Case No: 1406396/2019/V

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Collinson**

Respondent: **Asda Stores Limited**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 6 January 2021**

Before: Employment Judge Midgley

Representation
Claimant: In person,
Respondent: Miss Duane, Counsel

RESERVED JUDGMENT

1. The respondent's application to dismiss the claim of failure to make reasonable adjustments is dismissed.

2. The claimant does not require permission to amend to include claims to unfair dismissal and discrimination arising from a disability.

3. All claims will proceed to a telephone case management hearing on 15 January 2021 at 2pm.

REASONS

Claims and Parties

1. By a claim form presented on 24 December 2019, the claimant brought claims of discrimination in relation to his dismissal.

2. As detailed below the claimant was employed by the respondent as an HGV driver until his dismissal on 24 September 2019. The respondent now concedes that the claimant's back condition amounts to a disability.

3. The respondent is a well-known supermarket.

Procedure, Hearing and Evidence

4. The hearing was conducted remotely by the Cloud Video Platform to accommodate the claimant's disability and because of the Covid-19 Pandemic.

5. I was provided with the following for use at the hearing by the respondent:-

   5.1. A bundle of 105 pages, consisting of the claim, response, early conciliation certificate, and Tribunal Orders, and the claimant's grievance and the grievance outcome letter.

   5.2. A skeleton argument

   5.3. A bundle of authorities referred to in the skeleton.

6. The claimant had received a copy of the each of these documents and had read them prior to the hearing. However, his disability required him to lie prone on his back for the hearing and he was using his mobile telephone to connect and did not have a copy of the bundle. To facilitate matters I proposed, and the parties agreed, that I would show an unmarked copy of any documents referred to using the screen sharing facility in CVP. Adopting that approach enabled the claimant to be referred to, to comment upon and to give his evidence by reference to the documents in question.

7. The claimant had prepared a witness statement which he had sent to the Tribunal in accordance with the Order. Regrettably it had not been placed on the Tribunal file or forwarded to the respondent. Consequently, the hearing was adjourned briefly to enable the statement to be located and read by me and Miss Duane.

8. The claimant gave evidence by affirmation and answered questions from Miss Duane and from me. I found the claimant to be a truthful, credible, and candid witness.

9. I heard verbal arguments from Miss Duane and from the claimant himself. Having adjourned shortly before the lunch break to deliberate, it became apparent that (i) I would not finalise the Judgment until close to 3:30pm and (ii) in consequence, there would be limited time to deliver the Judgment in a way which enabled the claimant to follow, digest and understand it and to address the necessary case management. Consequently, I advised the parties that I would reserve my decision, so that the claimant would have written reasons, and listed a telephone case management hearing at the earliest opportunity (2pm on 15 January 2021) so that there would be no delay in the final hearing in consequence. The parties confirmed that they would be available for that hearing.

Factual Background

10. In approximately 2009 the claimant suffered a back injury which caused a fracture in his vertebrae at L2 and associated nerve damage.

11. The claimant began employment with the respondent on 10 January 2016 as an HGV driver.

12. Regrettably, the claimant's back condition progressively deteriorated with the consequence that on 18 January 2018 he was designated as a person with a disability and received his blue badge. He informed the respondent of that on 19 January 2018 and alleges that his managers responded sceptically and unsupportively. The respondent did not at that stage refer the claimant to occupational health to consider any adjustments to his role because of his disability.

13. The claimant alleges that between 19 January 2018 and his dismissal on the 26 September 2019 he was subject to harassment by his managers and work colleagues related to his disability. The respondent accepts that the claimant's claims of harassment in relation to those alleged actions are within time and can proceed, albeit, as detailed in the discussion section below, the respondent denies that the conduct after the claimant's sickness absence in May 2019 constituted harassment.

Sickness absence and the first OH report

14. Returning to the chronology of the case, on 19 May 2018 the claimant alleges that he suffered a back injury whilst moving a broken cage on the back of his trailer. He commenced a period of sickness absence due to pain caused by his back condition.

15. The claimant was referred for an occupational health appointment on 22 June 2018. The claimant did not see the resulting report until 17 July 2018. The report recommended that the claimant was fit for work with long-term adjustments and modifications to his role which were necessary because of his chronic back condition.

16. The report was not provided to me, but the claimant alleges that it included recommendations that he should be provided with a driver's mate or second man to assist him with his role and that he should be provided with a disabled parking space for his lorry closer to the respondent's office buildings.

17. On 18 October 2018, the claimant advised the respondent that he needed to mobilise regularly and should not be seated for long periods, and requested a short break during return journeys, which the respondent agreed.

The second period of sickness absence and Capability Review meeting

18. On 10 January 2019 the claimant commenced a period of sickness absence due to back and leg pain from which did not return prior to his dismissal on 24 September 2019.

19. In the intervening period, during a home visit on 13 February 2019, the claimant informed the respondent that he was immobile and unable to stand up.

20. On 1 March 2019, the claimant confirmed that there had been little change in his condition.

21. A further occupational health report, dated 15 March 2019, identified that the claimant was not fit for any role within the respondent and specifically was not fit to drive or to pull cages, two essential functions of his role as an HGV

driver. The report identified that there were no adjustments that would enable him to return to work and that it was not possible to predict if he would be able to return to work or to provide date where such an event might occur. The report stated that the claimant required nerve root blocking but indicated that if the treatment were not effective the claimant would be unable to return to work within the foreseeable future.

22. In consequence, the claimant was invited to a capability review meeting with Mark Williams, the Transport Shift Manager, which took place on 3 April 2019. The capability meeting was adjourned to enable the claimant to obtain updated medical information as to potential treatments.

The instruction of solicitors and the grievance

23. In late April or early May 2019, the claimant's health further deteriorated. He began to suffer from anxiety and depression, and he viewed the respondent's persistent efforts to contact him as harassment. In May 2019, the claimant's back condition deteriorated further and he became largely immobilised.

24. In late May or early June 2019, the claimant began a six-week course of CBT to improve his symptoms of anxiety and depression.

25. At or about that time, he spoke to his sister, who is an HR practitioner based in Germany, who recommended that he should seek advice from a family friend who was a solicitor. The aim of approaching the solicitor was to ensure there was a buffer between the claimant and the respondent to prevent the continuance of what he regarded as harassment in the form of what he believed to be unnecessary contact relating to his return to work. In addition, the claimant discussed the manner of his treatment prior to his sickness absence which he viewed as harassment. He had kept a diary of events which he provided to the solicitors. The events described within it, if accurate, represent a prolonged, serious and reprehensible course of conduct involving senior management and drivers.

26. His discussions with his solicitors focussed on raising a grievance and, subsequently, on appealing the outcome of that grievance (as described below). The discussions referenced the possibility of taking legal action and some discussion of injury to feelings awards. The claimant knew he could present a claim, but did not wish to do so because he did not wish to "queer the pitch," as he put it, as his predominant aim was to ensure that he remained employed, and he hoped that the outcome of his grievance and subsequent appeal might be to permit him to remain employed with no pay whilst he awaited treated on the NHS to resolve his back and leg pain.

27. On 30 May 2019, the claimant therefore raised a formal grievance in a letter to the respondent from his solicitors. The grievance alleged that the respondent had directly discriminated against the claimant, subjected him to discrimination arising from his disability, failed to make reasonable adjustments and subjected him to harassment.

28. The details of the conduct complained of included allegations that the claimant's colleagues and his managers abused, humiliated and belittled him because of his blue badge, and were entirely unsympathetic to his condition or concerns related to it and his role. Amongst the managers named in the

grievance relating to that conduct are:

28.1. Mr Chris Thomas, the Transport/Operations Manager;

28.2. Miss Sara Anderson Jones, Department Manager;

28.3. Mr Paul Smith, Department Manager;

28.4. Mr Chris Tilley, the General Manager;

28.5. Miss Caroline Bebbington, Department Manager;

28.6. Miss Karen Dayment, Department Manager;

28.7. Mr Ross Kotter, Department Manager;

28.8. Mr Bernie Miles, Department Manager

28.9. Mr Kevin Mitchell, the Shift Manager;

28.10. Mr Martin Leonard, Department manager

29. The drivers identified as the key protagonists of the harassment were Mr Paul Davis, Mr Adrian Hacker and Mr Kevin Stillard.

30. The allegations included matters that formed a complaint that the respondent had failed to make reasonable adjustments to the claimant's working practices to reduce the risk of further injury to his back. Those allegations were not specifically identified as failures to make reasonable adjustments but were recorded as part of the chronology of incidents. Amongst the complaints made were that the respondent had refused to provide the claimant with a second man or mate and had consistently required him to pull and push cages to and from the lorry tail lift, which had been expressly prohibited by the recommendations of the Occupational Health Report.

31. The grievance included allegations that the respondent's conduct between 10 January 2019 and 15 May 2019, consisting of telephone calls, home visits and letters, constituted harassment because the claimant had given his solicitor a power of attorney and the solicitor had directed the respondent to correspond with her directly, but the respondent persisted in contacting the claimant directly.

32. The claimant's mental health further deteriorated, despite the CBT course which he had begun in June, and he sought medical assistance in approximately July 2019 when he was prescribed antidepressants. He continues to take them.

The grievance investigation and outcome

33. The respondent appointed Mark Gilmore, the General Manager at Chepstow ADC, to investigate the allegations in the grievance. He interviewed all of those named in relation to the allegations. Consequently, a very detailed outcome letter addressing each allegation was sent to the claimant. Unfortunately, the letter was undated.

34. One of the findings of the grievance outcome was that the company had made the necessary reasonable adjustments for the claimant's medical condition.

35. The claimant appealed the decision by letter dated 18 July 2019. The appeal was rejected on 2 August 2019.

The re-commencement of the Capability Review process and the dismissal

36. During that time, on 22 July 2019, the claimant attended a further telephone consultation with Occupational Health. The resulting report advised the claimant was not fit for work and was unlikely to recover sufficiently to enable him to return to work. It advised that there were no adjustments that could be made that would facilitate an early return or aid in his rehabilitation.

37. On 20 August 2019 the claimant confirmed via his solicitor that his health had not changed since the occupational health report on 22 July, that there were no vacancies that were suitable for him and that he did not envisage being able to return to work in the short term or being able to provide a date when he would be able to do so.

38. A further occupational health report (following a telephone consultation on 5 September 2019) confirmed that the claimant remained unfit for work as a driver, warehouse colleague or retail shop floor assistant. Further, it reported that there were no work adjustments which could support his current level of mobility and pain symptoms and the claimant was consequently unfit to work for the foreseeable future.

39. The final capability review meeting took place on 17 September 2019 and was conducted by James Blow, the Regional Planning Manager. Mr Blow concluded that the claimant should be dismissed on the grounds of capability and the dismissal was confirmed in a letter dated 26 September 2019.

Early conciliation, appeals and the issue of proceedings

40. Consequently, on 20 September 2019 the claimant began the early conciliation process by notifying ACAS of the dispute. A certificate was issued on 9 October 2019.

41. The claimant appealed his dismissal in an email dated 2 October 2019. The appeal was rejected by a Mr Gamble, the Lutterworth ADC General Manager, on 21 October 2019. In error, the claimant was told of a further right of appeal, which he sought to exercise on 27 October 2019.

42. The respondent honoured the second stage appeal, despite that being outside its usual process. The appeal was conducted by Mr Carter, General Manager of Lutterworth CDC, who confirmed his findings in a letter dated 22 November 2019 and upheld Mr Gamble's decision.

The ET1 and claims

43. Following his dismissal, the claimant Googled the applicable time limits for unfair dismissal claims and noted that they were three months from the date of dismissal. Although he knew of his right to issue a claim, he did not do so

until 24 December 2019 because he hoped that his appeals might be successful and, again, he did not wish to risk antagonising the respondent. At that stage he did not have the benefit of legal advice or assistance from his union, and hastily completed the ET1 form himself.

44. He ticked the box for discrimination, but not the box for unfair dismissal in section 8.1; he accepts that he should have ticked the box but says he overlooked it. In box 8.2 the claimant understood that he should provide the general background to his claims and the main events about which he was complaining, and that he would discuss the detail of the allegations at a separate hearing. He wrote:

> *"While working tor Asda I was given a Blue Badge in January 2018 due to an existing disability with my back after an injury 10 years ago. At the time they did nothing, but when I went off sick in May 2018 they asked me to see their occupational health, which I did. They reccomended certain things Asda should do to help me. Asda refused to do any of these things. I also asked for some adjustments which they also refused. I was also ridiculed by other drivers because of my disability, again Asda did nothing to stop this. My health declined until January 2019 when I went off sick because I couldn't walk. Then Asda harassed me, trying to make me come back to work through multiple phonecalls, home visits, meetings, appeals and eventually they sacked me on the 26th September. I then appealed that decision which was refused, they then offered me a second appeal which was also denied. My final appeal was on the 22nd November, but that was denied as well."* [sic]

45. The respondent accepts that the section identifies claims under s.20 (failure to make reasonable adjustments) and s.26 (harassment) of the Equality Act 2010. It denies that any claim in relation to the dismissal is raised.

46. On 30 January 2020 the response was filed, denying the two claims above and requesting further particulars of the allegations.

47. EJ Livesey ordered the claimant to identify the adjustments which he argued should have been made and the details of the harassment about which he complained. However, a preliminary case management hearing was listed and it appears that it was agreed between the claimant and the respondent that the best course was to provide the further information at that hearing.

48. The case management hearing occurred on 6 August 2020 and was conducted by EJ Bax. The claims were discussed with the claimant. It was noted that the claimant argued that his dismissal was discriminatory and unfair. EJ Bax noted the following:

> *"34. The Claimant explained that he thought his dismissal was discriminatory and that if reasonable adjustments had been made in 2018, he would have been able to continue to work and his condition would not have deteriorated…. The Claimant also said that his dismissal was unfair. The Claimant had referred to dismissal in his claim form, but had not ticked the unfair dismissal box,*
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> *35. The solicitor for the Respondent accepted that it was likely the Claimant would be given permission to amend his claim in relation to*

including dismissal as an allegation of discrimination arising from disability but needed to take instructions from his client. Further the Respondent says that an amendment application would be required in relation to bring a claim of unfair dismissal, but he wanted to take instructions as to whether it would be opposed."

49. EJ Bax identified with the claimant the details of the claims for harassment, failure to make reasonable adjustments, and (subject to any argument as to the need to amend) the claims of discrimination arising from disability and unfair dismissal. It was recorded that:

    49.1. The claim for unfair dismissal was predicated on the alleged failure to make reasonable adjustments (see paragraph 1.5.1) and was therefore an allegation that the dismissal was discriminatory because of a breach of section 20 EQA 2010.;

    49.2. The claim under s.15 EQA 2010 consisted of allegations that the claimant's dismissal (and the rejection of appeals against that decision) were unfavourable treatment because of something which arose from his disability, namely his sickness absence and inability to fulfil his contractual role (see paragraph 3.2. (by implication) and 3.3).

    49.3. The harassment claim related to the respondent's contact with the claimant following the commencement of sickness absence in 2019.

50. The case was set down for this preliminary hearing for those matters to be determined.

51. On 24 August 2020 the respondent indicated that its arguments at the preliminary hearing would be that the claim for failure to make reasonable adjustments was out of time, and that the claimant required permission to amend his claim to include claims of unfair dismissal and discrimination arising from disability.

The Issues

52. The issues for the hearing are thus as follows:

    52.1. Whether the claims under s.20 were presented within 3 months of the act complained of or the last of those acts, if they formed conduct extending over a period?

    52.2. If not, whether it would be just and equitable to extend the limitation period to permit the claims to be presented within time?

    52.3. In relation to the claims of unfair dismissal and s.15 EQA 2010, whether the claims were identified in the claim form and if not, whether permission to amend the claims to include them should be granted?

The Relevant Law

Time limits

53. Section 123 of the Equality Act contains the primary time limit for claims brought pursuant to the Equality Act. It provides as follows.

> (1) Proceedings on a complaint within Section 120 may not be brought after the end of:
> (a) the period of three months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period if the Employment Tribunal thinks just and equitable.
>
> (3) for the purposes of this section conduct extending over a period is to be treated as done at the end of the period.

54. That means in this case that events that occurred prior to the last day of employment could be treated as having occurred on the last day because they form part of a conduct extending over a period.

55. While tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in s.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA, that when tribunals consider exercising the discretion under what is now S.123(1)(b) EQA:

> 'there is no presumption that they should do so unless they can justify a failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule.'

56. The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.

57. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32:

> "In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

58. Before a Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13).

59. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - Pathan v South London Islamic Centre EAT 0312/13.

60. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in s.33 of the Limitation Act 1980 (as modified by the EAT in British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT). Section 33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action (see British Coal Corpn v Keeble [1997] IRLR 336, at para 8).

61. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).

62. In Department of Constitutional Affairs v Jones 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a ‘valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant’s failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice.

63. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

64. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)). In

Wadher Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

65. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

Amendment

66. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

67. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

68. In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT. Mummery J as he then was explained that relevant factors would include:

    68.1. The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

    68.2. The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word “essential” is considered further below]; and

68.3. The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

69. These factors are not exhaustive and there may be additional factors to consider, (for example, the merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:

70. The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

71. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

72. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

73. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

74. The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

75. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

76. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole:

> "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."

77. The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

78. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

79. The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the

reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

80. In Reuters Ltd v Cole UKEAT/0258/17/BA, the claimant had a chronic depressive illness. He presented a claim to the Tribunal for discrimination arising from disability, and a failure to make reasonable adjustments. The claim was stayed pending the outcome of a grievance procedure. The claimant subsequently made an application to amend his claim to include an allegation of direct disability discrimination. The EAT rejected his application. In its view the more onerous test for direct discrimination and the wider factual enquiry needed for such a claim took the application outside the scope of a mere relabelling exercise. A direct discrimination claim imposes stringent tests of knowledge and causation, and requires the employee to show that he has been treated less favourably than a comparator. Granting the amendment would require the tribunal to undertake a wider factual enquiry, and in particular a comparative exercise to determine whether the claimant had been treated less favourably and if so whether this was on the ground of disability.

81. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16:

"The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning … the claim as set out in the ET1.

[17] … 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. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute.

[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 ground; 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 diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

Discussion and Conclusions

Time limits

82. The respondent accepts that the claim for harassment is within time. The caim under s.20 must be viewed against that background.

83. The claim of failure to make reasonable adjustments must, necessarily, have crystallised at the point at which the claimant began his sickness absence in January 2019 or shortly thereafter as the duty to make reasonable adjustments only applies in circumstances where an employee is able to return to undertake some work for the employer, or, at the very least, where they indicate that they are willing to return to work and that if adjustments were made they would be able to do so. In this case, there is no suggestion after January 2019 that the claimant was indicating that he was or would soon be fit to return to work at any stage.

84. Secondly, applying the decision in Matuszowicz v Kingston upon Hull City Council, the relevant date for the purposes of the limitation period in section 123 EQA 2010 must be a date on which the respondent either refused to comply with the section 20 duty, or did an act which was inconsistent with that duty. Whilst the two PCPs relied upon by the claimant continued to be applied until January 2019, the last date on which the respondent refused to make the adjustments in response to the claimant's requests appears to have been 19 December 2018, when Mr Mitchell refused to allow the claimant to stand down because of his disability at a time when he had not been provided with a second mate to assist with his tasks.

85. If the claim under section 20 were a freestanding claim, then any claim in respect of it would have to have been presented by 18 March 2019. These claims would therefore be significantly out of time.

86. However, the claimant alleges that the respondent's conduct in failing to make reasonable adjustments formed part of a course of conduct which included the acts of harassment about which he makes complaint.

87. The respondent argues that the claimant cannot establish that the two allegations are connected, and in particular there are different individuals involved in the conduct said to have breached the section 20 duty and the conduct said to form the harassment. Secondly, the respondent argues that there is a significant gap in terms of time, given that the duty to make reasonable adjustments no longer applied after January 2019, but the allegations of harassment continue until September 2019.

88. However, the question of whether the conduct in respect of which it is alleged that the respondent failed to make reasonable adjustments and the conduct

said to be harassment are linked, either by protagonist or by a shared intent, is one of fact that can only be determined by the tribunal that hears the evidence at the final hearing. For the purposes of this application, therefore, I must take the claimant's case at its highest and assume that he will establish the link. Given the number of senior management figures who are named by the claimant as being involved in the acts of harassment, and that some of those individuals are said to have been involved or 'directed' the contact with the claimant during his sickness absence, I cannot say that claimant has no reasonable or little reasonable prospect of establishing such a connection. As the respondent accepts that the allegations of harassment are within time, it follows that the claims under section 20 should be treated at this stage as being in time.

89. Consequently, I reject the respondent's argument the claim of failure to make reasonable adjustments has not been brought within the primary limit, such that I should strike it out. The argument is, however, one that the respondent may pursue at the final hearing, when the tribunal will have the benefit of hearing the relevant evidence.

90. The claim under section 20 EQA 2010 is therefore not struck out and will proceed to a final hearing.

91. Notwithstanding my finding above, if I have erred in my approach and the claim were not in time, I would have found that it would have been in the interest of justice to permit the claimant to bring the claim out of time because the balance of prejudice favours the claimant in this instance.

92. The claims were presented approximately 12/13 months outside the primary limitation period, during which period the claimant was bedbound for approximately nine months and during which he suffered from depression and anxiety. The reason that the claim was not presented in time is because the claimant sought to rescue his employment through exercising a grievance and appeals against his dismissal, hoping that that would permit him to access treatment so that he might return to work.

93. Secondly, the matters that formed the subject of the claim are predicated on the content of an occupational health report which is in the respondent's possession, and the allegations that the respondent failed to make the adjustments identified in the report were specifically investigated as a consequence of the claimant's grievance. All of the relevant witnesses were interviewed, and a comprehensive outcome letter detailing the findings and conclusions following that investigation was produced. Consequently, even though the passage of time may affect the ability of witnesses to recall the relevant events, there is a relatively contemporaneous record in relation to those matters from which they can refresh their memory and the cogency of their evidence is unlikely to be substantially adversely affected, in any event a tribunal is not meant to be a memory test. There is therefore little prejudice to the respondent in permitting the claims to proceed.

94. Conversely, if time were not extended to permit the claimant to bring the claim, he would lose the right to pursue a claim in relation to matters that are identified in contemporaneous documents and which he says were directly causative of his dismissal, which were raised at the time with the respondent,

and which form part of his complaints of harassment or significantly overlap with the factual matters relied upon in respect of those claims.

Amendment

Unfair dismissal

95. The first task in determining whether an amendment should be granted is assessing whether an amendment is needed at all, or whether the claim is already identified within the claim form.

96. Here the relevant facts are as follows: the claimant was a litigant in person, but he had received advice from a solicitor, and at a later period from his trade union. He was aware of the right to bring a claim for unfair dismissal at an early stage, and of the time limits applicable to that right in December 2019. He completed the ET1 claim form himself but did not tick the box indicating a claim for unfair dismissal, albeit he referred to the act of his dismissal, in the context of complaining that the respondent failed to make reasonable adjustments to enable him to carry out his role.

97. When he completed the claim form, he believed that all that was necessary was to set out the background to his claim and the events involved. That is what the instruction above box 8.2 in the form requires. Accordingly, the claimant made reference to the failure to make reasonable adjustments and his dismissal. When the claimant attended the case management hearing in August 2020, he clarified that he was alleging that his dismissal was discriminatory because the respondent had failed to make reasonable adjustments, and he believed that had those adjustments been made, is health would not have deteriorated and he would have been able to continue working, and the respondent did not give appropriate consideration to that matter in reaching its decision to dismiss.

98. In my judgement, the claimant identified the component elements of his claim for unfair dismissal in the claim form itself. An amendment is not therefore required.

99. If I am wrong in that conclusion, I go on to consider whether the claimant should be permitted to amend his claim to include a claim for unfair dismissal in any event.

100. I consider firstly the nature of the proposed amendment. In my judgement, it is an amendment which adds a new cause of action but one which is linked to, or arises out of, same set of facts as the original claim. That is because the basis on which the claimant alleges that his dismissal was unfair is the failure to make reasonable adjustments that forms the section 20 claim. It cannot reasonably be said that the claim of unfair dismissal is not factually connected to the original claim at all, in the sense that it relies upon an entirely new set of facts which do not form part of the original claim.

101. The new pleading, to adopt the words of Abercrombie, is unlikely to involve substantially different areas of factual enquiry. If the respondent did not fail to make reasonable adjustments, or those reasonable adjustments would have had no impact on the claimant's ability to fulfil his contractual rule, the claim for unfair dismissal will fail. If the respondent failed to make

reasonable adjustments, a narrow and new factual enquiry will be required as to whether the respondent considered that failure and its contribution to the claimant's health in reaching the decision to dismiss, and whether therefore dismissal for capability was within the band of reasonable responses.

102. There are limited different areas of legal enquiry that arise as a consequence of the unfair dismissal claim, in the sense that the tribunal will have to consider whether the respondent genuinely believed that the claimant was no longer capable of performing his duty, whether the respondent adequately consulted the claimant, whether it carried out a reasonable investigation including obtaining an up-to-date medical position, and whether it could reasonably be expected to wait any longer before dismissing the claimant. The first three of those issues are, as it seems to me, not put in issue by the claimant. His challenge is not to the process but to the ultimate decision that the respondent could wait no longer and therefore dismissal was the appropriate sanction. That issue will very little in terms of evidence or argument to the hearing.

103. Consequently, applying Foxtons above, the question of time limits do not apply.

104. Finally, in terms of the timing and manner of the application, it is relevant that the claimant is a litigant in person and believed that the claim was identified in the claim form. The period of delay therefore is attributable solely to the tribunal process, the claimant having raised the claim at the first opportunity where clarification was required.

105. Finally, I consider the balance of prejudice in granting the amendment or rejecting it. The respondent will not suffer significant prejudice if the amendment were allowed as the basis of the respondent's decision to dismiss is recorded in documents that will need to be considered for the purposes of the reasonable adjustments claim (the occupational health reports) and other documents which are produced contemporaneously (such as the concessions as to his state of health made by the claimant and the capability review meetings, and the letters of appeal and appeal meeting minutes). The respondent therefore has the advantage of a substantial body of contemporaneous documents which set out its reasons for dismissal which it can rely upon and to which its witnesses may refer in explaining the reasons for the dismissal.

106. Conversely, for the reasons that I have given above, the claimant would suffer significant prejudice and would be denied the opportunity to pursue a claim which significantly overlaps factually and legally with the claims that the tribunal will determine.

107. In my judgment, in all the circumstances, particularly balancing the hardship caused by refusing or permitting the amendment it would therefore be in interests of justice to grant the amendment.

S.15 EQA 2010.

108. There is no express reference to a claim under section 15 in section 8.2. However, as with the claim of unfair dismissal, the claimant has referred to the vast majority of the relevant components of such a claim. He has referred

to his disability (the back injury), its effect on his ability to fulfil his contractual role and/or the need to take sickness absence (he had to take sickness absence as he could not walk) and his dismissal. He has indicated that he was discriminated against by ticking the box at 8.1. He has not said that decision to dismiss could not be justified, but that is implicit and he is a litigant in person – it would impose too high a standard and to great a burden to expect him to adopt the phraseology of a legal practitioner in addressing all of the elements of the s.15 claim.

109. In my judgment, therefore, the claim is sufficiently identified in the claim and does not require an amendment. That view is offered some objective corroboration given that it was, at one stage, a view shared by the respondent's solicitor at the time of the case management hearing in August 2020, or at the very least, was a view which he reasonably anticipated that a Judge might form.

110. If I have erred in that conclusion, I would have permitted the amendment for the same reason that I would have permitted the amendment to include the claim for unfair dismissal. In essence, the reason for delay was the claimant's belief that the claims were sufficiently made in the claim form; that the amendment requires very little new factual or legal enquiry, and the respondent's ability to defend the claim is not significantly impacted by the passage of time given the volume of critical contemporaneous documents forming the basis of the decision to dismiss and recording the reasons for doing so.

Conclusion

111. Consequently, the claims which will proceed to a final hearing are those of unfair dismissal contrary to s.111 ERA 1996, and the following claims under the EQA 2010: s.15, s.20 and s.26 on the grounds recorded in the case management summary of EJ Bax with the addition that the tribunal must consider the respondent addressed its mind to the fact that (an alleged) failure to make reasonable adjustment caused or contributed to the deterioration in the claimant's health which itself led to the decision to dismiss.

112. Those claims will be listed for a final hearing and the relevant directions made at the TCMPH listed on 15 January 2021 at 2pm. The parties should consider the necessary directions to address the instruction of an expert in relation to the causation point in paragraph 111 above.

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Employment Judge Midgley
Date: 8th January 2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
11th January 2021
By Mr J McCormick

FOR THE TRIBUNAL OFFICE