EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lewis
Respondent: Secretary of State for Work and Pensions

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard by Video (CVP) **On:** 5 May 2021 and 21 June 2021
Before: Employment Judge Gray
Appearances
For the Claimant: In person
For the Respondent: Ms J Williams (Counsel) (day 2)
Mr R Stubbs (Counsel) (day 1)

RESERVED JUDGMENT

The judgment of the tribunal is that:

- **The Claimant's complaint of direct discrimination about the appeal outcome fails and is dismissed.**

- **It is just and equitable to extend time in respect of the Claimant's direct discrimination complaints relating to matters on and before 21 February 2019.**

- **The Claimant's application to amend to add 11 complaints of harassment from the period 24 May 2017 to 7 December 2017 is refused.**

- **All other matters remain to be determined and will require appropriate case management.**

REASONS

1. This is the reserved judgment following a preliminary hearing by video lasting 2 days, split to take place on the 5 May 2021 and 21 June 2021. Evidence and submissions concluded at just before 16:30 on the second day so it was necessary to reserve the decision.

2. The hearing was conducted by the parties attending by consent by video (CVP).

3. It was held in public in accordance with the Employment Tribunal Rules. It was conducted in that manner because it had been listed as such by the Tribunal to determine the preliminary issues as identified at the case management hearing before Employment Judge Fowell on the 28 January 2020. There was then a further case management hearing before Employment Judge Gray on the 30 April 2020 where this hearing was confirmed (albeit then subsequently adjourned

and relisted and increased to be two days in duration). Day one of this hearing took place on the 5 May 2021 and day two on the 21 June 2021.

4. The reasons for the split hearing have been set out in the case management order from the first day of hearing.

5. The second day was confirmed to determine the time limit / jurisdiction point (as detailed below) and the Claimant's amendment application to include complaints of harassment and victimisation. It was then to confirm the issues, fix and timetable a final hearing and make appropriate case management orders.

Time limits (the preliminary issues)

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions – so in this claim any act or omission which took place on and before the 21 February 2019) is potentially out of time, so that the Tribunal may not have jurisdiction.

1.2 This has been listed for preliminary determination by Employment Judge Fowell by a Judge sitting alone.

1.3 The Tribunal needs to consider whether the discrimination complaint was made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates? The outcome of the appeal (April 2019) is within that time period. The preliminary hearing is therefore to decide if the appeal outcome was an act of discrimination. If it is then it can be asserted by the Claimant that her complaint of direct discrimination is an act extending over a period.

1.3.2 It will then need to be determined if there was conduct extending over a period? This issue may well require determination at a full hearing because, if it is reasonably arguable that there was an act extending over a period in line with the Claimant's confirmed assertion that she made a number of requests in the period August 2018 to April/May 2019, the tribunal must not determine that issue until it has heard all relevant evidence (Aziz v. FDA [2010] EWCA Civ 304).

1.3.3 If the outcome of the appeal is not determined to be an act of discrimination, then the Tribunal can go on to determine as a preliminary issue, whether the claim was made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.3.3.1 Why were the complaints not made to the Tribunal in time?

1.3.3.2 In any event, is it just and equitable in all the circumstances to extend time?

6. The relevant direct discrimination complaint was confirmed and recorded in the agreed list of issues as follows:

Direct disability discrimination (Equality Act 2010 section 13)

1.1 The Claimant describes herself as a disabled person.

1.2 Did the Respondent do the following things:

1.2.1 Refuse to classify the Claimant's absence following an alleged verbal assault on the 1 June 2017 by a work colleague as "Assault - Work Related" absence at various points from the Claimant's initial request to do so (August 2018) to the appeal outcome (April 2019), despite its procedure/policy requiring it to be classified in this way.

1.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether they were treated worse than someone else would have been treated. The Claimant says she was treated worse than a hypothetical comparator.

1.4 If so, was it because of disability?

1.5 The Respondent asserts that there was no such entitlement as the Claimant alleges and that the procedure/policy meant that a work place assault by a customer was covered but not by a work colleague, so its refusal to classify it in that way was not an act of direct discrimination.

1.6 The Respondent also asserts that the appeal outcome (that the Claimant says was the most recent act of discrimination) cannot be because of the Claimant's disability, because it was upholding the grievance outcome, which itself followed the input from HR as to what the procedure/policy says. This suggests that the Claimant needs to prove that the "someone somewhere" who referred to it being unacceptable customer behaviour that qualified for the "Assault Work Related" classification, did so because of her disability, and that the individuals who agreed with this at the grievance and appeal stages did so because of her disability.

7. The Claimant's application to amend to add complaints of harassment and victimisation was to be determined at the second day of this hearing. Case management orders about this were made at the first day of hearing as follows:

Further information about the application to amend

1. The Claimant must write to the Tribunal and the other side by **2 June 2021** with the following further information:

    1.1 Details of her application to amend her claim to add complaints of harassment and victimisation, providing the following details:

        1.1.1 Why she makes the application at this time and not before;

        1.1.2 **In respect of the complaint of harassment related to disability (Equality Act 2010 s. 26)** what things does the Claimant say the Respondent did that was unwanted conduct relating to her disability. The Claimant needs to confirm the thing, the date when it happened, who at the Respondent she says was responsible for it and who, if appropriate, was a witness to it.

        1.1.3 **In respect of the complaint of victimisation (Equality Act 2010 s. 27)** what does the Claimant say was the protected act she did in accordance with section 27(2) of the Equality Act 2010? When does she say she did it and who at the Respondent does she say was aware of it and why.

        1.1.4 What does the Claimant say the detriments are that the Respondent subjected her to because of her protected act? The Claimant needs to confirm the thing, the date when it happened, who at the Respondent she says was responsible for it and who, if appropriate, was a witness to it.

2. The Respondent must write to the Tribunal and the other side by **16 June 2021** with any comments it wants to make about the Claimant's application.

8. For reference on the first day of this hearing I was provided with:
    a. Agreed PDF hearing bundle of 333 pages (including index);
    b. Statement of Claimant;
    c. Statement of Catherine Johnson on behalf of the Respondent – who heard the appeal of the Claimant's grievance;
    d. A chronology from the Claimant; and
    e. A document from the Claimant sent on the 28 April 2021 at 9:57 with the title "Failure to make reasonable adjustments".

9. For reference on the second day of this hearing the Tribunal was helpfully provided with the following as attachments to an email, so that all documents necessary were readily available and up to date for the second day of hearing:
    a. Updated Final Joint Bundle for the Preliminary Hearing
        i. this includes the latest Record of a Preliminary Hearing and correspondence between the Tribunal and the Parties since the last Preliminary Hearing on 5 May 2021;
    b. Claimant's Chronology;
    c. Witness Statement of Janet Lewis (Claimant);
    d. Witness Statement of Cat Johnson;
    e. Claimant's Further Information regarding her application to amend the claim; and

f. Respondent's response to application to amend the claim.

10. The Claimant had also submitted a copy of a letter from one of her treating Doctors dated 14 June 2021.

11. It was confirmed at the start of the second day that the matters to be determined were:
    a. Whether the outcome of the appeal was an act of direct discrimination because of the Claimant's disability.
    b. If yes, whether that was part of conduct extending over a period, and if no, whether the complaint of direct discrimination was made within a further period that the Tribunal thinks is just and equitable.
    c. The Claimant's amendment application.

The Facts

12. So, to the findings of fact relevant to the first and second issues. I have heard from the Claimant. For the Respondent I heard from Mrs Johnson.

13. It is for the Claimant to prove (on the balance of probability) facts from which the Tribunal could conclude that the Respondent (through the actions of Mrs Johnson) had committed an unlawful act of discrimination. The alleged act is that Mrs Johnson refused to classify the Claimant's absence following an alleged verbal assault on the 1 June 2017 by a work colleague as "Assault - Work Related" absence, because of the Claimant's disability.

14. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

15. The relevant policy/procedure is the "Sick Leave Procedures for Managers". Extracts were contained in the bundle and the relevant page of the bundle is 75, and in particular paragraphs 6.37 to 6.40 of the document. In paragraph 6.37 there is a link to "Guidance on the Health and Safety Managing Incidents site". Mrs Johnson confirmed that clicking the link took you to a web page headed up "Unacceptable Customer/Claimant Behaviour guidance" (see pages 77A and 77B).

16. The Claimant accepted during her cross examination that there is no documentary evidence or evidence in her witness statement that supports that Mrs Johnson decided what she did because of the Claimant's disability. The Claimant confirmed that she would seek to put this motive to Mrs Johnson in cross examination.

17. In her oral evidence Mrs Johnson confirmed and maintained that the Claimant's health and disability issues played no part in her decision. Mrs Johnson confirmed that her focus was on the interpretation of the policy/procedure.

18. Mrs Johnson, as set out in her witness statement, says she followed the terms of the policy (as interpreted by reference to the Guidance linked to the policy document – page 75 links to pages 77A and 77B) and elaborated in her oral evidence that she had personally seen the policy being followed in that way as well.

19. To make sure though that her understanding remained correct and current Mrs Johnson requested advice from HR and this advice is dated 21 March 2019 (see page 210) and received before the appeal outcome letter dated 29 March 2019 (at pages 218 and 219). That advice confirms what Mrs Johnson says she believed … "6.37 to the health and safety incident management site takes the reader to guidance for unacceptable customer behaviour so it is clear this relates to incidents involving customers and not between departmental employees.".

20. I accept the explanation provided by Mrs Johnson for the decision she made.

21. In respect of the factual matters concerning the time limit jurisdictional issue the Claimant addresses these in paragraphs 78 to 86 of her witness statement.

22. From that and the oral evidence given by the Claimant at the hearing I find as fact that the Claimant not making a complaint to the Tribunal before she did is explained by a combination of factors, as follows:
    a. her deteriorating health at the relevant time (2018/2019) (as the Claimant confirms in paragraphs 81 and 84 of her evidence).
    b. her lack of knowledge of Tribunal matters and time limits (as set out in paragraphs 83 and 84 of her witness statement). I accept that the Claimant had no knowledge about the way that Tribunal proceedings were conducted until her google search she says she undertook in the period of mid to end of May 2019 and then her contact with ACAS culminating in her commencing early conciliation through ACAS on the 21 May 2019. It also appears to be around then that applicable three-month time limits are confirmed to the Claimant. The Claimant in her oral evidence explained that the references made by her TU representative at the 22 January 2019 meeting (see paragraph 83 of the Claimant's statement and page 144 of the bundle) to the Respondent's decision not standing up in Tribunal and as at paragraph 83 of her statement that the … "TU representative said that she felt that I was 'too fragile to go to a tribunal' at that time and that we would look at it again at the end of the process.", that she did not understand them to mean she had to go to the Tribunal at that point and in any event she says she could not cope and couldn't do it at that time.
    c. Her belief that matters could be resolved by completing the internal procedures (paragraphs 80 and 84).

23. The Claimant did not accept, as put to her in cross examination, that she could have acted before she did as she was not prevented from conducting her research into Tribunal claims at an earlier point. I however accept that the combination of factors as evidenced by the Claimant are reasons for her not acting before she did, including investigating matters before she did.

24. The Respondent's position on the question of time limits is, it submits, that there is no evidence to find that there is connected conduct and in respect of just and equitable that the Claimant will not be able to evidence the allegations of direct discrimination, the Respondent submits they are highly likely to fail, and therefore there is prejudice to the Respondent as it will carry expense in having to defend complaints that have no merit.

25. For completeness the communication of the refusal of the Claimant's request to reclassify her absence as assault related, before the appeal outcome, was on the 6 February 2019 (see page 153).

A summary of the relevant law concerning the discrimination complaint

26. Direct discrimination

27. The complaint against Mrs Johnson is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimant complains that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimant alleges direct discrimination.

28. The protected characteristic relied upon is disability as set out in section 4 and 6 of the EqA. It is not in dispute that the Claimant was a disabled person at times material to this complaint.

29. For a claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

30. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.

31. Considering the relevant case authorities of:
    a. ***Madarassy v Nomura International Plc [2007] ICR 867 CA and Ayodele v Citylink Ltd and Anor CA [2017]***;

32. In ***Madarassy***, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and ***Madarassy*** remain binding authority in ***Ayodele***.

33. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the Respondent had committed an unlawful act of discrimination (***Madarassy***). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

34. These cases are taken as guidance, and not in substitution for the provisions of the relevant statutes.

35. Time Limits

36. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the 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 complaint relates, or (b) such other period as the employment tribunal thinks just and equitable. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.

37. From the 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings. The Claimant obtained a valid ACAS certificate for these proceedings.

38. I have considered the principals from the cases of ***British Coal v Keeble [1997] IRLR 336 EAT***; ***Robertson v Bexley Community Service [2003] IRLR 434 CA***; and ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA***;

39. I note the factors from section 33 of the Limitation Act 1980 which are referred to in the ***Keeble*** decision:
    a. The length of and the 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 parties co-operated with any request for information.
    d. The promptness with which the claimant acted once he knew the facts giving rise to the cause of action.
    e. The steps taken by the claimant to obtain appropriate professional advice.

40. I note that the Court of Appeal in the ***Afolabi*** decision confirmed that, while the checklist in section 33 of the Limitation Act provides a useful guide for tribunals, it need not be adhered to slavishly. The checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. The Court suggested that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time and they are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

41. It is also clear from the comments of Auld LJ in ***Robertson*** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard … "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify 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 discretion is the exception rather than the rule".

The Decision

42. With regard to the complaint for direct discrimination about the appeal outcome that complaint will fail unless the Claimant has been treated less favourably on the ground of her disability than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could

be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

43. About this complaint I find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the Respondent), that an act of discrimination has occurred. In these circumstances the Claimant's complaint of direct discrimination, concerning the appeal outcome by Mrs Johnson, fails and is dismissed.

44. With this finding I do not need to consider the connected conduct question. Instead I need to consider whether the direct discrimination complaint was made within a further period that the Tribunal thinks is just and equitable.

45. Considering the following factors which appear relevant:
    a. The length of and the reasons for the delay. I accept the Claimant's evidence as to there being a combination of factors for her not acting before she did, including investigating matters before she did. The last act of direct discrimination complained about before the appeal would be the decision dated 6 February 2019, so this is just over 2 weeks out of time (based on acts on or after the 22 February 2019 being in time).
    b. The extent to which the cogency of the evidence is likely to be affected by the delay. The Respondent has not submitted that the cogency of the evidence will be affected. This is understandable as matters were raised with the Respondent through the internal procedures and it will need to present similar evidence in any event to address the Claimant's complaints of unauthorised deductions from wages / breach of contract.
    c. The promptness with which the Claimant acted once she knew the facts giving rise to the cause of action. It would appear to be in a matter of days from the middle of May 2019 that the Claimant understood the need to act and then acted.
    d. As to the merits of the Claimant's direct discrimination complaints (other than the appeal decision) this has not been directly challenged by the Respondent by way of an application for strike out or a deposit order, and it is not unusual for discrimination claims to require all evidence to be considered before merits can be fairly ascertained. Further, the Respondent will need to present similar evidence in any event to address the Claimant's complaints of unauthorised deductions from wages / breach of contract.

46. I find that the Claimant has presented evidence to explain the reasons for the delay and I do not find that the Respondent has been prejudiced by the delay. For these reasons I find that it is just and equitable to extend time for the direct discrimination complaints.

47. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are summarised at paragraphs 11a and b; the findings of fact made in relation to those issues are at paragraphs 12 to 25; a concise identification of the relevant law is at paragraphs 26 to 41; how that law has been applied to those findings in order to decide the issues is at paragraphs 42 to 46.

The Amendment Application

48. The Claimant's further information document about her amendment application consisted of 8 pages and a further 14 pages of attachments. The document confirmed that the Claimant now only applied to add complaints of harassment related to the protected characteristic of disability and no longer applied to add complaints of victimisation (see page 8 of 22). It was not clear from the document though what the Claimant asserted as harassment complaints and what was provided as background narrative.

49. Therefore, at the commencement of the second day of hearing time was taken to confirm with the Claimant what from her document she says are complaints of harassment she applies to add to the current claim.

50. Through this process it was confirmed that Claimant seeks to add the following 11 allegations of harassment which she says took place between 24 May 2017 to 7 December 2017:
    a. **On or about 24/5/2017**, POMS called me to say that he was disappointed that I hadn't talked to him about how I was feeling. I reminded him that I had already done so and asked for support. He stated that he would arrange a meeting. This did not happen.
    b. **30/5/2017**: I met POMS at a conference event. He told me that I 'hadn't done myself any favours' by talking to my mentor and asked me how I thought my actions had made him feel. I explained that I really needed the support that I had asked for previously and that, emotionally, I was at the end of my tether and found his approach to be offensive. He confirmed that he would take my request forward. This did not happen.
    c. **1/6/2017**: I was the subject of a prolonged, verbal assault by Sally Guyett, a member of my team. This took place in an open plan office in the presence of a significant number of staff. I tried to resolve the situation by asking to speak privately with Sally but things deteriorated further. Sally refused my request and stated loudly that she was never going to speak with me privately again. I returned to my desk and it was clear that I was extremely distressed. Nobody did anything to stop the assault and subsequently, nobody asked me how I was. After a while, I tried again to achieve a resolution but the outcome was a further verbal assault. I telephoned my line manager to explain what had happened, how I felt and that I could not cope with my situation any longer. I asked again for support and was assured that a meeting would take place. This did not happen.
    d. **On or about 28/6/2017**: I had a 1-1 meeting with POMS. I was visibly distressed, was crying continually and told him that my situation was so bad that I felt that the only option for me was to leave work. I also raised the OH outcome report and recommendations and that I wished to address these with him. He did not take any action to address this or that I had said that my mental state was so bad that I felt the only solution was to leave. This made me feel that it was all my fault. I had never felt that way before at work, it was offensive and humiliating.
    e. **On or around 10/8/2017**, I had a further 1-1 meeting with POMS. I was emotionally distraught, once again saying that I felt that my only way out was to leave DWP. I raised my concerns about the fact that the OH recommendations hadn't been considered or implemented and at that point POMS said that this had been done by the referring manager. It had not and I was surprised about his response as I had spoken with him about this at my June 1-1. I believe that I was made to feel at fault, it was unsettling and I felt diminished.

f. **On or around 11/8/2017**: I attended a management team meeting and broke down during the meeting. POMS appeared to be quite agitated and said that one of my colleagues had a really good track record with team management and that he would give him my team to manage. This was totally humiliating. Over many years, I had demonstrated that I was able to manage teams successfully. I had been asking for help for some time and he had been aware of my distress. Yet, he had done nothing to support me. It was said in the presence of all my peers. It was degrading and humiliating. I began my first period of sickness on the afternoon of that day.

g. **During the next two weeks**, POMS maintained contact with me but although I told him that I was too unwell to work, he continued to raise the option of working from home. During this period, he also raised that I could consider applying for Actuarily Reduced Retirement as I was finding work difficult to manage. I was so unwell that I think it fair to say that I thought that this could be my 'escape route' although there was an element of shame about not being able to cope and that my manager was effectively suggesting a way to manage me out. I am sure that this approach couldn't have been raised during a discussion between POMS and his manager ET. I say this as DWP's focus as a Disability Confident Leader, is to support their staff (and customers) in managing their health conditions in such a way that they are able to return to work. No action was taken to support me. This was humiliating and offensive.

h. **25/8/2017**: I had asked for a 14 day review of my absence as I wanted to make a return to work as soon as possible. I wanted to discuss and agree the support that could be put in place for me. I went to this meeting fully prepared to discuss what I felt I needed by way of support. During the meeting, I stated that I felt that the absence of support that I had requested on several occasions had contributed to my current sickness absence. POMS said that I was being unfair to him and he appeared to be irritated, defensive and raised his voice. I stressed that it was not my intention to upset him, I just wanted to get back to work. Shortly after this, I asked if we could conclude the meeting as we hadn't made any progress in discussing a 'support package' and I was exhausted. Later that day, I emailed my TU representative as I felt this was the only way forward. When I went into the meeting, I was certain that there would be a positive outcome for me but it was just humiliating.

i. **1/11/2017**: I returned to work. No one from my team welcomed me back to work, asked me how I was and I was not included in conversations. I felt isolated and struggled to remain at work. At that point, my mental state was such that I thought that this was what I deserved as I had raised a formal complaint against one of them. However, no formal action was ever taken to address my complaint. This made me feel totally worthless, stripped me of my dignity and felt hostile.

j. **6/12/2017**: I had discovered, a few days previously, that I had been excluded from the Fraud community's Christmas celebration. My mental health deteriorated further and felt that I had to move to a different work space. This exclusion made me feel unworthy, intimidated and utterly worthless. Being excluded from any social event is difficult to deal with but to be excluded during the Christmas period was awful. I could not face seeing everyone leaving for the Christmas lunch while I remained at my desk.

k. I moved and contacted POMS by email (copying SF in), stating that my situation was intolerable – [**7/12/2017] -** This email and POMS response are on pages 266-267.

51. The Claimant sets out in her amendment application document that:

"I did not make this claim before now as I have very little knowledge of how the Tribunal claim process is conducted. When I first made my claim in 2019, I was in very poor health, with a diagnosis of Anxiety and Depression, with features of PTSD. I still have this diagnosis, although my symptoms are currently better managed through therapy and medication. In support, I am attaching an OH report dated 17/4/2018, Psychiatrist reports dated 28/1/2019, 18/7/2019 and 23/10/2019. My psychiatrist is currently on leave but is due to return to work on 9/7/2021. My community psychiatric nurse has messaged him, asking him to give an up to date report on my state of health. My TU representative did not give me any information about making my claim to the Tribunal. During recent months I have had 2 (or 3) telephone conversations with a representative of the CAB about my claim to the Tribunal."

52. The Respondent expressly addresses the identified complaints at paragraphs 11 to 13 of its written response:

"11. In respect of the allegations made between the 23rd May 2017 and the 16th January 2018, the Respondent submits that they are brought significantly out of time (some 3.5 - 4 years) and do not in any way relate to the absence related issue which appears to form the bulk of the Claimant's application to amend. The allegations set out in this period of time are entirely new factual allegations involving different people to the absent related issue and seek to advance an entirely new type of discrimination claim. Furthermore, there is simply no compelling reason as to why the Claimant could not have brought these claims within three months of them happening and/or at the latest in her original ET1 so as to extend time on just and equitable grounds so long after the events of which she complains.

12. The Respondent submits that notwithstanding the fact that the Claimant was suffering with her mental health, the Claimant could and should have brought these claims earlier. Indeed, apart from a period of absence between the 11th August 2017 to the 31st October 2017 due to depression, the Claimant was in work and seemingly capable of pursuing a claim. Upon commencing a period of absence in January 2018, the Claimant was able to apply for Injury Leave Benefit and Ill Health Retirement as well as raise a grievance in respect of the absence related issue and subsequently appeal the grievance decision. That being so, it is submitted that there can be little doubt that she was also capable of pursuing a harassment claim if she so chose. In addition, the Claimant was assisted by her Trade Union as far back as August 2017 (see her application to amend under paragraph commencing 25/8/2017) from whom she could and should have sought advice and assistance for the purposes of bringing a claim to this Tribunal.

13. In balancing hardship to the parties, it is submitted that the Respondent would clearly be prejudiced if this application were permitted. The issues raised are historical and involve a number of different people (at least 7 identified in the application) all of whom will now have obvious difficulty in remembering the specifics of what the Claimant alleges. In particular, her line manager during this period of time, Phil O'Meara Sheilds (referred to as POMS), was diagnosed with

prostrate cancer during the period concerned and as a result of his treatment has suffered quite significantly with his memory and is now also partially retired. It cannot be ignored that the Respondent may well face difficulties in obtaining all relevant documentation pertinent to the issues now raised."

53. The parties were given opportunity during their oral submissions to address me on the amendment application.

54. A summary of relevant law to the amendment:

55. 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.

56. 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***.

57. The EAT held in ***Selkent***: 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. Mummery J as he then was explained that relevant factors would include:
    a. ***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
    b. ***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; and
    c. ***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.

58. 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***.

59. I have also considered the recent EAT decision of Judge James Tayler in ***Vaughan (appellant) v Modality Partnership (respondent) UKEAT/0147/20/BA***. That finds … "A practical approach should underlie the fundamental exercise of balancing the hardship and injustice of allowing as against refusing the amendment. Representatives would be well advised to start by considering, possibly putting the Selkent factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis of instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.".

60. The decision on the amendment application

61. The Grounds of Claim (see pages 14 to 17 of the bundle) make no reference to these matters (the time period in the Grounds of Claim runs from August 2018), and no reference to a complaint of harassment so these complaints of harassment are new complaints that the Claimant applies to add.

62. The Claimant's amendment is a substantial alteration, pleading a new cause of action.

63. These new complaints are out of time. The last allegation was the 7 December 2017 so the complaint should have been issued in the first quarter of 2018, allowing for any ACAS conciliation extension.

64. Although I have accepted the Claimant's position in respect of the just and equitable considerations concerning her direct discrimination complaints, I do not find that they apply to the amendment application.

65. The reason for this is that the Claimant's own evidence is that she was aware of the Tribunal procedure and time limits from May 2019. Further, there were two case management hearings before this preliminary hearing and the Claimant did not raise the amendment matters, she now raises. The medical evidence the Claimant attaches to her application of amendment covers up to October 2019 and does not suggest the Claimant was unable to partake in Tribunal matters or raise complaints. The most recent medical correspondence dated 14 June 2021 does not assert that the Claimant was impaired from making an amendment application before she did.

66. Further, I accept there will be significant prejudice to the Respondent, and it has been prevented and inhibited from investigating the claim while matters were fresh. The Claimant has an existing claim to be determined which does not rely

on the harassment allegations so still has a route to remedy if her claims are proven.

67. As to the timing and manner of the application, as already noted, the Claimant was able to submit a claim on the 4 July 2019, with ACAS conciliation taking place between 21 May 2019 and 12 June 2019. The Claimant was able to take part in two previous case management hearings, one before Employment Judge Fowell on the 28 January 2020 and the other before me on the 30 April 2020. Despite this the amendment application was not formerly submitted until after the first day of this preliminary hearing (so after 5 May 2021). This is nearly two years after the claim was commenced. I accept the submissions of the Respondent that the delay may have put it in a position where evidence relevant to these new issues is no longer available or is rendered of lesser quality than it would have been earlier. This is particularly so with reference to the assertions made by the Respondent about the health of "POMS", which is more than just supposition.

68. For these reasons I refuse the Claimant's amendment application.

Employment Judge Gray
Date: 22 June 2021

Judgment and Reasons sent to the Parties: 30 June 2021

FOR THE TRIBUNAL OFFICE