



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No: 4102041/20 (V) Preliminary Hearing by Cloud Video Platform (CVP) on
7 May 2021

10

Employment Judge: M A Macleod

Joanna Murray

Claimant
Represented by
Ms L Neil
Solicitor

15

Tesco Personal Finance PLC

Respondent
Represented by
Ms C Goodman
Barrister

20

25

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application to amend is granted, but only insofar as relating to paragraphs 9 to 21 of the Scott Schedule submitted to the Tribunal on 6 May 2021; paragraphs 1 to 8 are excluded.

30

REASONS

35

1. In this case, a Preliminary Hearing (Open) was listed to take place on 7 May 2021 by CVP in order to determine whether the Scott Schedule presented by the claimant in response to Orders by the Tribunal amounts to an application to amend the claimant's claim, and if so, whether that application to amend should be granted.

2. The claimant attended and was represented by Ms Neil, her solicitor. Ms Goodman, barrister, appeared for the respondent.
3. The claimant gave evidence on her own behalf.
4. The Tribunal was presented with a number of documents, including different versions of the Scott Schedule. Accordingly, it is important to set out the procedural history of this matter prior to determining the facts upon which the decision will be based.

Background

5. The claimant presented her claim to the Employment Tribunal on 3 April 2020.
6. A Preliminary Hearing took place on 27 August 2020 before Employment Judge Buzzard, following which a Note was issued, the terms of which are referred to for their content.
7. It was noted at that time that the claims pursued by the claimant at that time (when she was still representing herself, having presented the claim to the Tribunal without the benefit of legal advice) were:
 - (i) Unfair Dismissal
 - (ii) Disability Discrimination
 - (iii) Notice Pay
 - (iv) Holiday Pay
 - (v) Arrears of Pay
8. By that stage, the claimant had produced a Scott Schedule, attempting to define her claims in a more precise way, again without the benefit of legal advice, and she was ordered to produce to the respondent an editable version of the Scott Schedule. The respondent was ordered to provide to the claimant an annotated version of the Scott Schedule setting out areas where the respondent was unable to understand how or why the claimant

linked the entry to her disability. The claimant, in turn, was then to provide to the respondent an amended Scott Schedule seeking to answer those points.

- 5 9. For the purposes of this Hearing, there were two versions of the Scott Schedule under consideration, dated, respectively, 9 November 2020 and 6 May 2021 (the latter being presented to the respondent and the Tribunal late in the evening prior to the Hearing). Parties addressed these matters in their submissions and I propose simply to deal with them at that stage.

10 **Findings in Fact**

10. In order to determine the questions before the Tribunal it was necessary to hear evidence from the claimant and consider the documents presented.

- 15 11. The claimant presented her claim on 3 April 2020 to the Tribunal, having been dismissed by the respondent with effect from 5 March 2020. By that date, the claimant had already notified ACAS of her intention to submit a claim to the Tribunal, on 28 February 2020, and ACAS issued an Early Conciliation Certificate by email to her on 4 March 2020.

- 20 12. The claimant noted in her claim form, at paragraph 15, that *“Due to Covid-19/Lockdown during the month I had to get this claim in, I’ve had to complete this form without the guidance from my Solicitor.”* The statement of claim attached to the ET1 ran to 8 pages of detailed narrative.

- 25 13. In their ET3 paper apart, the respondent sought, at paragraph 3, that the claimant present further and better particulars of her disability discrimination allegations in the form of a Scott Schedule, being a document *“setting out each act of discrimination the Claimant complains of, along with details of the date and location it allegedly occurred, the people allegedly involved and any eye witnesses present, and what type of discrimination the Claimant alleges this is.”*
- 30

14. At paragraphs 1 and 2, the respondent asserted that the Tribunal did not have jurisdiction to hear the claim insofar as it related to any alleged acts of discrimination which occurred more than three months prior to the date of presentation of the claimant's case to the Tribunal. They also argued that any claims prior to that date should not be allowed to proceed on the basis that it would not be just and equitable to allow the claimant to bring such a claim out of time under section 123 of the Equality Act 2010.
15. The Tribunal wrote to the claimant to refer her to paragraph 3 of the ET3 paper apart, and asked if she could provide further details of the incident of alleged discrimination by 16 June 2020. The claimant understood that she was ordered to produce a Scott Schedule, only outlining allegations which took place within 3 months of the date of presentation of her claim. She had information which went back beyond that date, and indeed considered that her difficulties at work began in August 2016.
16. She noted, then, that having presented a Scott Schedule, the Employment Judge in August 2020 ordered her to provide an editable version for the respondent, and for exchanges to take place between the parties. In September 2020, the claimant sought to instruct a solicitor in order to assist her understanding of the claims being made, following comment to that effect by Employment Judge Buzzard. She therefore instructed Ms Neil, who represented her before me, to act on her behalf in this matter. Extensions of time were sought for compliance with the Orders of the Tribunal, and the Scott Schedule was ultimately provided on 9 November 2020.
17. The terms of the Scott Schedule were amended from their original form following the receipt of legal advice by the claimant.
18. On 6 May 2021, the day before this Hearing, a further email was sent to the Tribunal and to the respondent by the solicitor for the claimant in which a new version of the Scott Schedule was provided. The claimant explained that in November, when constructing the earlier Schedule, the claimant was focusing upon the effects upon her of the treatment which

she alleged she received at work, and was seeking to follow the legal advice she was being given. However, on 6 May 2021, she had a further discussion with her solicitor, during which there was a conversation in which the claimant explained to her legal representative that she did not understand why the earlier “continuing” acts were not included in the Schedule. There followed a discussion about the different job titles and roles, and she explained to Ms Neil that Natalie O’Donnell was the Head of Department, overseeing all of the work within the department and taking responsibility for decisions made in relation to the claimant’s work.

19. Natalie O’Donnell replaced Graham Pringle as Head of Fraud Prevention and Customer Protection, and the claimant alleged that in August 2018, Ms O’Donnell directed that the claimant was to be moved back into the team in which she had previously worked at the time when she suffered a breakdown. This was referred to in page 2 of the paper apart to the ET1, in which it was alleged that she attended a meeting with Stephen McIntosh, on a date unspecified but apparently after 31 August 2018, who then told her that Ms O’Donnell wanted her to return to her previous team and not stay part time where she was, causing the claimant to have an emotional breakdown.

20. In her evidence, she maintained that in the meeting with Mr McIntosh, who reported to Ms O’Donnell, he told the claimant that Ms O’Donnell had made the decision to move her back to her old department, that she could do nothing about this, and that if she did not wish to go back, she would not have a job.

21. The significance of Ms O’Donnell, which the claimant said her solicitor had not hitherto understood, was that she was the one making decisions and overseeing decisions which affected her disability and exacerbated her illness. The updated Scott Schedule brought the claim to the point when she was dismissed with Ms O’Donnell’s “complete control of the situation”. She maintained that these matters were not included in the earlier Schedule as she was focused only on the events which were within the 3 month period. She said that she had been advised of this by

Strathclyde Law Centre, approximately 2 weeks prior to the Preliminary Hearing conducted by Employment Judge Buzzard in August 2020.

22. Employment Judge Buzzard's Note records, at paragraph 18:

5 *"It was confirmed that the claimant has only included incidents that occurred*

10 *within the three months prior to dismissal in the Schedule. The claimant indicated that she believes some of the incidents prior to that date may have been part of an ongoing act. The respondent's representative stated that the incidents were different in nature and related to different persons, and accordingly were not part of a continuing act. The claimant agreed to consider the position and confirm if she wished to argue that earlier incidents amounted to acts of discrimination which should be considered because they were part of a continuing act that ended within the three month time limit for presenting claims. An order to this effect was agreed*
15 *as set out at the end of this note."*

23. Among the Orders set out at the end of that Note was Order 2.6:

20 *"By no later than 2 October 2020 the claimant must confirm if she seeks to argue that any acts or omissions not included in her Scott Schedule, that occurred more than three months prior to the presentation of her claim, are argued to be acts of discrimination that fall within the jurisdiction of the Tribunal to consider because they formed part of a continuing act that ended no more than three months prior to the presentation of her claim. If the claimant confirms that any such acts are relied on, the claimant must produce and send to the respondent an*
25 *amended Scott Schedule, adding a row for each further act or omission and in addition stating where within her ET1 that act or omission is described."*

24. The claimant submitted her further Scott Schedule on 9 November 2020 with the benefit of legal advice, and her explanation for the final version

being submitted on 6 May 2021 was that she followed her solicitor's advice at each stage.

Submissions

- 5 25. For the claimant, Ms Neil submitted that when the claimant submitted her ET1 on 3 April 2020 she particularised claims of unfair dismissal, disability discrimination and holiday and other payment claims, without the benefit of legal advice.
- 10 26. The claimant submitted her ET1 on 3 April 2020, and in that claim she complained of unfair dismissal, disability discrimination, holiday pay and other claims.
- 15 27. The claim was submitted without the benefit of legal advice. In the paper apart attached to the ET1, she set out the date of dismissal as 5 March 2020, and listed incidents dating back to 2016. The respondent submitted an ET3 response in which they addressed each of the incidents described. The claimant then appeared on her own behalf at a Preliminary Hearing on 28 August 2020 in which she was ordered to produce a Scott Schedule.
- 20 28. She complied with that Order, having been provided with a number of headings under which to categorise the claims. Again, she produced the Scott Schedule, in its original form, without the benefit of legal advice, though the Employment Judge suggested to her that it may be appropriate for her to consider seeking support from a solicitor.
- 25 29. Ms Neil advised that the claimant limited her claims to the 3 months prior to the date of her dismissal. The claimant viewed the prior incidents as background, but the claim was a statement of claim in its entirety and stated to be such in the paper apart. She cautioned against defining the prior events as merely background as that was not the claimant's intention when she submitted the original claim.
- 30 30. She said that the claimant considered that there was a continuing series of acts, and raised that at the Preliminary Hearing, and as a result, she

was offered the opportunity to revise the Scott Schedule. She sought legal advice at that point, and was given an extension of the deadline to provide an amended Scott Schedule by 18 September 2020.

5 31. Ms Neil stressed that although there have been a number of delays created by extensions of time for presenting the claims, these have all been authorised by the Tribunal. The delay until 9 November 2020, when the Scott Schedule was eventually produced by the claimant, should not be regarded as material.

10 32. She submitted that the Scott Schedule simply provided further specification of the claimant's claims, which was clearly necessary from the terms of the ET1.

15 33. She argued that the Scott Schedule of 9 November comprised (1) matters specifically raised within the ET1 and (2) matters referred to in a more general sense. She highlighted the lack of support by the respondent in the final bullet points laid out in the ET1 paper apart. She complained that she was constantly refused HR and Payroll support, and lost trust in the respondent's management. A whole section of the ET1 raises the issue of lack of support.

20 34. The Scott Schedule then specifies further instances of the lack of support:

- Item 9 – a number of matters which the claimant considered of importance were omitted from the minutes following a welfare meeting on 13 September 2019. This was specifically mentioned in the ET1.
- Item 10 – the claimant alleged that she had sent an email on 3
25 December after receiving a letter from the respondent complaining that she had failed to reply to meeting invitations, confirming that she had in fact done so. This was not specifically particularised in the claim form but arose from the general failure to provide support. She also pointed out that she was at home,
30 without support, which disadvantaged her.

- Item 13 – she complained that she was subjected to a disadvantage due to the fact that she was absent from work, had no access to Payroll and that if she had been at work she would not have been subjected to that disadvantage.
 - 5 • Item 14 – this allegation was specifically referred to in the ET1. Given her role, Natalie O'Donnell was overseeing the issues which the claimant had been having.
 - Item 15 – the fact that she claimant was deprived of access to Payroll was specifically referred to in the ET1 paper apart.
 - 10 • Item 16 – the claimant being requested to provide answers to the same questions as had been answered before, which arises from the complaint of general lack of support.
 - Item 17 – the claimant complained that she had sent emails to HR asking for help, which arises from her complaint of a general lack of support.
 - 15 • Item 18 – Ms O'Donnell advised the claimant that she did not want any unnecessary contact.
 - Item 19 – this complaint was specifically referred to in paragraph 6, page 6 of the ET1 paper apart.
 - 20 • Item 20 – this complaint is clearly within the ET1.
 - Item 21 – the claimant complained that the letter of dismissal contained many errors.
35. The important point about the lack of support raised by the claimant is that she was asking someone objective to consider the issues. The lack of support is clear from the ET1 and the Scott Schedule, and the claimant was forced to return to the same managers to ask for answers, managers who had failed to support her.
- 25

36. The Scott Schedule of 9 November 2020 relabelled a number of claims, and was the first Scott Schedule provided with the benefit of legal advice. The updated Schedule was very similar to the earlier Schedule, and no allegations which are new are raised, compared to the earlier version.
- 5 37. Ms Neil then turned to the new Scott Schedule of 6 May 2021. She explained that when discussing the matter with the claimant, it became clear to her that there was a fundamental misunderstanding (on the part of Ms Neil) as to the involvement of Ms O'Donnell in her treatment. In the ET1, at paragraph 3, page 2 of the paper apart, there is mention of the
10 involvement of Stephen McIntosh and Natalie O'Donnell, but that the ultimate responsibility for the department is not clear from that. She very candidly accepted that this had arisen as a result of her own lack of understanding that Ms O'Donnell was the manager who moved the claimant back into the Fraud Prevention Team, from which point matters
15 became worse. None of the later incidents would have arisen had she not been put back into that team.
38. As a result of that discussion, Ms Neil said that she worked to produce an amended Scott Schedule as quickly as possible. She also submitted that the claimant does not accept that either of the two most recent versions of
20 the Scott Schedule amount to an application to amend the ET1.
39. She pointed the Tribunal to **Abercrombie & Others v AGA Rangemaster Ltd 2013 EWCA Civ 1148**, which, she submitted, updated the Tribunal's systematic approach to applications to amend set out in the well-known case of **Selkent Bus Co. Limited v Moore [1996] ICR 836**.
25 The court distinguished between minor changes and substantial alterations, and encouraged Tribunals to note that **Selkent** does not advocate a formalistic approach, nor a "tick box" approach to the assessment of whether or not the application should be granted.
40. Ms Neil submitted that the claimant's claims have now been particularized
30 in their entirety, and that the Scott Schedule, in its most recent form, is designed to assist the Tribunal by providing full specification, including

heads of claim. It is evident to all parties that the claimant considered herself to have been discriminated against and unfairly dismissed. Accepting the amendment would not alter the basis of the claim.

- 5 41. She acknowledged that the claimant should not be allowed to circumvent the time limits by amending her claim, but in this case the facts set out in the Scott Schedule were already based on what was said in the ET1 paper apart, and there is no such attempt here. The respondent was able to respond competently to all of the incidents raised in the ET1, going back to 2016. The difficulty was that the role of Ms O'Donnell was not
10 understood clearly by "other parties including me", as Ms Neil put it. She said that it was not possible for the claimant to have included this within the original ET1, and as soon as the issue became clear, an amended Scott Schedule was submitted.
- 15 42. The Tribunal has the power to grant the application to amend, if that is required. She urged the Tribunal to exercise its discretion on the grounds that it is just and equitable to do so.
- 20 43. Ms Neil referred the Tribunal to the Court of Appeal decision in **Bexley Community Centre trading as Leisure Link v Robertson [2003] EWCA Civ 576** and **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**.
- 25 44. She accepted that the claims relating to the continuing series of acts have been submitted 11 months after the statutory deadline, owing to an unfortunate series of circumstances arising from a complicated claim. She argued that the claimant has now provided a good explanation for the ongoing delays. The claimant was unrepresented, and had some
30 difficulty producing a Scott Schedule, whereupon she sought legal advice. She produced the first Schedule before she had the benefit of legal advice, on 27 August 2020; the second Schedule, relabelling the claims, with legal advice on 9 November 2020, and then once Ms O'Donnell's role was finally realized the third Schedule, on 6 May 2021. This was

through no fault of the claimant, who thought it was understood what Ms O'Donnell's role was.

- 5 45. The claimant has not delayed at any stage, which is a very relevant factor, and extensions have been granted and complied with. The most recent Schedule was the only document which did not arise in compliance with an Order of the Tribunal.
- 10 46. The claimant, she submitted, followed internal procedures with the respondent through her employment, and saw those procedures through to the end. She was repeatedly trying to address matters internally with her managers. The start of the series of continuing acts was in August 2016. There was a lack of clarity between the claimant and her legal adviser as to the structure of the respondent's organization, and throughout the claimant has demonstrated a willingness to follow the Tribunal's Rules of Procedure and comply with matters ordered of her.
- 15 47. It would be just and equitable to allow the amendment, if it is required, to be granted. The claimant would be concerned to lose the opportunity to raise these matters.
- 20 48. Having created the final Schedule, further expense should be prevented for the respondent and the Tribunal, since it was presented to them both prior to the Preliminary Hearing.
- 25 49. There is clear prejudice, she submitted, if the claimant were to lose the opportunity to raise the earlier acts of discrimination in her final hearing. The Schedule has provided to the respondent "an advantage which they would not normally receive" as it is a very detailed narrative setting out the complaints to be made, and refers to the emails which she will rely upon to support her claim. There is no issue with regard to the cogency of the evidence. The respondent now has notice of the arguments, and there is no apparent prejudice accrued by the respondent by this application.

50. For the respondent, Ms Goodman submitted that there are four stages: (1) to set out the number of different claims there are in order to have a picture of what the overall claim looks like; (2) to consider the timeline; (3) to determine whether an amendment application is required, and if so, in respect of which aspects of the further and better particulars; and (4) to determine whether the application to amend should be granted.
51. Firstly, then, she submitted that of the most recent Scott Schedule, paragraphs 1 to 8, 10, 11, 12, 14, 15, 16, 18, 19 and 21 all require to be the subject of an application to amend the claimant's claim. She pointed out that paragraphs 1 to 8 were intimated "last night", and the others on 9 November 2020.
52. Ms Goodman observed that if the amendment were not allowed, the Scott Schedule would then be left with paragraphs 9, 13 and 20, which are three claims under section 15 of the Equality Act 2010. However, she said that there is a remaining question about paragraphs 15 and 16 of the Scott Schedule, which may be claims under sections 15 and 26, or sections 15 and 27, or something else, given the claimant's reference to a reasonable adjustments claim, and as a result, suggested that further clarity is required from the claimant.
53. She also said that it is unclear whether the claimant concedes that some of the paragraphs amount to amendments to the claim.
54. Secondly, Ms Goodman moved to consider the timeline in this case. The claimant contacted ACAS on 28 February 2020, and received the Early Conciliation Certificate (ECC) on 4 March 2020. She presented her claim to the Employment Tribunal on 5 March 2020. On the face of it, any complaint before 31 December 2019 was therefore presented out of time. The claimant says she wrote the claim herself, without a lawyer, and it is factually extremely comprehensive in relation to the period from 2016 to 2020. She was very clear on her experience, but did not analyse it within a legal framework.

55. Before the first Preliminary Hearing (PH), the claimant was ordered to provide a Scott Schedule, and did so, sticking to the time lines, limiting the complaints to events occurring 3 months before dismissal. She said that this was based on advice from ACAS and the Law Clinic.
- 5 56. At the PH, the Employment Judge said that the disability claims remained unclear, and that the claimant needed to consider her position. She agreed to do so, in relation to the historic claims, and came back on that by 2 October 2020. She was urged by the Employment Judge to seek legal advice and she did so. At some point before 18 September 2020, 10 the claimant instructed Livingstone Brown, solicitors, and they, acting upon her instructions, sent in the next version of the Schedule on 9 November 2020. When the respondent received that Schedule, Ms Goodman said, they raised the point that this amounted to an application to amend the claim, and that was the basis upon which this PH was 15 listed, in order to deal with that application.
57. It is now 8 months since the solicitors came on board, and 6 months since the final clarification of the Schedule, but Ms Goodman observed that the respondent now had to deal with the additional 8 complaints inserted into the Schedule. She noted that the claimant's representative has 20 suggested that those items are already in the original claim in a general sense.
58. Ms Goodman submitted that the claimant was continuing to amend her claim "on the fly" in her submissions: for example, she is now saying that the respondent should have introduced an objective person to look at the 25 issues, a point never previously raised in writing.
59. She complained that the respondent is no better off than they were at the first PH, but given the stage which the proceedings had reached, it would not be appropriate to allow further amendments to be added to the proceedings.
- 30 60. She addressed the point made by Ms Neil, that the additional paragraphs 1-8 are only included due to the new understanding which she herself had

developed of the role played by Ms O'Donnell. She said that if the claimant is seeking to argue that these matters have always been part of the claim, this does not explain why they are only now included in the Schedule. She submitted that if the purpose of the additional particulars were to clarify the claims made, she may, as respondent's representative, welcome such clarification; however, in this case, the claimant is using the ET1 as a jumping off point from which to add further claims, which is contrary to the purpose of the pleadings.

5
10
61. Thirdly, Ms Goodman submitted that there is an application to amend the claim in relation to the items contained in the Schedule. She referred to a number of authorities in seeking to set forth the relevant principles to be adopted by the Tribunal. Having done so, she moved to address the different items in the Schedule.

15
20
62. Paragraph 10 referred to an email on 3 December to Susan McCarry, in which she was seeking confirmation that she had replied to previous meeting invitations. Ms Goodman said that the claimant now seeks to say that there were facts in the original claim form which encompassed this correspondence, but she submitted that there is simply no basis to suggest that these claims in the grounds of claim. She was sending emails and felt upset but there is nothing to foreshadow the claims in paragraph 10 of the Schedule, and the same point arises in relation to paragraph 11.

25
63. Paragraph 12 raises the point about not replying to emails immediately, about which there is nothing in the grounds of claim. The claim simply said that the claimant emailed the respondent and Ms O'Donnell started to reply. She said that she asked to be able to speak to HR and Payroll, which the claimant now says is about not having a point of contact in those departments, but that is not in the grounds of claim.

30
64. In paragraph 14, the claimant says that she was only given 7 days to respond and needed more, but there is nothing about this in the ET1,

even when looking at the claim as a whole. This is therefore a matter which must be the subject of an amendment application.

- 5 65. In paragraph 15, there is reference to an email of 6 January which was not in the ET1. This is not being quoted as an example but as something specifically done to remove contact details of Payroll. This was not in the ET1.
- 10 66. The same is true, she argued, of paragraph 16, as the ET1 does not mention that the claimant was being asked questions which she had already answered. The ET1 does not say that any of this happened due to a protected act, so this is a new claim which is insufficiently particularized.
- 15 67. In paragraph 18, the email of 5 February sent by Ms O'Donnell to the claimant is not mentioned in the ET1. There is no claim in the ET1 that Ms O'Donnell subjected the claimant to harassment in this way.
- 20 68. Paragraphs 19 and 21 are indicative of unnecessary delays as they were not in the ET1. It is not enough, she submitted, to say in general that she was not being heard; she required to have said something about victimization. If it is suggested that detrimental action was taken as a result of having raised an ET1, there is nothing in the original claim form about it.
69. Paragraph 21 avers that the reason for dismissal was related to a comment in a grievance meeting, but there is nothing said in the ET1 about that comment being used to dismiss her.
- 25 70. Ms Goodman submitted that this application is about "new facts, and new characterisations of the facts". It must be the case, she said, that from looking at the ET1, the particular complaints in the Schedule must be identifiable. There is simply no victimization claim in the original ET1. There is no suggestion that these acts were visited upon her for having raised a grievance. She maintained that when she put to the claimant in

cross-examination in this PH that the reason the grievance was not upheld was that the manager did not agree, the claimant accepted that.

71. She concluded this section of her submission by saying that it is plainly not correct to say that an amendment application is not required.

5 72. Fourth, Ms Goodman set forth her arguments as to why the Tribunal should not grant the application to amend.

73. Referring to well-known authorities, and to the overriding objective of the Employment Tribunals Rules of Procedure 2013, Ms Goodman submitted that it would not be proportionate for the Tribunal to allow the claimant's amendments when the claims made remain unclear, raising fuller issues of factual inquiry. She acknowledged that the original claim was drafted by an unrepresented claimant suffering from mental health difficulties, but she has now instructed solicitors, with whose assistance she has submitted two further Schedules. If the most recent Schedule were allowed to be received, there would still be work required in order to clarify what the claims actually amount to. The most recent Schedule was produced the night before this Hearing, and added 8 new items, which are still in need of clarification, giving rise to delay and additional expense.

10

15

20 74. There is ample information in the claim already presented, and the dismissal claim is there. She can therefore proceed with those claims she already has. She is not permitted to continue to add claims as she likes, but that appears, she submitted, to be the claimant's approach.

75. Even if the new claims were added, they are weak, and each one of the reasonable adjustments claims are out of time, so the Tribunal would require to consider exercising its discretion to allow those claims to proceed.

25

76. The claim in respect of victimization has no reasonable prospect of success, following the claimant's acceptance that the reason for the grievance being refused was unrelated to her protected characteristic.

30

There is in any event no basis for determining that there has been a protected act in this case.

- 5 77. What is left are three harassment claims, all of which are “pretty weak”, in Ms Goodman’s submission. She maintained that it would be relatively simple for the respondent to show that the emails of which the claimant complains were all sent for a different reason than that claimed by the claimant.
- 10 78. If granted, the respondent will have had to spend a significant sum on two PHs, will have to come up with further defences and will have to do so in the face of new claims which are weak and not likely to succeed.
79. The parties are on an equal footing. The claimant has benefited from legal advice for some 8 months to the date of this PH, and the ET1 sets out substantial claims which represent her complaint to the Tribunal.
- 15 80. There is no indication in the ET1 that the claimant regarded herself as having been victimized or harassed by the respondent.
81. If the application to amend is to be granted, it should be granted subject to time bar, which would still require to be resolved.
82. Finally, the payments claims which the claimant seeks to make also require to be clarified.

20 **The Relevant Law**

83. It is appropriate to refer to the overriding objective of the Employment Tribunal, set out at Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:
- 25 *“The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable –*

(a) ensuring that the parties are on an equal footing;

- (b) *dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) *avoiding unnecessary formality and seeking flexibility in the proceedings;*
- 5 (d) *avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) *saving expense.”*

84. There is a useful formulation of the types of amendment which are typically put forward by parties in Tribunal proceedings in *Harvey in Industrial Relations and Employment Law*, Division T at paragraph 311.03:

10

“A distinction may 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; (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; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.”

15

20

85. An important authority in this area is Selkent Bus Co Ltd v Moore 1996 ICR 836. At p.843, Mummery J, as he then was, said:

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

25

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

5 *(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the 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*
10 *change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.*

15 *(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal, section 67 of*
20 *the Employment Protection (Consolidation) Act 1978.*

(c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The
25 *amendments may be made at any time – before, at, even after the hearing of the case. 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*
30 *information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and*

hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision”.

5

86. The Tribunal was also referred to **Office of National Statistics v Ali [2004] EWCA Civ 1363**. At paragraph 39, Lord Justice Waller states:

*“In my view the question whether an originating application contains a claim has to be judged by reference to the whole document. That means that although box 1 may contain a very general description of the complaint and a bare reference to the particulars to an event..., particularisation may make it clear that a particular claim for example for indirect discrimination is not being pursued. That may at first sight seem to favour the less particularised claim as in **Dodd**, but such a general claim cries out for particulars and those are particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states...”*

10

15

87. In paragraph 40, he went on: *“One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so... There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time...”*

20

25

88. In **Abercrombie and Ors v Aqa Rangemaster Ltd 2014 ICR 209** a distinction was drawn between amendments which seek to relabel averments already made and the making of entirely new factual allegations which change the basis of the existing claim. Tribunals should

30

not focus on the formal classification of the claims but the extent to which the amendment would involve substantially different areas of inquiry than those made in the original claim.

Discussion and Decision

5 89. The application before the Tribunal is to allow the pleadings of the claimant to be augmented by the addition of the material contained within the Scott Schedule, as further amended in the version submitted on 6 May 2021, the day before this Hearing.

10 90. This is an unusually complex and drawn-out process, which began before the claimant was in receipt of formal legal advice, and at the instigation of the Employment Judge hearing an earlier Preliminary Hearing. It is plain that the claimant, particularly with the help of her solicitor, has sought to refine and narrow down the issues for the benefit of the Tribunal, but in doing so, has introduced new aspects to the claim. It is necessary for me
15 to determine the extent to which the Schedule does so, whether that involves the introduction of material which would involve substantially different areas of inquiry than those made in the original claim and then to decide whether or not the application to amend should be granted, in whole or in part.

20 91. It is perhaps useful to consider, firstly, the 8 new paragraphs which have been added to the Schedule on the day before this Hearing, numbered 1 to 8. The incidents which are set out in these paragraphs are all said to have taken place more than three months prior to the presentation of the claim, and were only included for the first time within the Schedule on 6
25 May 2021. In summary, these incidents were as follows:

1. September 2017 – claimant told that unless she moved back to the Fraud Prevention Team, she would not be able to keep her job;
2. January 2018 – claimant taken to a meeting by manager, Stacey, who criticised her language from a call and suggested she was lucky not to
30 be reported;

3. 10 November 2018 – told by her manager that payroll had told her that she owed money to the respondent, but subsequently advised that this was an error;
 4. Late February 2018 – told by her manager that she owed the respondent leave, to be paid either by financial repayment or by working extra hours, but despite asking her manager for details in writing this was never received by her;
 5. 30 July 2018 – claimant received a number of emails about alleged failures on her part, which she considered to be an act of harassment;
 6. September 2018 – claimant was advised that she needed to have an informal welfare check with her manager, Karen Lightfoot. When she attended the meeting, she found it distressing owing to “disturbing and probing questions” being asked by Ms Lightfoot and another manager, Bernie, which she regarded as harassment;
 7. 5 December 2018 – Frank Wilson told the claimant, prior to a grievance investigation meeting, that her account of the previous meeting was completely different to the managers’ account, and asked what she would do if she were sacked, a further act of harassment; and
 8. 18 February 2019 – David Laverie failed to uphold her grievance and to respond substantively to her appeal, when she had complained about her treatment during absences and in relation to her disability.
92. The claimant had previously indicated to the Tribunal that she regarded these matters which took place prior to three months before the presentation of her claim as background material, rather than the basis for separate heads of claim or claims.
93. The reason why she presented the claims at the late stage she did was because her solicitor had misunderstood the role of Natalie O’Donnell in the department, as having overall control, and therefore had not

understood that there was a continuity between those acts which would be likely to bring the claims within the three month period to dismissal.

- 5 94. Dealing, then, with these 8 new paragraphs, it is plain that Ms Neil has been quite candid in accepting responsibility for the late presentation of these additions to the Schedule. She accepted that she had not understood that it may be possible to argue that there was a continuing series of acts, wrought by Natalie O'Donnell, until that conversation which, it appears, took place on 6 May 2021, and necessitated a very late email to the Tribunal on that evening to seek to add these new claims.
- 10 95. It is accepted by the claimant that these claims have not previously been presented to the Tribunal as claims.
- 15 96. There is no doubt that the factual material which makes up the bulk of the allegations in these 8 paragraphs has largely been included in the ET1. It is plain that the claimant attributes much of what followed to the decision by Ms O'Donnell to insist that she return to the Fraud Prevention Team, and seeks to show that even those acts which were not specifically committed by her – for example, the conduct of the meeting in September 2018 and the handling of her grievance by David Laverie – were somehow her responsibility, or arose from the original decision to move
20 the claimant back into that team.
- 25 97. The context in which these new paragraphs appear is also of importance, however. The claimant and her solicitor have both previously made clear, in the presentation of the first Schedule, that the earlier averments exist in this claim only as background, and this Schedule is an attempt to revisit that clear declaration.
- 30 98. In my judgment, it is clear that paragraphs 1 to 8 do amount to an attempt to introduce new claims to the proceedings, and that those new claims arise out of events or incidents which took place on or before 18 February 2019, more than one year before the claim was presented to the Tribunal. While the averments have been foreshadowed in the narrative which was

attached to the ET1, they were previously stated by the claimant to be background material rather than averments of heads of claim.

5 99. The difficulty for the claimant is that these paragraphs have been added very considerably after the claim was instituted, and indeed after the point when she was ordered by the Tribunal to codify her claims in the form of a Scott Schedule. There must be finality to these pleadings, and it is unsurprising that it has caused the respondent some consternation that she has sought to amend her position, particularly the night before this hearing. The respondent has conducted itself, through its legal
10 representative, in a professional manner by agreeing to continue with this hearing notwithstanding the late attempt to alter the basis of the pleadings. Nor is it surprising that the respondent is concerned that were this application to be granted, the claimant may well wish to continue to alter the basis of the claim in the future.

15 100. The explanation given by the claimant for the last minute change of position is not a satisfactory one, nor one which is easy to understand. It is plain that the claimant consulted her solicitor in September 2020, and that there is no reason offered for the delay in achieving a full understanding of the position of Ms O'Donnell, whose name is mentioned
20 in the ET1 as Operations Manager.

101. In my judgment, therefore, there is no valid reason advanced for this late attempt to introduce new heads of claim, and averments as claims which had previously been adverted to only as background material. The delay caused is significant, and again there is no valid reason advanced for the
25 delay.

102. The nature of the amendment sought is significant, in my judgment, because it seeks to open up a long history of events which have not previously been included within the heads of claim. The timing and manner of the introduction of these paragraphs is unsatisfactory for the
30 reasons given above. It is plain, in my view, that these acts cannot be said to form a series of continuing acts, because they have been carried

out by a number of different managers, and it is unclear (and not pled) that Ms O'Donnell was the controlling mind behind these acts.

5 103. The balance of prejudice would fall very heavily upon the respondent in the event that the application were granted, in my view. They would require to make inquiries into events which happened up to four years ago, and possibly longer, and it is likely that the evidence would be detrimentally affected by such a significant passage of time. The claimant would lose the opportunity to expand upon her pleadings, but in my judgment she will be allowed to proceed with those existing claims which
10 she has already made to the Tribunal, and therefore her the prejudice to her will be limited. In any event, it would not be just to allow her to continue to expand her claim in this way, given the lengthy history of the proceedings.

15 104. Accordingly, it is my judgment that the application to amend this claim, insofar as relating to paragraphs 1 to 8 of the 6 May Scott Schedule, should be refused, on the basis that it would not be in the interests of justice to allow it.

20 105. Ms Goodman's submission, with regard to the remaining paragraphs, was that all apart from paragraphs 9, 13, 17 and 20 required to be the subject of an application to amend. As a result, I infer from this that those paragraphs are not included within the objection taken by the respondent, and that they may be permitted to proceed to a final hearing.

25 106. Paragraph 10 relates to an email sent to Susan McCarry by the claimant on 3 December (understood to be 2019), and the complaint made is that the claimant had no one to turn to for help. This email is not mentioned in the ET1, and therefore amounts to a new allegation not previously raised.

107. Paragraph 11 covers email correspondence with Susan McCarry on 10 December 2019, again not mentioned in the ET1 and therefore seeking to introduce new allegations against the respondent.

108. Similarly paragraph 12 appears to relate to the same correspondence or to similar failings on the part of the respondent. These are not specifically referred to in the ET1.
109. Paragraph 14 refers to an email of 17 December 2019 from Natalie O'Donnell to the claimant with questions and answers. There is a reference in the ET1 which says "Natalie sent me questions about my long term sickness in December. I answered these by email, I also asked that the emails I had sent previously and to Susan McCarry be used to support."
110. Paragraphs 15 and 16 refer to emails sent on 6 and 7 January 2020, suggesting that certain failings within those emails amounted to failure to make reasonable adjustments, or harassment and victimisation. There was no reference to those emails in the ET1.
111. Paragraph 18 and 19 refer to emails on 5 and 19 February 2020 from Ms O'Donnell, comprising conduct amounting to harassment and victimisation. Neither of those emails is referred to in the ET1.
112. Paragraph 21 refers to the letter of 5 March 2020 advising her of her termination from employment. This is referred to in the ET1, though not specifically associated with any particular category of claim. In addition, the ET1 also makes reference to the letter received on 4 March in which she was told that she no longer worked for the central operations team.
113. The nature of these amendments are, in this case, attempts to expand upon the narrative set out in the ET1 and classify the claims which are made by the claimant in this case. The claimant was required to set out her claims in a Scott Schedule, and with the assistance of her solicitor from September 2020 onwards, she did so, with suitable extensions of time within which to provide the information.
114. The timing and manner of the application to amend, which in relation to these paragraphs from 9 onwards was their inclusion in the Scott Schedule of 9 November, appear to me to be a reasonable attempt to

rationalise and clarify the claims which the claimant wanted to include within her original claim, as instructed by the Tribunal.

- 5 115. While some of the emails specific to the Schedule within paragraphs 9 to 21 were not actually mentioned in the ET1, it is clear, in my view, that the claimant was expanding upon the complaints which the original claim form made clear, that is, that there were failures on the part of the respondent in communicating with her during her absence, and failures by a number of managers to support her in that absence.
- 10 116. It is true that the claimant is now seeking to classify claims in a way which does not arise from the terms of the ET1, such as harassment and victimisation, but it is my view that these paragraphs amount to an expansion of the complaints in order to allow the respondent to have better notice of the claims made by her.
- 15 117. I understand and sympathise with the points made by the respondent as to the strength or otherwise of the new claims which are put forward, but given the broad-ranging terms of the original ET1, it seems to me that the new claims, such as they are, simply build on the original case being made.
- 20 118. As a result, it appears to me that the complaints made in paragraphs 9 to 21 should be admitted to the pleadings, on the basis that it would prejudice the claimant much more if they were to be excluded, while the prejudice to the respondent is minimal, since the facts being pled now relate to the same period as is covered by the ET1, and to the same areas covered by that claim form.
- 25 119. I am acutely conscious that the claimant sought to present her claim in the ET1 without the benefit of legal assistance. To prevent her from classifying and clarifying those claims at this stage, in relation to these paragraphs, would in my judgment be unjust and unduly harsh towards her. There is no doubt that this claimant has put in a good deal of effort to presenting her claim, and has obtained the services of a solicitor in order to do so. The period covered by these paragraphs is broadly the
- 30

5 same as that covered by the complaints in the ET1 and before the Tribunal, and accordingly since allegations relate to written correspondence, it does not appear to me to be beyond the reach of the respondent to be able to investigate and prepare for the claimant's case as now expanded.

10 120. It should be noted that I take on board the respondent's concerns about the specification of the claims, and their misgivings about the process required to clarify these matters further, but in the circumstances it seems to me that it is likely that that process need not prevent the listing of the case for a hearing on the merits. Again, there may be issues of time bar arising from some of the claims, as the respondent suggests, and consideration will require to be given as to whether or not that should be dealt with at a separate Preliminary Hearing, particularly in relation to the question of whether there are in the remaining claims any outstanding
15 issue about whether they are part of a series of continuing acts, which may require evidence to be resolved fully.

20 121. Accordingly, I have concluded that the application to amend, insofar as relating to paragraphs 9 to 21 inclusive of the Scott Schedule presented on 6 May 2021 should be granted.

25 Employment Judge: Murdo Macleod
Date of Judgment: 17 June 2021
Entered in register: 29 June 2021
and copied to parties