EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms L Harper	v	**Nuffield Health**

OPEN PRELIMINARY HEARING

Heard at: London South by CVP **On: 22 March 2022**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: **In person**
For the Respondent: **Ms A Kent solicitor**

JUDGMENT on PRELIMINARY HEARING

1. The claimant's claim of race discrimination and harassment for the period January to May 2019 was not presented within the time limit imposed by section 123 of the Equality Act 2010 and it is just and equitable to extend the time for the presentation of the claim.

2. The claimant's application to amend her claim is granted in the terms described in paragraph 31 hereof.

REASONS

Preliminary

1. An Open Preliminary Hearing was listed to deal with the Claimant's application to amend her claim although the Claimant's position was that she did not require to amend her claim. The Respondent objected to the Claimant's amendment to her claim.

2. The Tribunal was provided with information by the Claimant and she provided a print out from her GP showing her medical absences and medication. The Tribunal received written submissions from both parties supplemented by oral submissions.

3. The Tribunal was provided with an agreed electronic bundle to which reference will be made where necessary. The Claimant also provided an additional bundle containing a number of medical certificates.

The claim

4. The Claimant resigned on 14 August 2020.

5. From the ACAS Early Conciliation Certificate, the earliest date upon which the Claimant can seek to rely as founding any claim is 21 June 2020 (being 3 months less a day before Day A on the Early Conciliation Certificate, as the ET1 was issued within 1 month of Day B of the Early Conciliation Certificate).

6. The ET1 narrates:

> My issues started with Chad Green the line manager (bullying/asked to create fraudulent MOT?s/micromanaging/ asked me to work differently to how I was informed by General Manager.
> The racist comments started and included comments such as: " I smell black people."
> I was subject to racial harassment and direct discrimination contrary to S. 23 and S. 13 of the Equality Act 2010. Colleagues made comments in regards to my race
> I am also claiming constructive dismissal.
> Further particulars to follow.

7. The Claimant was ordered to provide further and better particulars and did so in a lengthy narrative style [37-49]. On 13 October 2021, the Respondent set out detailed criticisms of the particulars provided by the Claimant [50-51]. The Claimant replied [58-59] and provided an amended set of further particulars [64-77] where she added headings and dates to assist the Tribunal and the Respondent with understanding which set of facts related to each claim, as follows:

- Introductory narrative-paragraph 1.
- Bullying and harassment- paragraphs 2-5 (dates specified ‘early 2018’ to 3 July 2018)
- Bullying and harassment- paragraphs 7-9 (dates specified August 2018)
- Bullying and harassment- paragraphs 11-23 (dates specific February 2019 to April 2019)
- Narrative – paragraphs 24-25 (17 December 2019 and 27 March 2020)
- Unfair dismissal – paragraph 24.

Law
Time limit

8. The Equality Act 2010 provides:

123 Time limits

(1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 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.

9. The Tribunal has reminded itself of the developed case-law in relation to what is now section 123 of the Equality Act 2010. That has included a group of well-known judgments setting out the underlying principles to be applied in this area, together with recent occasions on which those principles have been applied and approved by later courts and tribunals. Particular attention has been paid to the historical line of cases emerging in the wake of the case of **Hutchinson v. Westwood Television** [1977] ICR 279, the comments in **Robinson v. The Post Office** [2000] IRLR 804, the detailed consideration of the Employment Appeal Tribunal in **Virdi v. Commissioner of Police of the Metropolis et al** [2007] IRLR 24, and, in particular, the observations of Elias J. in that case, as well as the decision of the same body in **Chikwe v. Mouchel Group plc** [2012] All ER (D) 1.

10. The Tribunal also notes the guidance offered by the Court of Appeal in the case of **Apelogun-Gabriels v. London Borough of Lambeth & Anr** [2002] ICR 713 at 719 D that the pursuit by a claimant of an internal grievance or appeal procedure will not normally constitute sufficient ground for delaying the presentation of a claim: and observations made by Mummery LJ in the case of **Ma v. Merck Sharp and Dohme** [2008] All ER (D) 158.

11. The Tribunal noted in particular that it has been held that 'the time limits are exercised strictly in employment … cases', and that there is no presumption that a tribunal should exercise its discretion to extend time on the 'just and equitable' ground unless it can justify failure to exercise the discretion; as the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time, 'the exercise of discretion is the exception rather than the rule' (**Robertson v. Bexley Community Centre** [2003] IRLR 434, at para 25, per Auld LJ); **Department of Constitutional Affairs v. Jones** [2008] IRLR 128, at paras 14–15, per Pill LJ) but LJ Sedley in **Chief Constable of Lincolnshire Police v. Caston** said in relation to what LJ Auld said "there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised."

12. The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980; **British Coal Corporation v. Keeble** [1997] IRLR 336; **DPP v. Marshall** [1998] IRLR 494. Section 33 of the Limitation Act 1980 requires courts to consider factors relevant to the prejudice that each party would suffer if an extension was refused, including:

the length and reasons for the delay;
the extent to which the cogency of the evidence is likely to be affected by the delay;
the extent to which the party sued had co-operated with any requests for information;
the promptness with which the claimant acted once she knew of the possibility of taking action; and
the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

13. Although these are relevant factors to be considered, there is no legal obligation on the Tribunal to go through the list, providing that no significant factor is left out; **London Borough of Southwark v. Afolabi** [2003] IRLR 220.

14. Incorrect legal advice may be a valid reason for delay in bringing a claim but will depend on the facts of the case: **Hawkins v Ball & Barclays** [1996] IRLR 258 and **Chohan v Derby Law Centre** [2004] IRLR 685. In answering the question as to whether to extend time, the Tribunal needs to decide why the time limit was not met and why, after the expiry of the primary time limit, the claim was not brought sooner than it was; see **Abertawe Bro Morgannwg University Local Health Board v Morgan [**2014] UKEAT/0305/13 unreported per Langstaff J. However, in determining whether or not to grant an extension of time, all the factors in the case should be considered; see **Rathakrishnan v Pizza Express (Restaurants) Ltd** (2016) IRLR 278.

15. The Tribunal has additionally taken note of the fact that what is now the modern section 123 provision contains some linguistic differences from its predecessors – which were to be found in various earlier statutes and regulations – concerning the presentation of claims alleging discrimination in the employment field. However, the case law which has developed in relation to what is now described as "the just and equitable power" has been consistent and remains valid. The Tribunal has therefore taken those authorities directly into account in its consideration.

16. It is also a generally received starting proposition that it is for the claimant who has presented his or her claims out of time to establish to the satisfaction of the Tribunal that the "just and equitable" discretion should be exercised in the particular case.

Amending the claim

17. The starting point must be the importance of what is actually set out within the ET1. In **Chandhok v. Tirkey** [2015] ICR 527, Langstaff J sitting alone in the EAT said the following at paragraph 16:

> "The claim, as set out in the ET1, is not something just 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, under the Rules of Procedure 2013, the claim as set out in the ET1."

18. Employment tribunals have a general discretion to grant leave to amend the claim. It is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. General guidance on making amendments to a claim is contained in **Selkent Bus Co Ltd v. Moore** [1996] ICR 836 EAT and **Cocking v. Sandhurst (Stationers) Ltd** [1974] ICR 650 NIRC. There is a distinction which requires to be drawn between:

(i) Amendments which are merely designed to alter the basis of an existing

> claim, but without purporting to raise a new distinct head of complaint. Amendments falling within this category are not affected by the time limits, as the nature of the original claim remains intact, and all that is sought to be done is change the grounds on which that claim is based, i.e. re-labelling.
> (ii) Amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim. As Harvey notes at paragraph 312.01 in relation to this type of amendment: *"*So far as category (ii) is concerned, the tribunals and courts have always shown a willingness to permit a claimant to amend to allege a different type of claim from the one pleaded if this can be justified by the facts set out in the original claim. It is usually described as putting a new 'label' on facts already pleaded.
> (iii) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

19. More recently, the Court of Appeal in **Kuznetsov v Royal Bank of Scotland** [2017] EWCA Civ 43 also confirmed the factors identified in **Selkent** as being factors to take into account as well as approving **Chandhok**. At paragraph 25, Elias LJ (giving the only reasoned judgment) noted that in respect of the Claimant, 'His obligation was to put his claims before the ET when he lodged his application.' Elias LJ went on to quote Langstaff J's views in **Chandhok** that the ET1 was not something simply to set the ball rolling, before saying:

> It was not sufficient for the appellant simply to add these claims at a later date when he was asked to produce a list of issues. They ought to have been made from the beginning. HH Judge Eady observed that there was absolutely no reason why this claim could not have been advanced as part of the original claims. It did not emerge as a result of the receipt of late documents of anything like that. If the appellant had an explanation for not advancing this claim earlier it was for him to produce it. No explanation was given.

20. In essence, **Selkent** said that whenever the discretion to grant an amendment was invoked, "a tribunal should take into account all the circumstances, including but not limited to the nature of the amendment, the applicability of time limits and the timing and manner of the application]" before balancing "the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it." This approach was approved by the Court of Appeal in **Ali v. Office of National Statistics** [2005] IRLR 201.

21. In **Vaughan v. Modality Partnership** [2021] ICR 535 EAT, Tribunals were reminded that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application.

22. When considering whether to allow an amendment, an employment tribunal should analyse carefully the extent to which the amendment would extend the issues and the evidence. Although the allegations in the original claim and in the amendment were not identical, Rimer LJ, giving the only reasoned judgment of the Court, held that 'the thrust of the complaints in both is essentially the same'. The fact that the whistleblowing claim would require an investigation of the various component ingredients of such a case did not mean that 'wholly different evidence' would have to be adduced. **Evershed v. New Star Asset Management Holdings Ltd** [2010] EWCA Civ 870 at para 50.

23. There is also Presidential Guidance.

24. One of the **Selkent** factors is time and whether the proposed amendment is out of time, and if so whether the time limit should be extended. In **Amey Services Ltd and another v. Aldridge and others** UKEATS/0007/16 the Scottish EAT held that an amendment cannot be allowed subject to time bar issues. However, shortly afterwards the EAT in England reached the opposite conclusion in **Galilee v. Commissioner of Police of the Metropolis** UKEAT/0207/16 and expressly held that **Amey** had been wrongly decided. The EAT in **Galilee** held at paragraph 109 that a Tribunal can decide to allow an amendment subject to limitation points, that an applicant need only demonstrate a prima facie case that the primary time limit or the just and equitable ground was satisfied, and also that amendments to pleadings which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend. The Presidential guidance on case management meanwhile aligns with the **Amey** line of authority in saying that time points must be decided at the point of amendment. The Court of Appeal has not as yet had the opportunity to clarify the position.

DISCUSSION and DECISION

25. The ET1 gives no dates for any of the acts complained of but the subsequently provided information makes it clear that the acts complained on took place in January to May 2019 with the resignation on 14 August 2020.

26. At paragraph 26 of the amended particulars, and it is the amended particulars which are addressed hereafter unless otherwise stated, the Claimant says: Once I am well enough to return to work…" The significance of that comment was not apparent to Ms Kent for the Respondent when she was preparing for the hearing, nor was it apparent to the Tribunal from any of the material it received at the hearing. It emerged that the Claimant was absent from work from May 2019 until her resignation. She never returned to work, albeit she had some contact with the Respondent as described in paragraphs 24 and 25.

27. The ET1 is in time of the resignation. It is out of time for any allegations on 2019. The Claimant in her submission [83] relies on her resignation as *'the last act of discrimination'* but there is not a continuing act of the Respondent through to her resignation due to her ill health absence from work. Accordingly, her claim so far as relating to events in 2019 is out of time, although the events in January to May 2019 constitute a continuing act.

28. The Tribunal considered whether it was just and equitable to allow the 2019 claims to be received late. The Claimant was absent from work through illness which was medically certified. She raised a grievance later in 2019 but the investigation of the grievance was not completed. The events in 2019 are inextricably linked, according to the Claimant, with her resignation. The Tribunal decided that it was just and equitable to allow the 2019 claims to be added to the claim.

29. The information in the ET1 is sparse and does not give the Respondent fair notice of what the Claimant is alleging. The Claimant said that she had the benefit of

legal advice from a legal aid lawyer when completing the ET1. The Tribunal accepted her evidence but, standing the terms of the ET1, the provision of information was inadequate. The Claimant made no arrangement to provide the further details as indicated in the ET1 until she was ordered to do so by the Tribunal. When ordered, she provided much more detail and where the Respondent identified inadequacies, the Claimant sought to give clarification.

30. The Tribunal considered that the Claimant is introducing materially new factual allegations. The Tribunal considered that the Claimant must amend her ET1.

31. The references to events in 2017 and 2018 may be background only but for the avoidance of any doubt, paragraphs 1-9 are not within the jurisdiction of the Tribunal and are out of time and the Tribunal is not permitting the allegations to be amended into the ET1. Paragraphs 24 and 25 add narrative but are not the basis any claim, accordingly amendment to add these paragraphs is not permitted. In her amended further particulars, she makes it clear that her complaint is about the alleged racist behaviour towards her by her manager and fellow employees from January 2019 until May 2019. In December 2019, the complaints were raised with the Claimant's line manager. These are understood to be those raised in her grievance (and listed at paragraph 10). One of the reasons given for her resignation is that she has no confidence in the grievance process. She is adding necessary information to the existing claim. Amendment to include the further information in this period contained in paragraphs 11-23 is permitted. The Claimant is permitted to amend the claim by adding paragraph 26. The Tribunal considered that adding the additional information did not involve an extension of time although the material was provided well after the expiry of any time limit. The material falls within category 2 of **Selkent**. The Claimant did have the benefit of legal advice in relation to the ET1 but that can only be described as deficient.

32. In addressing the balance of injustice and hardship, the balance falls clearly in favour of the Claimant. If what she says is correct, she brings a serious claim. It does not span a lengthy period of actual employment; the Respondent now has fair notice of the allegations. The hearing is on 29-31 March 2023 so there is time for appropriate case management to take place. Against that the Respondent is facing an expanded claim but it is expanded in a way that can now be understood by it.

33. Due to shortage of time, further case management could not be undertaken.

Employment Judge Truscott QC

Date 28 March 2022