Case No: 1303644/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ellahi**

Respondent: **iCare Living Limited**

Heard at: Birmingham **On:** **23 June 2022**

Before: Employment Judge Flood (sitting alone)

Appearances

For the claimant: In person (assisted by Mr Zahoor in support)
For the respondent: Mrs Peckham (Solicitor)

RESERVED DECISION ON PRELIMINARY HEARING

1. The claimant's application for permission to amend his claim to add the complaint below of discrimination on the grounds of religion/belief is refused. Any remaining complaint of discrimination on the grounds of religion/belief is dismissed.

2. The claimant's application for permission to amend his claim to add additional allegations of detriment on the grounds of having made a protected disclosure as follows is REFUSED:

   (b) In Jun 2020, allegations were made against the claimant that he was accusing the respondent of stealing service user's money.

   (e) In July/August/September 2020, the respondent said that, if the claimant covered another colleague's shift, he would not be paid for it. The colleagues received texts from management saying this and the colleagues forwarded the texts to the claimant.

3. The claimant's application for permission to amend his claim to add additional allegations of detriment on the grounds of having made a protected disclosure as follows is ALLOWED:

   (a) After May and July 2020, the claimant's hours of work were reduced and he was told that, if he did not want to work a night shift, he would have to find a substitute.

   (c) During a period of suspension from 1 Nov 2020 to 27 Jan 2021, the claimant was not paid all the money he was entitled to as wages.

(d) The claimant tried to take accrued holiday for the year 2019 to 2020 (which he carried over due to COVID) just after his return from work for the period of suspension and the respondent refused his request to take some of that holiday.

4. The claimant's complaints of direct discrimination because of marriage/civil partnership and in respect of accrued but untaken holiday pay are **struck out** under Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulation 2013 ("the Rules") on the grounds that such complaints have no reasonable prospects of success.

5. The claimant's complaint of direct discrimination on the grounds of race has little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £50** no later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance this complaint.

6. The claimant's complaint of unauthorised deduction of wages has little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £25** no later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance this complaint.

7. The claimant's complaint of failure to provide rests breaks has little reasonable prospect of success. The claimant is **ORDERED to pay a deposit of £25** no later than **21** days from the date this Order is sent as a condition of being permitted to continue to advance this complaint.

REASONS

Background

(1) The claimant presented a claim form on 25 August 2021, having entered into early conciliation between 15 June and 26 July 2021. The history to this claim is set out in detail in a case management order sent to the parties on 15 February 2022 following a preliminary hearing before Employment Judge Kelly on 8 February 2022 ("the CMO").

(2) The claimant is pursuing complaints of:

- (i) Unlawful detriment on the grounds of having made a protected disclosure;
- (ii) Direct race discrimination
- (iii) Direct discrimination on the grounds of civil partnership;
- (iv) Unpaid holiday pay;
- (v) Unauthorised deduction from wages;
- (vi) Breach of the Working Time Regulations in relation to daily rest break

(3) The preliminary hearing today was listed to consider the claimant's application to firstly amend his claim to add the following complaint of religious discrimination, relying on his religion which he identified as Muslim:

a) *He says a Christian colleague, Mr Jokujohn, was allowed to take Christmas off, but the claimant was only allowed to take Eid off with conditions. This was in June 2020;*

(4) Secondly to add the following additional allegations of detrimental treatment on the grounds of having made a protected disclosure:

a) *After May and July 2020, the claimant's hours of work were reduced and he was told that, if he did not want to work a night shift, he would have to find a substitute.*
b) *In Jun 2020, allegations were made against the claimant that he was accusing the respondent of stealing service user's money.*
c) *During a period of suspension from 1 Nov 2020 to 27 Jan 2021, the claimant was not paid all the money he was entitled to as wages.*
d) *The claimant tried to take accrued holiday for the year 2019 to 2020 (which he carried over due to COVID) just after his return from work for the period of suspension and the respondent refused his request to take some of that holiday.*
e) *In July/August/September 2020, the respondent said that, if the claimant covered another colleague's shift, he would not be paid for it. The colleagues received texts from management saying this and the colleagues forwarded the texts to the claimant.*

(5) The preliminary hearing was also listed to consider whether to strike out or make a deposit order in relation to the complaints set out at paragraph (2) (ii) to (vi) above.

(6) After the first case management hearing the claimant wrote in to the Tribunal on 3 March 2022 to correct some of the information contained in the CMO (page 52 Bundle). He confirmed that the allegation listed at 8(d) related to holiday that he tried to take for the year 2020/21; and not 2019/2020. He confirmed that the allegation listed at 12 (e)(iii) related to the respondent responding to his subject access request made on 14 December 2021 on 28 July 2021 (not 28 January 2022 as indicated in the CMO). In relation to allegation 17 (g) he stated that this related to the years 2018 and 2019. I have updated the allegations accordingly.

(7) The parties made detailed submissions on the various applications. I made enquiries regarding the claimant's financial position for the purposes of the deposit order application. The claimant disclosed that his take home pay varied but was approximately £1000 per month. He had expenses of approximately £400 (mortgage payments); £250 (loan repayments); £100 living expenses and £100 on his childcare. He was not in receipt of benefits and described himself as just about coping. On the figures, provided, there was £100 a month unaccounted for. It was not possible to reach a decision in the time available so I adjourned the hearing for a reserved decision to be made.

The Issues

(8) Does the Tribunal allow the claimant to amend his claim to bring the claim of religious discrimination as set out at paragraph (3) above? If the claimant's amendments are not allowed, should his claim for religion discrimination be dismissed?

(9) Does the Tribunal allow the claimant to amend his claim to add the factual matters to his public interest disclosure detriment claim as set out at paragraph (4) above?

(10) Should the Tribunal strike out the following of the claimant's claims on the grounds that they have no reasonable prospect of success?:

(i) The claim for civil partnership discrimination (in particular because it seems to be misconceived).
(ii) The claim for race discrimination (in particular because it is apparently out of time).
(iii) The claim for not being given a rest period in 2019 (in particular because it is apparently out of time).
(iv) The claim for a deduction from wages relating to wages allegedly not paid to him in 2019 (particularly because it is apparently out of time).

(11) Alternatively, should the claimant be required to pay a money deposit not exceeding £1000 to the Tribunal as a pre-condition of being allowed to continue with the claims listed at paragraph (8) above grounds that they have little reasonable prospect of success? Before making such an order, the Tribunal shall make reasonable enquiries about the claimant's ability to pay a deposit.

Relevant Legal Framework

Amendment application

(12) The general case management power in rule 29 of First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (amended and reissued on 22 January 2018) ("the ET Rules") together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

(13) In the case of Selkent Bus Co Limited v Moore [1996] ICR 836, the Employment Appeal Tribunal gave useful guidance, namely:

(4) Whenever a discretion to grant an amendment is invoked the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The Nature of the Amendment
Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions 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 have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.
(b)The Applicability of Time Limits
If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.
(c) The Timing and The Manner of the Application
An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."

(14) This position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the ET Rules which I have also considered.

(15) The EAT followed the Court Appeal decision in Housing Corporation v Bryant 1999 ICR123 in Foxtons Ltd v Ruwiel EAT 0056/08, "*it is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a relabelling one, the claim form must demonstrate the causal link between the unlawful act and the alleged reason for it*".

(16) In the case of GTR Ltd v Rodway and ors EAT 0283/19 the EAT overturned the decision of a Tribunal to allow an amendment on the basis that although the judge had correctly determined that the factual basis for the claims was largely unchanged, it had failed to take into account the substantial differences between the causes of action and the remedies sought.

(17) In the case of Remploy Ltd v Abbott and others UKEAT/0405/14, the EAT confirmed that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.

(18) Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. This might be deferred where the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.

(19) Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07, whether a claim has been presented in time is "*a factor — albeit an important and potentially decisive one — in the exercise of the discretion*".

(20) Ladbrokes Racing Ltd v Traynor EATS0067/06 when considering the timing and manner of the application in the balancing exercise. It will need to consider:

- why the application is made at the stage at which it is made and not earlier
- 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
- 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.

(21) It may be appropriate to consider whether the claim, as amended, has a reasonable prospect of success - Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06 and Olayemi v Athena Medical Centre and ors EAT 0613/10.

Strike out/deposit orders

(22) The Tribunal's power to either strike-out complaints or to make a deposit orders and the tests be applied to each application are set out in Rule 37 (Strike Out) and Rule 39 (Deposit Orders) of the ET Rules.

(23) The relevant part of Rule 37 states:

At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(24) The relevant part of Rule 39 states:

"Where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party, the paying party, to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

(25) In relation to strike out applications, guidance been given by the House of Lords in the case of case of Anyanwu v South Bank Students' Union [2001] ICR 391, and the Court of Appeal in Ezsias v North Glamorgan NHS Trust [2007] ICR 1126, and by Lady Smith in the Employment Appeal Tribunal in Balls v Downham Market High School and College [2011] IRLR 217. The former two cases made the point, that in cases of discrimination and whistleblowing respectively, that a strike out on the basis of no reasonable prospect of success should only arise in an exceptional case when central facts are not in dispute. Lady Smith in the Downham Market High School case noted that it was not a question of assessing whether a claim was

likely to fail or whether its failure was a possibility but that the claim had no reasonable prospect of success and that the tribunal should assess this from a careful consideration of all the available material. I am required to take the claimant's pleaded case at its reasonable highest and it is not the role of the judge hearing a preliminary hearing to conduct a mini trial on partial evidence. The test under rule 39 is "less rigorous than under rule 37 and I am not limited to considering whether the claimant meets the threshold of having set out a prima facie case turning on real factual disputes but may go on to form a view as to whether the claimant is likely t be able to make out their case on the facts (Van Rensburg v Royal Borough of Kingston-upon-Thames [2007] All ER (D) 187 (Nov)).

(26) I have also considered the case of Sharma v New College Nottingham [2011] UKEAT which was also a case which contained underlying factual disputes and where the EAT cautioned that tribunals should take the same approach in such cases where considering making a deposit order as it does when considering striking out a claim.

(27) Hemdan v Ishmail [2017] IRLR 228, the purpose of a deposit order "*is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails*" (para 10), and "*emphatically not … to make it difficult to access justice or to effect a strike out through the back door*" (para 11).

Holiday pay and daily rest period complaints

(28) Regulation 10 of the Working Time Regulations 1998 ("WTR") provides:
'10.—(1) An adult worker is entitled to a rest period of not less than eleven consecutive hours in each 24-hour period during which he works for his employer.'

Regulation 13 (1) of the WTR provides that:
'... a worker is entitled to [four weeks'] annual leave in each leave year.'

Regulation 13(9) of the WTR provides:
'Leave to which a worker is entitled under this regulation may be taken in instalments, but —
(a) it may only be taken in the leave year in respect of which it is due, and
(b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.'

(29) Regulation 16 of the WTR provides:
'*A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.'*

(30) Regulation 30 of the WTR provides:
(1) A worker may present a complaint to an employment tribunal that his employer—

(a) has refused to permit him to exercise any right he has under—
(i) regulation …….. 10 (1)….13(1);…………

(2) An employment tribunal shall not consider a complaint under this regulation unless it is presented—

(a)before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

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

(31) Section 23 (4A) of the Employment Rights Act 1996 ("ERA") provides:

'An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.'

Time Issues

(32) Section 23 of the ERA states:

'2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a)in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
(b)in the case of a complaint relating to a payment received by the employer, the date when the payment was received.

(3)Where a complaint is brought under this section in respect of—
(a)a series of deductions or payments, or
(b)a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.'

Under subsection (4), that time limit can only be extended where the tribunal:

"is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months"
[and was presented to the tribunal*]*
"within such further period as the tribunal considers reasonable"

(33) Section 123 of the Equality Act 2010 ("EQA"), which specifies time limits for bringing employment discrimination claims, provides so far as relevant that: "(*1) … proceedings on a complaint … may not be brought after the end of—*
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable."

Conclusions

Amendment application

(34) In support of the claimant's applications to amend, he contends that he did not make the complaints he now seeks in his claim form as he did not have legal advice on how to proceed. He said he did not have enough time or information as so much information he needed from the respondent was missing after he made a subject access request. He still complains about missing information but says that he applied to amend his claim once he became aware of the extent of his complaint. He explained that his income had been drastically reduced as a result of the respondent's actions.

(35) Mrs Peckham for the respondent acknowledges that the claimant did indicate at paragraph 8.1 of his claim form that he was making a complaint of discrimination because of religion or belief and that when asked for further particulars, he provided this detail at the last preliminary hearing. On that basis no particular objection was raised on the nature of the application, although it is contended that the claim appeared to be made considerably out of time as the claimant was informed about the respondent's decision on his request to take Eid off on 29 July 2020 (see page 61). In relation to the application to add additional detriments, Ms Peckham contended that the claimant did appear to have had some legal advice before he submitted his claim form and so all the detriments he wished to complain about should have been included. She submits that all the new detriments sought deal with historical matters and adds additional burden to the respondent. She contends that the new detriments sought at para (8) (c) amounts to an abuse of process as the sum was in fact paid. She pointed out that all matters now sought has also been considered in the grievance and so should have been complained about in the claim form already. It was also disputed that the claimant had not been provided with all information in response to his subject access request.

(36) I have considered carefully the submissions made and the documents provided and I set out my conclusion on each amendment application below:

Addition of complaint of religious discrimination - being informed he could only take Eid off work with the imposition of conditions on 29 July 2020

(37) I have considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship and reached the conclusion that the amendment should not be permitted. I set out the analysis on each of these points below:

Nature of the amendment and timing/manner of application

(38) The claimant ticked the box on the claim form to indicate that he wished to bring a complaint of religious discrimination, but there is no reference anywhere in the claim form submitted on 25 August 2021 to any factual allegation about what this is said to be and nothing at all relating to conditions being imposed to taking time off for Eid. The claimant provided further information about his claim on 1 February 2022 (page 46-47) but again makes no reference to this factual allegation. It appears that the first mention of this factual allegation was during the first preliminary hearing on 7 February 2022 and the text messages referencing the allegation was provided on 8 March 2022 (page 53). This is a substantial amendment as it seeks to rely on new facts not mentioned in the claim form. This is more in the nature of "*entirely new factual allegations which change the basis of the existing claim"* as identified in the **Selkent** case above. The application to add this allegation was only made at the first preliminary hearing almost 7 months after the claim was presented. However the facts making up these new factual allegations would have been known to the claimant before he submitted the claim form so it is surprising it is not mentioned.

Applicability of time limits

(39) The claimant requested and was granted time off for Eid on 29 July 2020 so any complaint that this was an act of religious discrimination should have been made by 28 October 2020. The claimant did not commence early conciliation on any of his claims until 26 July 2021, some 9 months later and did not present his claim until 25 August 2021. Considering the statutory provisions on time limits above, it is out of time, and as this is the only allegation of religious discrimination, it cannot be part of conduct extending over a period ending with a complaint brought in time. The claimant would be relying on the Tribunal's just and equitable discretion alone in order to allow this claim to be heard if the amendment were permitted. The claimant has provided no cogent reason why the Tribunal should exercise such discretion, in particular no cogent explanation has been provided as to why this factual allegation was not made earlier.

Other relevant factors

(40) I note that the decision in Selkent sets out the factors that a Tribunal should consider but it is clear that these are not the only factors that a Tribunal may consider in the exercise of its discretion on amendment applications. I refer to the cases of Cooper v Chief Constable of West Yorkshire Police and Olayemi v Athena Medical Centre above and I consider that this is a clear example where the merits of the proposed amendments to the claim are a highly relevant factor. The claimant wishes to bring an out of time allegation and such allegation is the only complaint of religion/belief discrimination. There is no course of conduct (in relation to religion/belief discrimination) relied upon so the only way that the Employment Tribunal would be able to hear this complaint would be if it decided that it should exercise its discretion to hear the complaint because it is just and equitable to do so. The

allegation of race discrimination is similarly out of time and this issue led Employment Judge Kelly to list the matter for a preliminary hearing to consider whether it had little reasonable prospects of success and whether a deposit order was appropriate. In the hearing today I heard submissions from the parties on this matter. For the reasons set out below, I have concluded that the claimant's out of time race discrimination complaints had little reasonable prospect of success and have made a deposit order against them. I therefore also conclude for exactly the same reasons that the amendments sought would have little reasonable prospects of success at trial. This is a highly relevant matter in determining whether such claims should be permitted to proceed.

Balance of prejudice

(41) Putting these factors together I concluded that the balance of prejudice and hardship favoured refusing the amendment. Allowing this amendment, would be giving the claimant the opportunity to add a substantial and already out of time allegation that had never been mentioned before. This amendment if allowed is one which I consider has little reasonable prospect of succeeding. His complaint about Eid could have put from the outset but it was not. Even if it had been included, it is raised substantially after the primary limitation period. It is at this stage, an even more historic allegation. The respondent would be prejudiced in addressing this new factual complaint as to do so would require additional evidence and findings of fact to be made. The claimant has many other complaints in play. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings could be significant. For the above reasons, this element of the amendment application is refused. As this is the only allegation of religious discrimination made, then the whole complaint of discrimination on the grounds of religion/belief is dismissed.

<u>Application to add additional allegations of detrimental treatment on the grounds of having made a protected disclosure as set out at para (4) (a) to (e) above</u>

(42) In his claim form the claimant complains that he:

"suffered discrimination, bullying, victimisation and harassment due to raising the Service User's concerns" and

"I suffered a detriment for directly whistleblowing to my superiors of bullying, harassment, victimisation and threats regarding my employment which lasted for over 08 months" and

"I was punished by both Daljit Singh and Diane Bogle for my sincerity and acting in the best interests for my Service User"

(43) The detriments identified at the last preliminary hearing and currently being relied upon by the claimant are as follows:

(i) The claimant was told, by Mr Singh and Mrs Bogle, in a meeting on or around 9 Jun 2020, that he had no power to raise these matters and was made to feel as if he had failed in his own duty of care towards the service user.

(ii) *The claimant was suspended by the respondent from 1 Nov 2020 to 27 Jan 2021.*

(iii) *The respondent responded, on 28 ~~January 2022~~ July 2021, to his subject access request of 14 December 2021 in a way which was slow and did not comply with the respondent's legal obligations.*

(iv) *On 10 Dec 2021, the respondent accused the claimant of being drunk at work.*

Detriments (i) and (ii) were factual matters already mentioned in the claim form (and identified under the heading, Public Interest Disclosure Act) and detriments (iii) and (iv), although not mentioned on the claim form were amendments granted by the Tribunal at the last preliminary hearing.

(44) The five new allegations of detriment sought are set out below:

(a) *After May and July 2020, the claimant's hours of work were reduced and he was told that, if he did not want to work a night shift, he would have to find a substitute.*

(b) *In Jun 2020, allegations were made against the claimant that he was accusing the respondent of stealing service user's money.*

(c) *During a period of suspension from 1 Nov 2020 to 27 Jan 2021, the claimant was not paid all the money he was entitled to as wages.*

(d) *The claimant tried to take accrued holiday for the year ~~2019~~ 2021 to ~~2020~~ 2021 (which he carried over due to COVID) just after his return from work for the period of suspension and the respondent refused his request to take some of that holiday.*

(e) *In July/August/September 2020, the respondent said that, if the claimant covered another colleague's shift, he would not be paid for it. The colleagues received texts from management saying this and the colleagues forwarded the texts to the claimant.*

(45) I set out my analysis on each of the relevant factors to consider on the new detriments sought below:

Nature of the amendment

(46) The claimant does make factual allegations about hours of work and being required to work nights in the claim form. He also makes an allegation about a "*failure to calculate holiday pay accurately*"; "*failure to calculate suspension pay*"; and that the respondent "*failed to pay holiday wages*". To that extent, the detriments sought at paragraphs (a), (c) and (d) are at least foreshadowed in the claim form in a factual sense. There was no express link in the claim form stating that those matters were done <u>because of</u> whistleblowing and were not listed under the heading the claimant used in his claim form of "Public Interest Disclosure Act" and under which he lists the matters set out at paragraphs (35) (i) and (ii) above. These allegations were presented under the headings of "Contract of Employment" and "Holiday payment/s, unlawful deduction from wages, arrears of pay". I acknowledge that an allegation that something has been done because of whistleblowing involves different questions that considering the same

factual matters in the context of a contract based complaint, which is purely about whether the claimant had some form of entitlement to be paid sums due. An allegation of whistleblowing detriment involves consideration as to why particular acts took place and whether each individual act was done because of a protected disclosure. The remedy in respect of a whistleblowing detriment is also considerably different. The claim form does not mention anything about allegations made about accusing the respondent of stealing service user's money or not being paid for covering shifts so the detriments sought at paragraphs (b) and (e) are entirely new allegations not mentioned before even in terms of factual allegations. I conclude that the nature of the amendments sought in relation to paragraphs (b) and (e) are substantial, adding new and additional factual causes of action to the existing whistleblowing detriment claim. The amendments sought in relation to (a), (c) and (d) are still different types of allegation, even if the underlying factual issue complained of was mentioned.

Timing and manner of the application

(47) This application to amend was made at the first preliminary hearing in the claim in February 2022 which was listed following the presentation of the claim form in August 2021. The factual matters at (a), (c) and (d) that the claimant is now trying to suggest are also acts of whistleblowing detriment were referenced factually in the claim form so if such matters were thought by the claimant to have been because of whistleblowing, some reference should perhaps have been made to this. The claimant says that because he was unrepresented, he was unsure what to include and there was not sufficient time to put in all the matters that were still being discussed as part of the grievance process at the time. He also says he did not have the data at the time to support his claim. The respondent denies there was a lack of data and states that the complaints were ones made as part of his grievance the outcome of which was provided before the claim was presented. There is clearly some uncertainty around what the claimant knew and when, in particular about his hours and work and pay. He confirms he received a response to his subject access request on 28 July 2021, which was before his claim form was presented but in that claim form he complains about what was provided being incomplete and falsified and that information had been destroyed. He further asks for this information on 1 February 2022 (see page 47). The application to amend was made at the hearing on 7 February 2022. In this regard, there appears to be at least some reason to explain why complaints were not included earlier.

Applicability of time limits

(48) The amendments that the claimant seeks are on their face brought out of time, the application to amend having been made on 7 February 2022 in respect of acts said to have taken place from May 2020 to January 2021. However it also appears to me that if such claims were allowed to proceed, the claimant may be contending that some of the acts he now seeks to add formed part of a course of conduct extending over a period ending with an act that is in time. Therefore my view is that whether the amendments to the claim are brought in time or not is something that evidence would need to be heard on, so if allowed to proceed, I would adopt the approach in

Galilee v Commissioner of Police of the Metropolis above and defer the issue of whether such matters are in time to the final hearing. Therefore, I have considered the point but also note that the applicability of time limits in this particular case is broadly neutral in considering whether to allow the amendment or not.

Other relevant factors

(49) I note that the decision in Selkent sets out the factors that a Tribunal should consider but it is clear that these are not the only factors that a Tribunal may consider in the exercise of its discretion on amendment applications. The respondent suggests that the claimant's allegation at (c) above that he was not paid during suspension is an abuse of process because the claimant was subsequently paid in full for that period in July 2021 (the sum of £950) before the claim form was presented. The claimant was unclear on this but even if this is the case, on an whistleblowing detriment complaint, the issue is why these sums were not paid when due and whether this was because of the claimant having made a protected disclosure. Whether or not sums are subsequently is not determinative to the success or otherwise of the complaint (although of course may provide evidence to support the respondent's contention that any sums not paid were in error and not because of whistleblowing). Therefore I do not consider this to be a relevant factor counting against amendment.

Balance of prejudice

(50) My decision was therefore to grant the amendment application in relation to the allegations listed at (a), (c) and (d) where, having weighed up the balance of prejudice, I consider that the amendments sought were more in the nature of re-labelling factual complaints already raised and further particularising more general allegations. The matters raised on the facts in the claim form, fall within the ambit of the general allegation that:

"I suffered a detriment for directly whistleblowing to my superiors of bullying, harassment, victimisation and threats regarding my employment which lasted for over 08 months" and

and

"I was punished by both Daljit Singh and Diane Bogle for my sincerity and acting in the best interests for my Service User"

(51) The respondents are not significantly prejudiced regarding these particular amendments. These matters can be addressed by the same witnesses required to deal with the existing acts of detrimental treatment. Having conducted a careful balancing exercise, and having regard to all the circumstances of the case, including the nature of the amendments sought and delay on the part of the claimant in making this application I permitted the claimant to amend to amend his claim in this limited manner only.

(52) However, in relation to the allegations at (b) and (e), I have considered the factors identified by **Selkent** before addressing the balance of prejudice and hardship and reached the conclusion that these amendments should not be permitted. These new allegations were more in the nature of "*entirely new*

factual allegations which change the basis of the existing claim" as identified in the Selkent case above. They were allegations not foreshadowed in the claim form. The claimant does not really set out a real reason as to why the factual allegations he now wished to rely on were not included at all. The underlying facts making up these new factual allegations would have been known to the claimant before he submitted the claim form (as they are not about hours of work, pay or holiday that he may have only found out about at a later date). My main concern was that allowing this amendment at this very late stage, would be giving the claimant another "bite of the cherry" enabling him to try and correct deficiencies in the way the complaint was previously made. He could have put these allegations in the claim form but did not and the respondents would be prejudiced in addressing new factual complaints. The claimant has other complaints in play. The relative prejudice to the claimant if the application is not granted would be relatively small whereas the disadvantage to the respondents if it were and the effect on the proceedings, could be significant.

Application for a strike out/deposit order to be made

Direct race discrimination

(53) The claimant's one and only allegation of race discrimination is that he was not given a contract after starting on 20 April 2018 and compares himself to a white colleague, Simon Jones, who was issued with a contract of employment about six months after starting employment. On this basis the less favourable treatment appears to be the failure to issue the claimant with a contract of employment between 20 April 2018 and approximately 6 months later which would be 20 October 2018. The claimant commenced early conciliation in June 2021 and presented his claim form in August 2021. This allegation is therefore very significantly out of time. As it is the only act relied upon, the only way that the Employment Tribunal would be able to hear this complaint would be if it decided that it should exercise its discretion to hear the complaint because it is just and equitable to do so. The claimant does not explain why he did not make a complaint about this alleged race discrimination until 2021 save that he suggests that when he was looking back over text messages when he was suspended, and having spoken to other people at the time, he thought that this "looked like discrimination". Applying the guidance set out in **Van Rensburg** I am not confident that the claimant fully meets the threshold of having set out a prima facie case which would suggest that the Tribunal should exercise its discretion to allow this out of time claim to succeed. I therefore conclude that this complaint has little reasonable prospect of success. The claimant is **ORDERED** to pay a deposit of £**50,** if he wishes to pursue this complaint**.**

Direct discrimination on the grounds of civil partnership

(54) This matter was listed for consideration as to whether it should be struck out or subject to a deposit order, because Employment Judge Kelly identified that the claim seemed to be misconceived). She recorded at paragraph 14 a) of the CMO that the claimant feels that being made to work nights was linked to him being married/in a civil partnership but he did not agree it was because of this. To succeed in a complaint of direct discrimination on the grounds of civil partnership/marriage this is essentially what he would have to prove so there is a big problem with this complaint.

The claimant further explained at the hearing that his claim was based on comments he said were made when he was asked to work nights and when he refused saying his partner and family were not happy with this, his manager made a comment along the lines of "*Does your wife not trust you?".* He said he found this joke being made about his partner offensive. He also says a comment was made by D Bogle, that he should "*Go and sort it out with your wife, it is your problem*" when he was informed he would have to work nights. He still does not contend that the reason he was required to work nights was because of his marital status. Applying the principles set out in **Anyanwu v South Bank Students' Union** and **Balls v Downham Market High School and College** (as above) that a strike out on the basis of no reasonable prospect of success should only be made in exceptional cases where discrimination is alleged, I do believe this is such a case. There may be a dispute of fact as to whether comments were said but the claimant is still not alleging that it is actually the fact he is married or in a civil partnership that was the reason he was asked to work nights in the first place. The claimant was upset and offended that a comment about his wife/civil partner was made after he was asked to work nights but he does not suggest that the fact he had a wife/civil partner was the reason he was asked to do those shifts in the first place. Taken at its highest, and even if all the factual disputes are resolved in the claimant's favour about what was said, he would not be in a position to make out a direct discrimination claim under **section 13 of the EqA 2010**. I conclude that this complaint has no reasonable prospects of success and should be struck out.

Claim for accrued but untaken holiday pay

(55) There are two elements of the complaint in respect of holiday pay. Firstly that the claimant should be paid for 4 hours accrued but untaken holiday he had left over from the holiday year 2018/19. Secondly that the claimant should be paid the sum of £450 in respect of holiday pay for not being allowed to carry over holiday from the 2020/21 holiday year into the holiday year starting in April 2021 (2021/2022). The respondent says there is no right to carry over holiday pay from previous holiday years either contractually or under regulation 13 (9) of WTR and that it is not possibly for a worker to be paid in lieu of holiday whilst they remain employed, the whole point of the entitlement is to provide rest. It further points out that there is no entitlement going back more than 2 years. The claimant says as a front line worker who was unable to take holiday in 2021 due to the Covid pandemic, he was entitled to carry over in 2022. He also states that he has received incorrect holiday pay and had in the past been paid in respect of holiday not taken.

(56) On this issue, I conclude that the claimant has no reasonable prospects of succeeding in a complaint for unpaid holiday pay because of the provisions of Regulation 13(9) (b) of the WTR which provides that entitlement to annual leave may not be replaced by a payment in lieu except where the worker's employment is terminated. It is not disputed that the claimant remains employed. On that basis alone, I cannot see any basis on which the claimant will be able to succeed in this complaint. Issues regarding being permitted to carry over holiday from one year to the next and adjustments to this as a result of the Covid 19 Pandemic, do not change the fundamental position that the claimant is not entitled to be paid in lieu of holiday that has not been taken whilst he remains employed. On that basis this complaint is

struck out under rule 37 (a) of the ET Rules because it has no reasonable prospect of success.

Claim for unauthorised deduction from wages

(57) This claim relates to the claimant not being paid for days when the service user he was supporting was on social leave in 2018 and 2019. The claimant explained that if placed on the rota to work, for example over Friday and Saturday to support a service user, but subsequently the service user decided to go home to his or her family on the Saturday, that the remainder of the shift would be cancelled and he would not be paid. The respondent contends that there is no entitlement to be paid for such hours (as the local authority does not pay the respondent for any such hours when no care is provided). There is clearly a dispute of fact as to whether the claimant is entitled to such pay. The respondent also states that even if there was any entitlement, the claimant is well out of time to present a complaint in respect of such deductions as although full particulars are not provided, it appears to relate to days in 2019 and so any complaint about this should have been presented at the latest in March 2020.

(58) The respondent's arguments on the issue of whether the complaints are in time are persuasive. The claimant may be in difficulty in showing that he has presented his complaint within three months beginning with the date when such sums were due to him. The jurisdiction of the Employment Tribunal is strictly defined by legislation and can only hear claims that satisfy all the legal tests for such claims to be brought including time limits. Claims such as unlawful deduction from wages have a particularly strict time limit with limited room for manoeuvre so the claimant may have an uphill struggle in this regard. I cannot go so far as to say he has no reasonable prospects of succeeding in this argument, but I have also reached the conclusion that the claimant has little reasonable prospect of success of being able to show that the claims were brought within time. The claimant is **ORDERED** to pay a deposit of £**25** if he wishes to pursue these complaints.

Breach of the Working Time Regulations in relation to daily rest break

(59) This claim relates to failing to put the claimant on the rota to get a daily rest break on 14 September 2020 (because he was required to attend a meeting). The CMO records that the claimant did not in fact attend the meeting but the claimant was unclear on this matter today. The respondent states that there is no basis for such a complaint to succeed under the WTR and again that any failure would be well out of time for pursuing a remedy.

(60) Contrary to what the respondent contends, an individual claimant does have the right to pursue a remedy in respect of failure to provide a daily rest break as a result of regulations 10 (1) and 30 (1) of the WTR. Nonetheless that remedy is subject to the same time limit as other complaints made under the WTR that complaints have to be made within three months of the date on which it is alleged that the exercise of the right should have been allowed. Therefore it does appear that the claimant is significantly out of time in making such complaints. For the same reasons as set out at paragraph (57) above in relation to the unlawful deduction of wages complaint, the claimant is going to have an uphill struggle in showing that the complaint was made in time or if not, that it was not reasonably practicable for it to have been presented in time. Therefore I conclude that this complaint has little

reasonable prospect of succeeding. The claimant is **ORDERED** to pay a deposit of £**25** if he wishes to pursue it.

Employment Judge Flood

13 July 2022