EMPLOYMENT TRIBUNALS

Claimant: Mojibola Odusanya

First Respondent: Pennine Care NHS Foundation Trust

Second Respondent: Anne Marie Ashworth

Third Respondent: Jennifer Mack

Fourth Respondent: Sharon Whitworth

Heard at: **Manchester ET (by video)** **On:** **15th May 2023**

Before: Employment Judge J Bromige

Representation

Claimant:	Ms Goodman (Counsel)
First, Third and Fourth Respondent	Mr. Stepanous (Solicitor)
Second Respondent:	Ms Quigley (Counsel)

RESERVED JUDGMENT

Background and Introduction

1. The Claimant presented her ET1 on 26th August 2022, in which she brought allegations of race discrimination against the four Respondents named in the claim form. At the time she issued her claim, she was a Litigant in Person. The headline aspect of the claim is that:

   From 23/02/2022 to 07/06/2022, [R2] *copied* [R4] *our line managers into every email to me that did not require her attention in discriminatory acts of passive aggression and harassment. On 08/04/22 and 20/04/22, her discrimination became overt when copied* [R4] *into the emails requesting the NHS numbers of clients.*

2. The Second Respondent filed their ET3 on 29th September 2022, with an ET3 for the remaining Respondents received the following day. A preliminary case management hearing was listed for 9th December 2022, with a final hearing listed for 3 days from 13th – 15th November 2023.

3. On 24th November 2022, the Royal College of Nursing came on record for the Claimant. An application to amend the claim was received on 6th

December 2022, which resulted in the preliminary hearing on 9th December 2022 being adjourned and relisted on 15th May 2023.

4. The hearing was listed for 3 hours, however in discussion with the parties, it was agreed that this preliminary hearing would only deal with the amendment application. Consequential directions are set out below. I have relisted the case for a further case management hearing on 6th June 2023, in order for the list of issues to be resolved and directions made through to the final hearing in November 2023.

The Application

5. The Respondents replied to the application on 7th December 2022. Solicitors for the Second Respondent indicated they needed further time to take instructions before a response. The First, Third and Fourth Respondents set out some headline areas of opposition from their *"initial review"* and stated they also needed time to take full instructions. Despite this, it is regrettable that none of the Respondents took the opportunity of the intervening 6 months to furnish the Tribunal with a more detailed outline of their opposition to the application, such as in the format of a skeleton argument.

6. I was provided with an agreed bundle of 98 pages. The Claimant had set out in her amended grounds of claim (dated 5th December 2022) the areas that were existing claims, identified in green text. There was a further helpful draft list of issues which easily identified the new claims that the Claimant sought to add (pgs. 67-69).

7. Ms Goodman told me that the amendment application arose from a conference with the Claimant on 2nd December 2022, and it was made promptly, both in the context of that conference, and the RCN coming on record the previous week. Before that the Claimant had been representing herself and, Ms Goodman submitted, she could not be expected to have identified discriminatory acts out of particular examples of poor treatment, for example, the victimisation amendment.

8. Broadly Ms Goodman's application fell into two camps. Firstly, there was additional factual pleadings between the period 23rd February – 7th June 2022, which is when the Claimant says she was discriminated against. Secondly, there were acts pre-dating 23rd February 2022, by both the Second and Fourth Respondent. For these allegations, the Claimant submitted that these would be put before the Tribunal in evidence in any event, since they demonstrate unfavourable treatment by the Respondents and so the Tribunal would be invited to draw inferences from these matters to support the contention that discrimination occurred after 23rd February.

9. From the Claimant's position, there was no prejudice. The case could be effectively case managed and prepared, and there was no risk to the final hearing in November 2023.

10. Mr. Stepanous submitted that there was prejudice in granting the application, in that the First Respondent would need to call at least two additional witnesses, and the final hearing would need to be listed for 5-6 days, potentially causing delay (in re-listing the hearing) and expense

(through the additional days). He said that the ET1 is not just a form to get the ball rolling but rather it must set out the basis of the claim in full. He rejected Ms Goodman's position that the application was made promptly – there was nothing stopping the Claimant from contacting her Union earlier (such as before contacting ACAS) and there had been no new information discovered in this matter.

11. Mr. Stepanous also addressed me on the merits of the claim, in particular, the victimisation complaint which he said was a new cause of action. One of the alleged protected acts, an email from 8th April 2022 (pg. 98), refers to a complaint of *"micro aggression and harassment"* by the Fourth Respondent. This was, the Respondents say, a reference to more general bullying, and not a complaint which would bring it under the ambit of s.27(2)(d) EqA 2010.

12. Ms. Quigley also resisted the application. She said that the ET1, whilst short, was well articulated. It identified the period in which discrimination had occurred. That was an allegation of overt discrimination by the Second and Fourth Respondents during a defined period, and so it was not necessary to look at background matters to establish the general working relationship, nor subconscious bias.

13. Further, even during the defined period, the Claimant is seeking to add new allegations which do not disclose a meritorious case. Ms. Quigley gave several examples, including §25 of the amended particulars of claim (pg. 75) where the Claimant acknowledges that the Second Respondent placed pressure on both the Claimant and her colleagues *"in order to mask her discriminatory intent toward the Claimant"*. Ms. Quigley suggests that if such an amendment was allowed, it would be well within the territory of a deposit order. She also gave further examples to illustrate the point, which I have considered, at §32, 44 and 46.

The Law

14. The leading case giving guidance upon whether to permit an amendment is Selkent *Bus Co Limited v Moore* [1996] IRLR 661. I must take into account all of the circumstances in the case and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances are:

    a. The nature of the amendment.
    b. Time limits for any new claims that are being brought; and
    c. The timing and manner of the application to amend the claim.

15. The nature of the amendment can cover a variety of matters, such as:

    a. the correction of clerical and typing errors;
    b. the additions of factual details to existing allegations;
    c. the addition or substitution of other labels for facts already pleaded;
    d. the making of entirely new factual allegations which change the basis of the existing claim.

16. The reference in *Selkent* to the importance of time limits as a factor in the exercise of the discretionary exercise must not be elevated to a suggestion

that an amendment will not be permitted simply because it is (apparently) presented outside any statutory time limit. An Employment Tribunal has a discretion to allow an amendment which introduces a new claim out of time: as per *Transport and General Workers Union v. Safeway Stores Limited* UKEAT/0092/07/LA

17. *Galilee v Commissioner of Police for the Metropolis* UKEAT/0207/16/RN states that it is not always necessary to determine a potential time/jurisdiction point when considering whether to allow an amendment. There might be cases where the issue of jurisdiction should be left to the final hearing.

18. In respect of amendments which seek to do more than make corrections or add to existing allegations in *Abercrombie & Others v Age Rangemasters Limited* [2014] ICR 209 Underhill LJ said:

'48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.....

.....50. ..... Mummery J says in his guidance in Selkent that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case – justice does not require the same approach....'

19. Ms. Goodman also drew my attention to the case of *Sefton Metropolitan Borough Council v Hincks* UKEAT/0092/11/SM, although this authority (from Underhill P as he then was) does not add any further gloss on the principle in *Abercrombie*.

20. Finally, in *Kumari v Greater Manchester Mental Health NHS Foundation Trust* [2022] EAT 132, HHJ Auerbach stated at para 63:

The Tribunal is therefore not necessarily always obliged, when considering just and equitable extension of time, to abjure any consideration of the merits at all, and effectively to place the onus on the respondent, if time is extended, thereafter to apply for strike-out or deposit orders if it so wishes. It is permissible, in an appropriate case, to take account of its assessment of the merits at large, provided that it does so with appropriate care, and

that it identifies sound particular reasons or features that properly support its assessment, based upon the information and material that is before it. It must always keep in mind that it does not have all the evidence, particularly where the claim is of discrimination. The points relied upon by the Tribunal should also be reasonably identifiable and apparent from the available material, as it cannot carry out a mini-trial, or become drawn in to a complex analysis which it is not equipped to perform.

Discussion and Conclusions

21. With reference to the Claimant's draft list of issues, I start by examining the proposed amendments which pre-date 23rd February 2022, in other words are both new factual and legal pleadings. These are the allegations of harassment at §5(e), (f), (g) and (h).

22. Applying the language in *Selkent*, I assess these amendments as wholly new factual allegations (there is no reference to discrimination occurring prior to 23rd February in the ET1) although I do not conclude that they change the basis of the existing claim. They are further allegations of racial harassment, or in the alternative, direct race discrimination.

23. Where they do potentially impact upon the claim is that the Respondent will be required to call additional witnesses to deal with these allegations, namely two employees who are named as part of the caseload distribution allegation (that is, §5(h) of the list of issues). I accept the Respondents' submission that this, coupled with an expanded period of allegations which will extend the cross-examination of the Claimant, as well as the Second and Fourth Respondent, will impact upon the length of the final hearing.

24. The final hearing is listed 13th – 15th November 2023. Fortunately, having made enquiries with the Tribunal Listing Team, the Tribunal is able to accommodate an extended 5-day listing, between 13th – 17th November 2023. This extended listing does not impact upon other cases listed (by diverting away judicial resource), and it does not create a delay for either party. Therefore the prejudice suffered by the Respondents is being put to the additional time and expense of two additional hearing days and needing to source additional evidence (both documentary and via witnesses).

25. The injustice and hardship to the Claimant is that if this amendment is not allowed, she may not be able to advance evidence from which further inferences might be drawn, in particular against the Second and Fourth Respondent. I accept Ms Goodyear's submission that in cases of this kind, it is not for the Tribunal to view each allegation in isolation. Race discrimination is often not overtly displayed by the perpetrators of such conduct but instead might be proven from inferences drawn from several sources.

26. Here the Claimant is not seeking to cast her entire employment with the Respondent through the lens of discrimination (which some Claimant's try to do), and so is not expanding her claim over a period of years. At its highest, these allegations go back one month prior to her already pleaded case. If the Claimant is denied permission to amend, she potentially loses the ability to bring cogent evidence of the Respondents' conduct before the

Tribunal. In my judgment this is the greater prejudice, and so, balancing those factors of injustice and hardship, I will allow the amendments pertaining to §5(e), (f), (g) and (h).

27. I can deal with the next batch of amendments, that is §5(i) – (o) more succinctly. These are, in my judgment, the addition of factual details to existing allegations. Whilst the focus of the ET1 was the Second and Fourth Respondent's discrimination via being copied into emails, the overall pleading is that the Claimant was subjected to race discrimination between 23rd February 2022 – 7th June 2022.

28. I have some sympathy with the Respondents' position that some of these claims are difficult to follow, or contradictory. In particular, the allegation at §25 of the amended pleadings (pg. 75-76) which is also at §5(i) on the list of issues seems to be legally muddled. However, apart from the pleadings, I have not been provided with any evidence around this issue, and to paraphrase the warning of HHJ Auerbach in *Kumari*, I am ill-equipped to hold a mini-trial on this issue.

29. Where the Respondent is on firmer ground is that allegation 5(i) cannot work as an act of direct race discrimination, since the Claimant accepts that the same treatment was imposed upon everyone – her and her colleagues. Taking the Claimant's case at its highest, if this was a heavy-handed measure designed specifically to target her, it could (and I express no firm view on this) amount to an act of unwanted conduct under s.26 EqA 2010. But that allegation is, I conclude, bound to fail as an allegation of direct race discrimination since there are several potential named comparators, all of whom were subject to that same treatment. There is no <u>less-favourable</u> treatment compared to the Claimant's colleagues, even if the treatment was unwanted and linked to the Claimant's race.

30. Therefore I do not allow the proposed amendment at 5(i) to be advanced as an allegation of direct race discrimination, however, the rest of the proposed amendments, including §5(i) as an act of racial harassment is permitted. In arriving at this decision, I have concluded that the addition of further specific allegations during the already pleaded period does not cause any particular hardship to the Respondent.

31. Whilst perhaps a separate factual issue, the grievance outcome - 5(p) is in my judgment also raised adequately in the ET1, and therefore this is at most the additional of a label to facts already pleaded. To the extent permission to amend were required, it creates no prejudice to the Respondent. The evidence around the grievance process and outcome would have been disclosed and relevant to the issues at the final hearing even on the way the claim is formulated in the ET1. That amendment is allowed.

32. The final amendment I must consider is the victimisation complaints. The Respondents have submitted that from the alleged protected act contained in the bundle (from 8th April 2022) I can take into account the merits (or lack thereof) in the Claimant being able to show this is a protected act. I am not persuaded by this argument. The Respondents might very well be correct in their analysis of this document, but this is the only piece of documentary evidence I have seen, and I am not aware, for example, of what conversations the Claimant may have had with the Second and Fourth

Respondents around what she perceived to be *"micro*-aggression(s)*"* before this email. Nor have I heard any evidence as to what the Second and Fourth Respondents interpreted *"micro-aggression and harassment"* to be.

33. I take into account that this is a new cause of action being introduced after the expiry of the statutory time limits (which would be 7th September 2022 adopting the calculation method of s.140B(4) EqA 2010). However, I am also prepared to accept the Claimant's submission that this technical type of claim (i.e., recognizing the concept of a "protected act") was not something that would have been apparent to her as a litigant-in-person. The Respondent is correct that the Claimant could have sought legal advice earlier via her Union, but I have no information as to what caused that delay, and in any event, little prejudice to the Respondent attaches to what is effectively a three-month delay as to their ability to gather evidence.

34. What is the prejudice to the Claimant if she is prevented from this amendment? She would not be able to bring a claim for detriments, which as above, is a new cause of action and addresses a different mischief to the primary harassment claims. However, the Claimant is still employed by the Respondent, all of her detriment claims are very much "in the alternative" to her harassment allegations, and there would be little to no increase in her compensation if she was successful.

35. The prejudice to the Respondents is that they face further claims, of a different legal basis, which expands the focus of the claims and could cause some additional expense. However, the same two alleged perpetrators (the Second and Fourth Respondents) are named as the people subjecting the Claimant to detriments, and so the evidential inquiries needed are not significantly expanded.

36. This proposed amendment is more finely balanced than the others, however in my judgment it is just about in favour of the Claimant. The prejudice to the Respondent is relatively minor, and the Claimant would be denied bringing a different claim which requires the Tribunal to further analyse the mindset of the alleged perpetrators. This is in particular relevant to the allegation that Ms. Mack's grievance outcome was tainted by discrimination which might more naturally fit as an allegation of victimisation, especially as in the Claimant's own initial analysis she did not think that the grievance outcome was racially motivated.

37. Therefore the Claimant's application to amend her claim is granted in full, save that allegation 5(i) is only allowed as an amendment in relation to the s.26 EqA 2010 claim.

Consequential Directions

38. In light of my judgment, and having canvassed further case management with the parties at the preliminary hearing, I make the following directions:

    a. The Claimant is to provide an updated draft list of issues and updated case management agenda to the Respondents by 26th May 2023;
    b. The Respondents to provide any proposed amendments and/or comments to the list of issues and agenda by 2nd June 2023;

c. Further case management hearing heard via CVP on 6th June 2023 to finalise list of issues and provide directions through to the final hearing.
d. The listing of the final hearing is amended to 13th – 17th November 2023. This proposed listing is to secure the additional days at this stage, and it will be a matter for the Judge at the next preliminary hearing to confirm the exact length of hearing and timetable.

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Employment Judge **J Bromige**

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Date **22nd May 2023**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 May 2023

FOR EMPLOYMENT TRIBUNALS