Case No: 2301161/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Miss M Martin	AND	Vinci Construction UK Limited

HELD AT Croydon (CVP) **ON** 27 October 2022

EMPLOYMENT JUDGE A Matthews

Representation
For the Claimant: In Person, accompanied by her sister
For the Respondent: Ms A Greenley of Counsel

JUDGMENT

1. The Claimant's application to amend the originating application is granted. This is dealt with further in case management orders setting down the claims and issues.
2. The Respondent's application, that the claims to be struck out, is dismissed.
3. The Respondent's application, that the Claimant be ordered to pay a deposit, is granted. This is dealt with by separate order.

REASONS

1. These written reasons are provided on the application of the Respondent, made at the hearing.
2. **Background and procedural history.**
3. This open preliminary hearing (later converted into a private hearing for case management) has resulted in this Judgment, case management orders and an order that the Claimant pay a deposit. All three documents should be referred to for the full picture.
4. The Respondent produced a 57 page electronic bundle of documents. As is not uncommon with an electronic bundle, this included the index. The electronic bundle is, therefore, out of step with the hard copy bundle by one page. References in this Judgment to pages in the bundle are to pages in the electronic bundle.

5. The Tribunal understands that Ms Greenley sent written argument to the Croydon office of the London South employment tribunal. That had not reached the Tribunal at the time of the hearing and the Tribunal has not seen it since. However, Ms Greenley spoke to the argument at the hearing.
6. The Claimant lodged her application with the employment tribunals on 27 March 2021 (3-13 - the "Claim"). The Early Conciliation Certificate records notification on 25 January 2021 and the date of the issue of the certificate as 3 March 2021 (2).
7. The case came before Employment Judge Khalil for case management on 31 May 2022. The resultant orders sent to the parties on 7 June 2022 are at 43-46 (the "Khalil Orders"). They should be referred to for their full content.
8. At that case management hearing the claims could not be properly identified without further information from the Claimant. An order to that effect was made. It was agreed that, in any event, the factual allegations did not support a claim of victimisation by reference to section 27 of the Equality Act 2010 (the "EA"). The Khalil Orders note: *"There may be a pleaded direct discrimination claim or harassment, but this is for the claimant to assert and particularise. It is not an invitation to expand the claim to include a claim not pleaded. That would require an application to amend and adjudication."*
9. The Khalil Orders, therefore, left open the possibility that there might be a claim of direct discrimination or harassment to be found in the wording of the Claim but, if so, it needed particularising. Otherwise, anything additional would require an application to amend.
10. The Claimant sent in further information (28-29 - the "Further Information").
11. As it had been given leave to do, the Respondent filed an amended response in reply (30-36).
12. On 17 October 2022 the Respondent lodged an application for strike out or, in the alternative, for a deposit order (47-48). The basis of the application, in short, was that, notwithstanding the Further Information, the Claimant had failed to particularise her claims and/or they were time barred.
13. The Khalil Orders had set down this open preliminary hearing. The purpose of the hearing was explained in paragraphs (2) and (3) of those orders.
14. At the start of this hearing, having regard to what had happened since the Khalil Orders were made, it was agreed that the purpose of this hearing was to deal with the Respondent's application for a strike out or deposit order and any amendment application made by the Claimant. Before this could be done, however, it seemed to the Tribunal that it was necessary to understand the claims as set out in the Claim but with the benefit of the Further Information. The order of proceeding, therefore, was to identify the claims, deal with any resulting application for amendment, hear the Respondent's application for a strike out or deposit order and then deal with case management as appropriate.
15. **The claims**
16. The way the claims are presented in this case is not untypical. The Claimant, an apparently unrepresented litigant in person, provides some

factual information and ticks the boxes that seem to the Claimant to characterise the claims. The Claimant does not otherwise put legal labels on them. (Where there are claims of discrimination, litigants in person often do not understand the legal niceties of the different heads of discrimination in the EA. As a result, they either do not label their claims at all or mis-label them.) Sometimes, as in this case, the factual detail is not clear and further information is ordered. Once that is provided, it is the Tribunal's task, working with the parties and having regard to the overriding objective set out in rule 2 of the Employment Tribunals Rules of Procedure 2013 (the "ET Rules"), to clarify the claims and issues. This includes agreeing legal labels for the claims.

17. In the Claim, the Claimant completed box 8 (*"Type and details of claim"*) by ticking the boxes for race and sex discrimination and *"I am making another type of claim which the Employment Tribunal can deal with."* Below the *"another type of claim"* box the Claimant had typed *"VICTIMISATION After raising a grievance against senior Manager Michael (Mike) Harris, i believe how i was treated and the lack of support i was given was a punishment for raising a grievance against him."*
18. As noted, it was established at the hearing before Employment Judge Khalil that there was no claim of victimisation. Nevertheless, the wide factual allegation about treatment and lack of support remained.
19. In addition to the information at box 8 in the Claim, the Claimant provided some narrative at box 15. This can be seen at 14 and will be referred to as needed below.
20. Ms Greenley's central submission on the issue of the claims is straightforward. It is that it is clear from the additional information provided by the Claimant at box 15 that the Claimant's real claim is *"My reason for claim – I believe that i was victimised for raising a grievance against a senior manager and i believe the redundancy consultancy was used as i way of getting me out of the business. This was performance based, despite the issues i was having that they were aware of and the admission by a senior manager that i was working/managing someone that was racist and sexist his pressure was not taken into consideration and this was not dealt with."*
21. As the Tribunal understands the argument, it is that the Tribunal should conclude from this that the claims are about the redundancy process and nothing else.
22. There is no question that, on a plain reading of the Claim, that is a central issue for the Claimant. However, on that plain reading there is another central issue. This is in the wider narrative that follows in box 15 and that is also included in box 8 of the Claim. It is about wider treatment attributable to a grievance the Claimant brought against Mr Harris earlier in 2020.
23. Working with the parties, the Tribunal identified four sets of factual assertions made by the Claimant that might give rise to a claim within the framework of the EA.
24. The first arises from a meeting on 19 May 2020 between Mr Harris and Mr Pace (both employees of the Respondent) and the Claimant. The Claimant

complains generally about treatment and lack of support from the Respondent in box 8 of the Claim (see above). The meeting is referred to in box 15 of the Claim. Apparently, it was covertly recorded. The Claim suggests that a transcript was attached but, if it was, it has not reached this Tribunal. Whilst it is for the tribunal at any full hearing of the matter to find what was actually said, in its amended response in these proceedings the Respondent accepts that Mr Harris referred to Mr Tyler (who reported to the Claimant) as a *"chauvinist pig"* and went on to say *"you know, and he might be partially racist as well".* (33). In the Further Information the Claimant provides specifics about both what she alleges happened and how she alleges she felt about it (28).

25. The second factual assertion is that the Respondent recommended mediation between the Claimant and Mr Tyler, a person who Mr Harris had described as above. It is the case that the word *"mediation"* does not figure in the Claim. However, the Claimant complains about treatment generally and this is the sort of matter an order for further information is intended to tease out.
26. The third factual assertion is that the Respondent took no action to address the Claimant's continued management of Mr Tyler; someone that Mr Harris had made the above comments about. Apart from the general reference to treatment and lack of support in box 8 of the Claim, box 15 is specific about this. The Claimant refers to it as *"not dealt with".* Clarification is provided in the Further Information.
27. It seems to the Tribunal that what has happened in relation to each of the above three sets of factual allegations is this. The Claimant raised the issue of treatment generally in the Claim and, as she was required to do, provided clarificatory information about it. As such, it seems to the Tribunal that no application to amend is required. However, these areas are often "grey" and, if the Tribunal is wrong about that, the issue is addressed below on the basis that such an application is required.
28. The Tribunal discussed with the parties a fourth set of factual circumstances. These were plainly made out in the Claim (see paragraph 20 above). The Claimant says that, in conducting the assessment to determine which employees would be made redundant, no account was taken of the view that Mr Harris had expressed about Mr Tyler and the effect that might have had on the Claimant's performance. It was agreed that this did not "work" as a direct discrimination claim or a claim of harassment in the context of the EA. These were the only two legal labels contemplated by the Khalil Orders. The Respondent may have anticipated a third possibility when it pleaded that *"The Claimant has not pleaded any claims for direct discrimination, indirect discrimination and/or harassment"* (30). This was not, however, discussed at this hearing. It is for the Claimant to decide if she wishes to pursue this further.
29. **The application to amend**
30. The Claimant did not have sufficient knowledge of employment tribunal procedures to make an application to amend of her own initiative. However,

having regard to the overriding objective, the Tribunal invited such an application and it was made.

31. The Respondent opposes that application on the basis that the Claimant should not be permitted to add to the factual allegations. The Respondent's response raises two further issues. First, it opposes the Claimant relying on any type of discrimination (other than victimisation) because no other type has been specifically pleaded. Second, concerning time limits, the Respondent says that the Claimant may not rely on any argument that there is *"conduct extending over a period"* under section 123 EA nor may the Claimant make any application for an extension of time under that section, because there is no pleading or application to that effect.
32. The general background and procedural history of the claim as it stands before the determination of this application and the application itself is set out above. In essence, the Claimant applies to allow the first three of the specific allegations identified above (paragraphs 24-26) to proceed as distinct claims. Bound up in that are the Respondent's other points about the type of discrimination relied on, *"conduct extending over a period"* arguments and any application for an extension of time limits.
33. **The applicable law on the application to amend**
34. An employment tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of <u>Chapman v Simon</u> [1994] IRLR 124). If a case is not before the tribunal, it needs to be amended to be added.
35. The EAT held in <u>Selkent Bus Company Ltd v Moore</u> [1996] ICR 836 EAT: 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 the following.
36. <u>The nature of the proposed amendment</u> - 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.
37. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.
38. <u>The applicability of time limits</u> - 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. Whether this is still "essential" is now the subject of conflicting case law. This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether

or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

39. 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.
40. These factors are not exhaustive and there may be additional factors to consider, for example, the merits of the claim). The EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.
41. The Balance of Prejudice: per HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V): [21] *"… 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 … [26] a balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice. [27] Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it. [28] An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional costs; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."*
42. Overall, on the subject of amendment, the Tribunal bears in mind Langstaff P's observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: *"The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made meaning … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the*

case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

43. **Conclusions on the application to amend.**
44. In the Tribunal's view the applications involve the addition of factual details to existing allegations and not the making of entirely new factual allegations which change the basis of the existing claim. The amendments sought are not substantial alterations pleading a new cause of action.
45. Whatever the state of the law on time limits, one of the factual allegations (see paragraph 26 above) may involve the determination of whether or not there was *"conduct extending over a period"* (section 123 EA). It is trite law that such issues are to be determined after the facts are aired at a full matters hearing. As far as the other two allegations are concerned, they may be more vulnerable to the out of time argument, but the issues are so bound up that this is better determined at the full matters hearing having heard the evidence and on the basis that the Claimant makes an application for an extension of time, if necessary.
46. Nothing arises from the timing and manner of the application. How it arose is set out above.
47. As far as prejudice is concerned, it appears that whilst one of the Respondent's potential witnesses (Ms Patel) has left the Respondent's employment, the others are available. This seems to have been the position before and after the application was made. It is also true that the relevant events will be well over two years old by the time the matter comes to a full hearing. That is regrettable but not uncommon. There appears to be relevant documentary evidence and two of the Respondent's key witnesses are available. There is no other obvious prejudice.
48. There are some issues relating to the merits of the claim. However, this is not an utterly hopeless case.

49. Accordingly, the application for amendment is granted.
50. Apart from opposing the applications to amend the facts relied on by the Claimant, the Respondent also raises the two other points mentioned above.
51. First, the Respondent opposes the Claimant relying on any type of discrimination (other than victimisation) because no other type has been specifically pleaded. The Claimant did not particularise the type of discrimination alleged other than by ticking the *"race"* and *"sex"* boxes in the Claim and mentioning victimisation.
52. Litigants in person cannot be expected to have detailed knowledge of the types of discrimination covered by the EA. It is in accordance with the overriding objective and also accepted practice within the employment tribunals for the parties to agree the type of discrimination alleged as part of case management.
53. Second, the Respondent says that the Claimant should not be able to rely on any argument of *"conduct extending over a period"* in relation to time limits, nor should the Claimant be allowed to make any application for an extension of time, because neither is raised in the Claim.
54. These are jurisdictional issues that the tribunals are required to consider in any event. They are commonly anticipated and identified as being relevant or not in the course of case management discussions.
55. **The application for strike out or for a deposit order**
56. As noted above, this arises both from the Claimant's failure to particularise the claims (as the Respondent sees it) and/or that they are time barred.
57. The grounds on which a Tribunal may make a strike out order are set out in rule 37 of the ET Rules.
58. The failure to particularise the claim is dealt with above. The Tribunal sees no grounds on which it can strike out the now particularised claim on the basis that it has no reasonable prospect of success either on its merits or as far as the arguments about time limits are concerned.
59. The grounds on which a tribunal may make a deposit order are set out in rule 39 of the ET Rules. In the Tribunal's view it is appropriate to make such an order. The terms of the order and the grounds for making it are set out within it.

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Employment A Matthews
Dated **1 November 2022**

Judgment sent to Parties on:
15 November 2022

For the Tribunal Office