible. The fact that an unless order has been made, which of course puts the party in question squarely on notice of the importance of complying with the order and the consequences if he does not do so, will always be an important consideration. Unless orders are an important part of the tribunal's procedural armoury (albeit one not to be used lightly), and they must be taken very seriously; their effectiveness will be undermined if tribunals are too ready to set them aside. But that is nevertheless no

more than one consideration. No one factor is necessarily determinative of the course which the tribunal should take. Each case will depend on its own facts".

50. **Thind** concerned the 2004 ET Rules, but it has been applied to the 2013 ET Rules: see **Morgan Motor Company Ltd v Morgan** [2015] (UKEAT/0128/15/DM).

51. Underhill P ends his judgment in **Thind** [para 36] by making clear that it will not be usual for relief to be granted from the effect of an unless order, and that provided the order was appropriately made, it could be just to strike the claim out even though a fair trial remained possible given the important interest in employment tribunals enforcing compliance.

52. See also the Supreme Court in the non-employment law case of **Prince Abdulaziz Bin Mishal Bin Abdulaziz Al Saud v Apex Global Management Ltd and Another** [2015] 2 All ER 206 (commonly known as 'Global Torch'), where Lord Neuberger said (in the context of enforcing an unless order) [paras 23-25]:

"The importance of litigants obeying orders of court is self-evident. Once a court order is disobeyed, the imposition of a sanction is almost always inevitable if court orders are to continue to enjoy the respect which they ought to have. And, if persistence in the disobedience would lead to an unfair trial, it seems, at least in the absence of special circumstances, hard to quarrel with a sanction which prevents the party in breach from presenting (in the case of a claimant) or resisting (in the case of a defendant) the claim. And, if the disobedience continues notwithstanding the imposition of a sanction, the enforcement of the sanction is almost inevitable, essentially for the same reasons. Of course, in a particular case, the court may be persuaded by special factors to reconsider the original order, or the imposition or enforcement of the sanction".

… it is difficult to have much sympathy with a litigant who has failed to comply with an unless order, when the original order was in standard terms, the litigant has been given every opportunity to comply with it, he has failed to come up with a convincing explanation as to why he has not done so, and it was he, albeit through a company of which he is a major shareholder, who invoked the jurisdiction of the court in the first place...

… procedural orders [reflect] not only the interests of the litigation concerned, but also the interests of the efficient administration of justice more generally" [underlining added].

53. The EAT in **Morgan Motor Company** considered the above dicta was apposite to the employment tribunal [see para 18]. The EAT made clear [para 37] that whilst there is no prescribed requirement for a compelling explanation or special factor before relief will be granted, and hence enforcement of the sanction in those circumstances is not inevitable, it is 'almost inevitable'.

Strike out for scandalous, unreasonable or vexatious conduct of the proceedings – ET Rules r.37(1)(b)

54. In **Blockbuster Entertainment Ltd v James** [2006] IRLR 630, the Court of Appeal made clear that strike out is a 'draconic power' [para 5]:

> "The two cardinal conditions for its exercise are either that the unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps, or that it has made a fair trial impossible. If these conditions are fulfilled, it becomes necessary to consider whether, even so, striking out is a proportionate response".

55. In **Baber v Royal Bank of Scotland** [2018] (UKEAT/0301/15/JOJ), in the context of an appeal against a decision to strike out a claim under r.37(1)(b) for non-compliance with orders, Simler P confirmed the applicable four-stage test [para 13]:
    a. There must be a finding that the party is in default of some kind, falling within Rule 37(1).
    b. If so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed.
    c. Even if a fair trial is unachievable, consideration must be given to whether strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed.
    d. If strike out is the only proportionate and fair course to take, reasons should be given why that is so.

Strike out for no reasonable prospect of success

56. The test of 'no reasonable prospect of success' is a high hurdle to pass, with the stress on 'no'. It is not enough to show that a claim will possibly fail or is likely to fail: **Balls v Downham Market High School and College** [2011] IRLR 217, at [para 6]. However, it is a lower threshold than being utterly hopeless or bound to fail: **Balamoody v UK Central Council for Nursing, Midwifery and Health Visiting** [2002] IRLR 288, at [para 46].

57. The striking out of discrimination claims is exceptional for the policy reasons set out in **Anyanwu v South Bank Students' Union** [2001] IRLR 305 [para 24, per Lord Steyn; para 37, per Lord Hope]. However, where there are no reasonable prospects of success, it remains appropriate for a discrimination claim to be struck out and inappropriate for it to continue to take up the tribunal's resources [para 39, per Lord Hope]. To similar effect, in **Community Law Clinic Solicitors Ltd v Methuen** [2012] EWCA Civ 571, the Court of Appeal quoted with approval Moses LJ's dicta at the permission stage that [see para 6]:

    "It would be quite wrong as a matter of principle… that claimants should be allowed to pursue hopeless cases merely because there are many discrimination cases which are sensitive to the facts, and the whole area requires sensitivity, delicacy and therefore caution before access is deprived to the tribunals on an interlocutory basis".

58. In **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603, the Court of Appeal held that only exceptionally would an employment claim be struck out on a 'reasonable prospect of success' basis where the central facts are in dispute [para 29]. An example said to fall within the exception was where the facts the claimant sought to establish were inexplicably inconsistent with undisputed contemporaneous documentation.

59. In **Chandhok v Tirkey** [2015] IRLR 195, the EAT held [para 20] that one exception justifying strike out of a discrimination claim is where the pleaded case sets out no more than a difference in status and a difference in treatment and thus does not overcome the burden of proof hurdle set out in **Madarassy v Nomura International plc** [2007] IRLR 246 [para 56].

Amendment

60. The leading case is **Selkent Bus Co v Moore** [1996] IRLR 661, [paras 21-24]. It provides that there needs to be consideration of all the relevant circumstances, balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Mummery J (P) highlighted as being among the relevant circumstances:
    a. the nature of the amendment - whether it is the addition of factual details to existing allegations on the one hand, or to the making of entirely new factual allegations on the other;
    b. the applicability of time limits - considering whether the complaint is out of time and, if so, whether the time limit should be extended; and
    c. the timing and manner of the application - including consideration of why the application was not made earlier and why it is being made now.

61. There is discretion to allow an amendment where a claim presented at that point would be out of time. However, where the claim would be out of time (including after consideration of whether to exercise the discretion to extend time on grounds of justice and equity), then unless the new claim is closely connected with that originally pleaded (i.e. because it is a mere relabelling and/or arising out of the same facts or substantially the same facts as are already in issue), the application to amend should only be allowed in special circumstances: **Abercrombie v Aga Rangemaster Ltd** [2013] IRLR 953, per Underhill LJ at [para 50].

62. Merits can be relevant. See **Gillett v Bridge 86 Ltd** UKEAT/0051/17/DM, where it was accepted by Soole J (at paras 26-28) that it would be "difficult to concede a case where a pessimistic view on merits falling short of "no reasonable prospect of success" could provide support for the refusal of an amendment application that has been brought in time". He contrasted this with the situation where an out of time application is made. In such instance, he held:

> "… it is not the case that an Employment Judge considering an application to amend can only take account of the merits if [he or] she considers that the proposed new claim is bound to fail as a matter of law… the Employment Tribunal must be entitled to consider whether the proposed claim has reasonable prospects of success … Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. **Selkent** refers to "all the circumstances", and **Olayemi** is an example where the prospects of success "did not appear good" and were taken into account".

Time Limits

63. Subject to the extension of time for ACAS early notification under s.140B, s.123(1) of EA 2010 provides for a primary time limit of 3-months and a fall-back exception where it is just and equitable for the claim to be brought within a longer period of time.

64. When considering whether an amended claim is brought in time, it is deemed to be made at the time at which permission is granted for the amendment: see **Galilee v. CMP** [2018] ICR 634 at [para 109(a)].

65. EA 2010 s.123(3)(a) provides that an act extending over a period is treated as being done at the end of that period. So, it may be necessary to consider whether distinct acts in fact form part of the same continuing act.

66. At a preliminary hearing stage, a claimant needs only to prove a prima facie case that an act that would otherwise fall out of time is part of a continuing act that ends within

time[3]: **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548 per Hooper LJ at [para 10].

67. In **Abertawe Bro Morgannwg University Local Health Board v. Morgan** [2018] ICR 1194, the Court of Appeal explained the unfettered nature of the ET's 'just and equitable' discretion. Although there is no prescriptive list of factors that needs to be considered, the Court made clear it will almost always be relevant to consider:
    a. the length of delay;
    b. reasons for the delay, including the lack of proffered reasons; and
    c. whether the delay prejudiced the respondent, including inhibiting investigation of the claim while matters were fresh: see **Morgan** at [para 17 and 22].

68. The Court of Appeal did not disturb the guidance given in **Robertson v Bexley Community Centre** [2003] IRLR 434 that [para 25]:
    a. there is no presumption in favour of exercising the discretion;
    b. it is for the applicant to convince the ET to exercise the discretion to extend time; and
    c. extensions of time are the exception rather than the rule.

APPLICATION TO FACTS

(1) Mr Inyang

Relief from unless order?

69. I find as follows:
    a. I am not presently persuaded by Mr Braier's submission that a fair trial is impossible (though a fair trial may well be harder, and perhaps impossible on certain discrete issues). See further paras 76(c)&(d) and 77(a)-(c) below.
    b. The unless order was, at least in part, founded on a false premise. SLA had in fact provided the POC to the tribunal.
    c. That fact notwithstanding, the unless order was not complied with.
    d. There is no good reason given by SLA for this failing.
    e. There is no suggestion that SLA did not receive the order in good time. That being so, SLA ought to have complied with it, by sending the POC to Dentons before the expiry of the 14-day deadline. After all, if SLA had been in any doubt as to whether or not Dentons was already in possession of the POC[4] (e.g. via the tribunal), the May 2018 GOR spelt out that this was not the case.

[3] For present purposes, the respondent does not seek to argue that the decision given on 21.12.17 was not the last of a series of continuing acts.
[4] Mr Ebirilem does not assert as much in his statement.

f. I do not know (because SLA has not told me) "the reason for the default"; nor "whether it is deliberate" -though I suspect it was caused at least in part by SLA's incompetence (which is something of a theme in this case).

70. I also give some (limited) weight to the fact that SLA is seeking the tribunal's indulgence, in circumstances where (as set out above) there has been repeated non-compliance by SLA with the ET Rules, More compellingly, it is harder to see how it can be in the interests of justice to allow the claim to proceed, in circumstances where an amendment is required in order for the claim to proceed- see further below.

71. It might have been said to be artificial and contrary to the interests of justice to disallow Mr Inyang's claim, if Mr Sakala had been able to proceed with his broadly identical claim -notwithstanding the identical failings regarding the POC in Mr Sakala's case. However, for the reasons set out below this does not in fact materially impact on the issue.

72. So, for these reasons, I consider it would not be in the interests of justice to allow the claim to proceed.

73. The decision is, however, finally balanced in the light of, in particular, para 69(a)&(b) above. So if I am wrong, below I consider what the outcome would have been had the I found interests of justice dictated that the unless order ought to be set aside.

Is amendment necessary?

74. No authority was provided to me by either Counsel as to whether or not a claimant who has simply ticked a box in the ET1 alleging "race discrimination" but provided nothing else in the ET1 by way of detail must seek permission to amend in so far as he later wants to add the facts which constitute his claim, rather than simply provide FBPs. Paragraph 13 of Buckley J's judgment in **Quarcoopome v. Sockshop Holdings Ltd** [1995] IRLR 353 might have supported the submission that FBPs would suffice. But that decision has since been held not to "present the current law". See **Ali v. Office of National Statistics** [2005] IRLR 201 at para 54.

75. It seems to me that the answer to the question posed in the above header must be 'yes'. FBPs are just that- further and better details of facts already pleaded. It cannot be right that a claimant who merely ticks a box but gives no detail beyond that can - at a time outside of the primary limitation period prescribed by s.123 EA- thereafter "particularise" matters not already in his ET1, without concern as to whether not his claim is brought within that period, in contrast to a claimant who has provided some factual allegations of (say) direct race discrimination in the ET1, and seeks belatedly

to add new facts or a new 'type' of race discrimination -say, an indirect discrimination claim- and has to apply to amend (e.g. as in **Ali**).

Ought permission to amend be given?

76. I think the answer to this question ought to be 'no. In reaching this conclusion, I take into account all the circumstances, including the following matters in the Claimants' favour:
    a. The litigation is at an early stage.
    b. The POC, whilst presented out of time, arrived at tribunal weeks rather than months or years late (and the ET1 itself was just in time).
    c. There is a paper trail explaining the Respondent's actions relating to many of the matters about which complaint is made (albeit no 'race filter' was applied, as set out above).
    d. I have been given no specific evidence to confirm that as a result of lapse of time, the Respondent's witnesses have forgotten key events, can no longer be traced etc.

77. However, I also note the following:
    a. The events in question occurred some time ago- the incident was over 2 years ago. The prospect of at least some loss of recollection might sensibly be inferred, I think.
    b. This is perhaps all the more so given that no or no detailed allegation of direct race discrimination founded on the matters set out in the POC was made prior to the POC itself. Indeed, as already explained, the focus appears to have been on 'protected disclosures' and 'unfairness' instead.
    c. Even now, the allegations are ambiguous in important parts (e.g. the POC refers to the Claimants having been "generally made subject to humiliation and degrading treatment" at the time of the incident).
    d. The Claimants had lawyers to assist them and articulate their concerns many months prior to the ET1. Neither Adams nor SLA mentioned race discrimination.
    e. No explanation has been given (save in the very limited and inadequate respects set out above) as to why the POC did not accompany the ET1, and was as to why the POC was not presented within the primary limitation period. This "lack of proffered reasons" is damaging.
    f. No reason has been given by SLA or the Claimants as to why a 'just and equitable' extension ought to be allowed (this being one important, though not determinative, factor for me to consider).
    g. The application to amend was made months after the tribunal received the POC (and Dentons were only sent the POC in September 2018).

h. I agree with Mr Braier's submission that the POC "provide for the making of entirely new factual allegations changing the basis of the claim". Thus, the amendments are "at the end of the spectrum where a tribunal should be more reluctant to allow an application to amend".
i. The Claimants' case, on its face, looks to me to be weak. Though I appreciate I have only limited information before me, and so can make only a preliminary assessment, the facts as set out above and the content of the report of the incident in the bundle both suggest to me that the Claimants would have an uphill struggle in persuading the tribunal they have even a prima facie case for saying that the sanctions imposed upon them were on grounds of race. They appear to have acted in a manner which was potentially hazardous, and contrary to their training (despite their COSS qualifications), and in the case of Mr Inyang to have given misleading answers when questioned. Moreover, at least one of their colleagues who was spared a more serious sanction was black (albeit British).
j. I also bear in mind, and consider to be of some persuasive force, the submissions made by Mr Braier at paras 86.1- 86.10 of his skeleton argument.

78. I therefore reject the amendment application.

No reasonable prospect of success?

79. For the sake of completeness, I add the following:
    a. Had I set aside the dismissal of the claim for non-compliance with the unless order, but disallowed the amendment application for the reasons set out above, the claim would necessarily have had no reasonable prospect of success and I would have struck it out on that basis.
    b. Had I set aside the dismissal, and allowed the amendment application, I probably would have made a deposit order (as suggested by Mr Otchie as a fallback position[5]), rather than strike the claim out on grounds of no reasonable prospects. I say this in the light of the guidance set out in cases such as **Anyanwu**, and because -unsurprisingly- I do not have the entire array of relevant factual matters before me at this stage. However, that issue is academic, in the lights of my findings above.

(2) Mr Sakala

Strike out under r.37(1)(b) or (c)?

[5] He told me, having taken instructions from his clients, that they each earned about £2,000 pcm.

80. SLA's conduct of these proceedings has been highly unsatisfactory, as explained above. However, I am not convinced SLA's inadequacies show deliberate non-compliance (as opposed to non-compliance resulting from incompetence). In the light of the guidance given in **Blockbuster** and **Baber**, I do not think it would be appropriate to strike out Mr Sakala's claim pursuant to r37(1)(b) or (c) of the ET rules. In particular, at least on current information, I do not think it can be said that a fair trial (at least of the most important issue, concerning sanction) is no longer possible. See further above.

Amendment?

81. For the same reasons set out at paras 74 & 75 above, I think it is necessary for Mr Sakala to seek permission to amend his claim in order to be able to introduce the content of the POC. For the same reasons set out at paras 76 and 77 above, I decline to give him that permission. As a result, for the same reasons set out at para 79(a) above as applied to Mr Inyang's case, Mr Sakala's claim falls to be struck out under r37(a) of the ET Rules because (in my judgment) it has no reasonable prospect of success.

82. Had I allowed the amendment application, what I have said in respect of Mr Inyang at para 79(b) above would have applied to Mr Sakala, too. Again, though, that issue is academic in the light of my other findings.

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4/4/2019
Employment Judge Michell, Cambridge

JUDGMENT SENT TO THE PARTIES ON

9/4/2019.

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FOR THE SECRETARY TO THE TRIBUNALS