Case No: 2600132/2017

EMPLOYMENT TRIBUNALS

Claimant: **Ms A Codner**

Respondent: **IBM United Kingdom Limited**

Heard at: **Nottingham**

On: **Tuesday 4 April 2017**

Before: **Employment Judge Faulkner (sitting alone)**

Representation: **Claimant – in person**
Respondent - Miss D Masters (Counsel)

PRELIMINARY HEARING

JUDGMENT

1. The Claimant's complaints of race discrimination are dismissed on the basis that they were submitted to the Tribunal out of time and not within such other period as the Tribunal considers just and equitable.

2. The Claimant's applications to amend her claim so as to add complaints of disability discrimination, religion and belief discrimination, age discrimination and harassment related to race are refused.

3. The Claimant's application to amend her claim so as to add a complaint of breach of contract related to holiday pay on termination of her employment is granted.

4. Directions are given below as to the future conduct of this case.

REASONS

Complaints

1. The Claimant submitted to the Employment Tribunal complaints of unfair dismissal and race discrimination. Further details are set out below.

Issues

2. The issues to be decided at this Preliminary Hearing were as follows:

a. Whether any or all of the complaints of race discrimination were submitted to the Tribunal after the end of the period of three months starting with the date of the act to which the complaint relates, and taking into account that conduct extending over a period is to be treated as done at the end of the period;

b. If any or all of the complaints of race discrimination were submitted after the end of the three-month period, whether any or all of them were submitted within such other period as the Tribunal thinks just and equitable;

c. Whether the Claimant should be permitted to amend the case she pursues before the Tribunal to add complaints of failure to pay holiday pay, religion and belief discrimination, disability discrimination, harassment related to race, and age discrimination;

d. What further directions are required from the Tribunal so that the case is ready for final hearing.

Procedural issue

3. Having heard my outline of the preliminary issues as above, Miss Masters submitted that I should not deal with issue 2(c) at this Preliminary Hearing. This was essentially on the basis that the Respondent had not received proper particulars of the complaints the Claimant seeks to add. They were simply listed in the Claimant's Schedule of Loss and/or in her comments on the Case Management Agenda and List of Issues which had been produced by the Respondent. The Schedule was provided to the Tribunal and Respondent around 8 March 2017, and the Claimant's comments on the Agenda and List of Issues on 29 March 2017. Miss Masters' case was that a formal application is required for any amendment application to be considered, and that it was not permissible to consider an oral application. It was agreed that I should deal with this point first. Miss Masters relied on the judgment of the Employment Appeal Tribunal in **Amey Services Limited and Enterprise Managed Services Limited v Aldridge and others [2016] UKEAT/0007.** That case referred in turn to **Remploy Limited v Abbott and Others [2015] UKEAT/0405.**

4. I considered both cases during an adjournment. It seemed to me that they flag two crucial issues. First, Tribunals cannot grant amendment applications on the basis that time limit issues will be dealt with later – this was the Tribunal's error in **Amey**. As I will say in more detail below, time limit issues are highly relevant to consider as part of deciding whether or not to grant an amendment; they cannot be put off to another day. Secondly, amendment applications cannot be allowed if they are poorly formulated and insufficiently particularised as respondents have to know the case they are expected to meet; they have to be given fair notice of the amendment that is sought. And of course, one key reason why proper

formulation of amendment applications is important is so that Tribunals can know whether there are any time limit points to be taken into account in deciding whether the application should be granted.

5. Whilst I entirely accepted that the Claimant's applications to amend had not been properly detailed in writing, I did not read either of the cases Miss Masters referred to as saying that a party cannot make an oral application to amend. Such applications are very common in tribunal proceedings, including sometimes in submissions at the end of a final hearing, although of course that is not to be encouraged. It is certainly not for a Tribunal to make a party's case, but I saw no reason not to allow the Claimant to make her amendment application orally before me. This had the practical case management benefit of enabling as much progress as possible on all the preliminary issues at this stage, well ahead of the final hearing. I made clear that if needed Miss Masters would be given time to take instructions from the Respondent once she had heard the Claimant's applications, and of course to cross-examine her on time limit and other points arising from the applications. I also made clear that if Miss Masters found herself unable to deal with some or all of the applications in this way, then I would require the Claimant to put them in writing, the Respondent would be given opportunity to reply in writing, and it could then be decided whether a further Preliminary Hearing was required or not.

6. The applications were heard as I had suggested. No application was made for an adjournment.

Facts

7. I made clear to the parties that it was not the purpose of the Preliminary Hearing to consider the detailed substance of the complaints, though it was of course necessary for me to understand some of the details in order to decide the agreed preliminary issues. The parties had prepared a bundle of almost 200 pages. My having read the pleadings (including the Claimant's "witness statement" though not the other attachments to the Claim Form), Schedule of Loss, List of Issues and Case Management Agendas – thus most of pages 1 to 120 – the parties confirmed that there was nothing further that it was essential for me to read other than documents that would be referred to in evidence. I heard oral evidence from the Claimant under oath, and submissions from both parties and received a skeleton argument from Miss Masters. Having considered all of this material, I make the following findings of fact relevant to the preliminary issues. References to page numbers are references to the bundle.

8. The Claimant, who is of African Caribbean race, was employed by the Respondent from November 2002. She had transferred to its employment under the Transfer of Undertakings (Protection of Employment) Regulations 2006, so that her continuous service dated back to 1983. The Respondent is a well-known provider of technology, hardware, software, new business solutions and services. The Claimant was employed in the Respondent's Asset Management Team when her employment terminated, the Respondent says by reason of redundancy, on 7 October 2016. She contacted ACAS in respect of Early Conciliation on 3 January 2017. The Early Conciliation Certificate was issued on 3 February 2017, and the Claimant's Claim Form (ET1) was received at the Tribunal on 6 February 2017.

Applications to amend

9. As already noted, the Claimant complains of unfair dismissal. No preliminary issues arise in relation to that complaint. I will turn to her complaints of race discrimination below. As also already noted, she seeks to add a number of complaints to her case before the Tribunal. I will now detail the substance of those applications in turn, and summarise the Claimant's evidence in relation to each.

10. The Claimant's complaint in relation to holiday pay is that under her contract of employment she was entitled on termination in October 2016 to be paid for a full holiday year (1 April 2016 to 31 March 2017), minus any holiday she had actually taken. Page 4 of her written particulars (missing in the bundle between pages 39 and 40 but read from spare copies by me and the parties at the Hearing) states, "On termination you will receive your annual entitlement less holiday taken in the current holiday year together with 1/12 of your annual holiday entitlement for each complete month worked since 1 July in the current holiday year". In support of a submission that the holiday pay complaint is misconceived, Miss Masters referred to pages 46 to 47, a letter to the Claimant at the time of her transfer to the Respondent, which includes (page 47) under the heading, "Holidays", the sentence, "Participation in the Boots accrual scheme [this appears to be a reference to the clause just referred to] will cease on transfer to [the Respondent]". The Claimant protests that this was contrary to her rights under the TUPE Regulations. The holiday pay complaint is not mentioned in the Claim Form; it was first mentioned, as the Respondent acknowledged in its Response, in the Schedule of Loss.

11. The complaint of religion and belief discrimination was said by the Claimant to be based on her being a Pentecostal Christian, which she says was known to her colleagues, including Andy Hull, who was at one time her line manager. She says that in December 2013 she informed Mr Hull that she did not like him using expletives and misusing the name of Christ in team calls and meetings. She alleges that he nevertheless continued to use such language and believes he did so up until February 2015. She regarded it as a form of bullying. She brought a grievance about Mr Hull's conduct in March 2015 (see details below). In doing so she referred to certain things that took place at meetings with Mr Hull, but did not mention complaints about his language. She was unable to say in evidence why. She agreed that it would have been the obvious thing to do to complain to the Tribunal at that point, and agreed there was no explanation as to why she did not do so. The Claimant also says that a team leader, Mr P Lawrence, had discriminated against her in this way but gave no further details.

12. As to disability discrimination, the Claimant says that it is well-known that she has a prosthetic eye. She says she also experiences hypertension and needs to keep her blood pressure under control because of concerns about blindness. She says that she was subjected to workload pressures that she complained about but without securing a resolution. This continued until 1 July 2015 when she reduced her hours from 33 to 25 per week. The Claimant says that all of her managers – Ms B Steel, Mr R Colvin, Mr S Morgans and Mr Hull – were responsible for this state of affairs.

13. The age discrimination complaint is that Mr Hull allegedly informed the Claimant during one or more one-to-one meetings in 2013 that she was taking too long to do certain of her duties, thus putting her under pressure to work more

quickly. She accepted that there was nothing preventing her bringing a complaint about this to the Tribunal in early 2014.

14. The harassment complaint also concerns Mr Hull. The Claimant alleges that he referred to her as "codfish", despite her requests that he refrain from doing so. She says that only she had a nickname, and that she was the only person of African Caribbean race in her team. She says that Mr Hull started using the name in 2005, and although she cannot recall when he last did so she thinks it was in 2012 or 2013. She agreed that there was nothing preventing her making a complaint to the Tribunal about this matter in early 2013.

Race discrimination

15. At page 119 there is a Scott Schedule produced by the Respondent, to which the Claimant added some details ahead of this Preliminary Hearing, summarising certain matters referred to in the Claim Form. Although in adding her comments to the List of Issues (page 116) the Claimant stated that the reason for dismissal was her race, she confirmed and re-confirmed in evidence before me that the document at page 119 set out a full record of her allegations of race discrimination. This does not include a complaint about her dismissal. That is wholly consistent with the fact that, whilst her Claim Form levels many criticisms at the Respondent in respect of her dismissal under the heading "Unfair dismissal", it does not allege that her dismissal was an act of discrimination in some way related to her race, or indeed otherwise.

16. The allegations set out on page 119 are therefore threefold, the Claimant stating that what is alleged in relation to each is direct race discrimination. First it is stated that the Claimant was paid less than white colleagues for doing the same work, between August 2003 and 6 May 2009. In her Claim Form (see page 33, paragraph 108), the Claimant says that her pay "remained artificially low throughout [her employment with the Respondent] because of [her] race and ethnicity". She was nevertheless very clear in her evidence before me that the period stated in the Scott Schedule was the period she was relying on. Secondly, it is stated that the Claimant lost access to a client's site in July 2010. Thirdly, it is stated that she worked additional hours for a certain client, leading to an excessive workload, between July 2011 and July 2013, though in oral evidence she said that her excessive workload continued until July 2015. The alleged perpetrators and suggested comparators are named in the Scott Schedule in relation to each allegation. The person allegedly responsible for the alleged pay discrepancy was a Ms B Steel, who left the Respondent's employment, possibly around 2005. In answer to my question regarding what connected the three allegations, the Claimant stated that managers had her record, via her personnel file, and saw her as someone who was expected to take on extra duties.

17. The Claimant stated that what prevented her bringing complaints to the Tribunal about these matters in 2013 was fear for her job. She accepted this was speculation on her part, but said there were lots of redundancies in 2013 and 2014. At page 145 is an email from the Claimant dated 10 October 2014 addressed to an "AskHR" email account, in which she raises concerns and questions about her pay. At pages 141 to 142 is an email from the Claimant dated 24 November 2014 in which she then raised a formal grievance about these matters. The complaint was put on the basis of the right to equal pay between men and women, referring to the Equal Pay Act 1970 and the Equality Act 2010. The Claimant says that before writing the grievance she had carried

out some relatively brief online research into the legislation, and knew at that point that it covered race and age, as well as sex, discrimination, although her focus was on her concerns about her pay. She says that she did not know that the legislation also covered religion and belief discrimination, but that she "probably" knew it covered disability.

18. The Claimant sent a further email, this time to Mr Hull, on 1 December 2014, asking for his response to questions she had previously posed to him regarding her pay. As the email makes clear, the Claimant spoke to her representative at Unite the union at some point between lodging her grievance and writing this email. She says that it was just for a few minutes on the telephone. She had been a union member since around September 2013, by which time a number of the issues she seeks to bring before the Tribunal had arisen. She did not tell the union about them, she says because she had grown used to this kind of thing happening to her, but accepts that she should have done so.

19. At pages 147 to 148 (with enclosures following), is a further email from the Claimant dated 5 March 2015, to a colleague called Debbie Anson, making a complaint against Mr Hull. The Claimant says that she was willing to complain because she had had enough by then. She repeated her evidence that she did not complain to the Tribunal at this point because she was fearful for her job. When challenged as to how complaining to the Tribunal was different in this regard to making a complaint internally, she said that she did not think of bringing a complaint to the Tribunal. She then reiterated her concern about repercussions, but accepted that if she was concerned in this way it seems odd to confront the Respondent with an internal complaint but not bring the matter to the Tribunal.

20. At page 178 is an email dated 18 August 2016 from Karen Weir, then the Claimant's line manager, to a colleague called Abigail Baker, relaying details of a call Ms Weir had with the Claimant evidently whilst the latter was off work due to sickness. The Claimant accepted that the call took place very close to the date of that email. The email mentions that the Claimant "will be taking it [i.e. various complaints] to a tribunal and she has 3 months to do that in". The Claimant believes this was a comment she made to Ms Weir. She had visited solicitors, as the email also says, in or before August 2016 which the Claimant says was a general meeting about her rights. She says that she decided she was going to bring a claim after a discussion with the trade union about tribunal proceedings in June 2016, this being the first discussion with them after an initial conversation in 2014. As a result of discussions with her union, she said she was aware of the three-month time limit less one day for bringing complaints but assumed it was six months for discrimination complaints.

21. The Claimant's evidence was that she decided to complain to the Tribunal about race discrimination after her employment terminated on 7 October 2016. The note of the August 2016 call at page 178 includes the comment, "has raised many times about her salary and banding and it's discrimination". The Claimant therefore accepts that she was in fact thinking about a discrimination complaint before her dismissal. Similarly, the allegation regarding being moved from a client account some years before is also mentioned in the note and the Claimant again confirmed that she believed this to be discrimination in August 2016. The matter of carrying out duties above her pay band is also mentioned in the note; the Claimant says that she believed this to be discrimination "a long time ago" but had just been "bottling it up".

22. The Claimant says that she does not know why she did not contact ACAS in November or December 2016, but only on 3 January 2017. She says that the Unite union had a case file in relation to her which she left with her representative after a meeting with him on 17 November 2016; she was told by the union of the three-month time limit; and she wanted a break from matters relating to the Respondent as well as taking time to compile her file.

23. The Claimant confirmed that she does not pursue a complaint of breach of contract related to failure to give proper notice of dismissal. Similarly, she does not pursue a free-standing complaint of failure to comply with section 1 Employment Rights Act 1996, i.e. failure to provide written particulars of employment. Rather, if she is successful in any of her complaints, then on the basis of an alleged failure to provide written particulars she seeks compensation under section 38 Employment Act 2002.

The law

24. The leading case in respect of amending a case to add new complaints is **Selkent Bus Co Ltd v Moore [1996] IRLR 661**. Whether to allow a claimant to do so is according to the Employment Appeal Tribunal a matter of judicial discretion, taking account of all the circumstances, and balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. A number of factors may be relevant to consider, according to the EAT. The first relates to the nature of the application itself, whether it is minor or substantial. The second concerns time limits - if a new complaint is sought to be added and it is out of time, this is not the sole factor to take into account but it is an important and potentially decisive one. Thirdly, a tribunal must have regard to the timing (and manner) of the application. A late application will require a Tribunal to consider why it was not made earlier. In addition, the effect on the proceedings is also a factor to take into account, for example whether the progress of the case will be delayed by allowing the amendment, and how far it will extend the issues the Respondent will have to deal with in preparing its defence. In addition, there are the matters highlighted in the **Amey** and **Remploy** cases referred to above, particularly relating to the formulation and clarity of the amendment being requested.

25. Section 123(1) of the Equality Act 2010 provides that proceedings on a complaint under Section 120 may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks just and equitable. Section 123(3) says that for the purposes of this section conduct extending over a period is to be treated as done at the end of the period, and failure to do something is to be treated as occurring when the person in question decided on it.

26. Miss Masters referred to the cases of **Aziz -v- FDA [2010] EWCA Civ. 304** and **Hendricks -v- Metropolitan Police Commissioner [2003] IRLR 96**. These were decisions which clarified the approach required at preliminary hearings in considering whether matters complained of which took place more than three months before a claim was presented to the Tribunal could be said to be conduct over a period ending within that three-month timescale. Given however the clear statement by the Claimant that the last complaint of race discrimination concerned alleged events long before the three-month period preceding submission of her Claim Form, I need say nothing more about these authorities.

27. The provision for extending time where it is just and equitable to do so gives to tribunals wider scope than the test of reasonable practicability which applies for example in breach of contract cases such as a complaint about holiday pay. Nevertheless, the onus remains on the Claimant to demonstrate why it would be just and equitable to extend time and there is no presumption that it will be – **Robertson v Bexley Community Centre (trading as Leisure Link) [2003] IRLR 434**. In **British Coal Corporation v Keeble [1997] IRLR 336**, it was held that similar considerations arise in this context as would be relevant under the Limitation Act 1980, namely the prejudice which each party would suffer as a result of granting or refusing an extension, and all the other circumstances, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

28. Miss Masters asked me to consider two other cases relating to time limits in discrimination complaints, decided by the Employment Appeal Tribunal. The first of these chronologically is **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283,** a decision of Judge Peter Clark. He states at paragraph 9 that "if the claimant advances no case to support an extension of time, plainly, he is not entitled to one", reflects in paragraph 14 on the "multi-factoral" approach that is required such that "no single factor is determinative", and adds at paragraph 16 that he cannot accept that "a failure to provide a good excuse for the delay in bringing the relevant claim will inevitably result in an extension of time being refused". He therefore distinguishes between no explanation being offered at all and an unsatisfactory explanation being offered, only the former inevitably leading to an extension of time being refused.

29. **Rathakrishnan** was considered by Mrs Justice Laing in **Edomobi v Le Retraite RC Girls School UKEAT/0180/16.** She saw no distinction between a complete absence of explanation and a case where an explanation is disbelieved (paragraph 31). In neither case, she said, is there material on which the employment tribunal can exercise its discretion to extend time. She added, "If there is no explanation for the delay, it is hard to see how the supposedly strong merits of a claim can rescue a claimant from the consequences of any delay".

Analysis

Applications to amend

30. I deal first with the amendment applications, and begin with disability discrimination. The complaint is essentially that the Claimant was subjected to an unfair workload. Although factually she refers to concerns about workload in the "witness statement" attached to her Claim Form, particularly at page 27 from paragraphs 23 to 31, there is no mention of or even allusion to disability discrimination in that statement. In fact, even in the List of Issues, the Claimant simply alludes to the fact that she believes she is disabled within the meaning of the Equality Act, and therefore the first attempt to articulate any complaint of disability discrimination was made at this hearing.

31. I agree with Miss Masters that this complaint exemplifies the problems with the formulation of all the discrimination complaints that the Claimant seeks to add

to this case. Of course, as someone who was not represented at this Hearing, the Claimant cannot sensibly be expected to plead a complaint as a lawyer would be required to do, although it is relevant to note that she did have access to legal and trade union advice beforehand. Even making allowance for her appearing alone however, and for the fact that it is not always straightforward to articulate discrimination complaints, it is far from clear what is being alleged when the Claimant complains about a heavy and unfair workload. Putting aside the question of whether the definition of disability would be satisfied in this case, it is in particular unclear whether she alleges a failure to make reasonable adjustments, direct discrimination, harassment or some other form of disability discrimination. That of itself would mean that the Respondent would be unable to properly prepare to defend itself without seeking and obtaining substantial further particulars, without which it simply would not know the claim it is expected to meet. It cannot be right in those circumstances to grant an amendment application; and it cannot be for me to seek to further articulate the Claimant's complaint on her behalf, still less for me or the Respondent to venture a guess at what is intended. Allowing an amendment of this nature would clearly create substantial prejudice to the Respondent far outweighing any prejudice to the Claimant in being unable to pursue a complaint that she was unable to properly articulate before me.

32. The lack of proper formulation of the amendment being sought is of itself fatal to the Claimant's application. In addition, however, there is the question of time limits. As Miss Masters suggested, the two issues combined create considerable difficulty in relation to the disability case in that the nature of the complaint being pursued would have a significant bearing on when the normal three-month time limit expired. In her submissions, the Claimant suggested – albeit without any clear statement of what was being alleged – that she continued to work reduced hours up to the date of termination of her employment, those reduced hours being a result of previous workload pressures. Her explanation of her application to add a disability discrimination complaint very clearly included however the statement that the state of affairs she was complaining about lasted until 1 July 2015. The complaint to the Tribunal was presented some 19 months after that date. I deal with time limits in more detail below, in the context of the race discrimination complaints, but note here that the fact of a complaint being out of time is a potentially decisive, and certainly crucial, factor in deciding whether to allow an amendment. Although in relation to the amendment applications, Miss Masters did not detail any specific prejudice to the Respondent in having to deal with historic allegations, there is a general reference in the Respondent's Response, at paragraph 3 (page 75), to a number of individuals having left its employment and it is not difficult to see the potential prejudice to the Respondent of having to deal with such matters so long after the event. For time limit reasons too therefore, particularly in the absence of an explanation from the Claimant as to why she could not have made the complaint in time, I would not allow the amendment.

33. Similar problems beset the Claimant's applications to add complaints of religion and belief discrimination and age discrimination. I do not need to repeat all of the issues I have referred to in relation to the disability complaint, as it is on the same grounds that I am not prepared to allow these amendments either. The religion and belief complaint has a basic factual matrix in relation to Mr Hull who allegedly used inappropriate language knowing that the Claimant did not wish him to do so. The same is true of the age case, where the Claimant provides the bare fact that she was told she was working too slowly. Again, one should not

expect an unrepresented party to produce expert pleading of her case. It is nevertheless wholly unclear whether the Claimant asserts that she was thus harassed on the grounds of religion and belief or age, subjected to direct discrimination on those grounds, or in the case of age discriminated against indirectly. There is also some lack of clarity about how she says that Mr Hull's conduct related, respectively, to her religion and belief and her age. Again, therefore, in both cases, without significant further particulars the Respondent would be left substantially unclear what it was required to establish by way of response and therefore what evidence was needed to meet the case against it. Again, it is not for me or the Respondent to seek to formulate the Claimant's case. I note also that in relation to Mr Lawrence there is barely the basic articulation of a factual allegation. As in relation to the disability case, and for the same reasons, the amendment applications relating to religion and belief and age must fail on this basis.

34. Both applications would also fail in my judgment for time limit reasons. Both were first raised at the end of March 2017 in the comments on the List of Issues, though the Claimant did not seek to articulate them until this Hearing, on 4 April 2017. For the religion and belief case that is more than two years after the matters complained of, and for the age case more than three years. The Claimant accepted there was no cogent reason why the complaints could not have been made within the normal time limits, or at least substantially sooner than they were. This is a crucial factor in deciding whether to extend time and would weigh heavily against the Claimant even had she been able to properly articulate her complaints.

35. As Miss Masters acknowledged, the race harassment complaint is at least categorised more clearly. The application to add this complaint is however as much as four or five years after the event, and faces the additional difficulty that the Claimant cannot be sure that even that general articulation of her complaint is accurate as to timing.

36. I would also add the further crucial point that all of the applications to add discrimination complaints are clearly applications for substantial, rather than minor, amendments to the Claimant's case. All of them would also substantially extend the issues the Respondent would have to deal with in defending the case.

37. Taking into account particularly the lack of proper formulation and particulars, but also the time limit and other factors I have mentioned, I conclude that the injustice and hardship to both parties that I am required to weigh in the balance means that the Claimant's applications to add complaints of discrimination in relation to disability, age, religion and belief and race harassment should not be granted. I noted the Claimant's comment in closing submissions that she would have to seek advice on particularising her complaints. Especially when she has obtained advice already, that is a comment that is very telling as to the lack of proper formulation of the complaints she wished to add. I can see no reason why she did not seek to do so, albeit she would still have had to contend with time limit issues, at the very latest when making her application to the Tribunal two months prior to this Hearing, at the beginning of February 2017.

38. As Miss Masters acknowledged, the holiday pay complaint – which is clearly a complaint of breach of contract – is in a different category. In resisting this application to amend, she relied only on a submission that the complaint is misconceived. It was first mentioned by the Claimant in her Schedule of Loss on 8 March 2017. This was just a few days (allowing for ACAS Early Conciliation)

after the expiry of the time limit for submitting to the Tribunal complaints which arose on termination of the Claimant's employment, such as this is. The test that applies in relation to whether to extend time in relation to this complaint is whether it was not reasonably practicable to bring the complaint in time, and if it was not whether the Claimant brought the complaint within such further period as was reasonable. As already indicated, time limit issues are crucially important to consider in weighing up whether to grant an amendment, particularly where no explanation has been offered by the Claimant as to why this complaint was not submitted before, and the test of reasonable practicability is more stringent than that which applies in discrimination cases. Time limits are not however decisive in every case, as **Selkent** makes clear both expressly and in its reference to other relevant factors that have to be taken into account. In this case, the complaint is sufficiently articulated, and concerns a very discrete issue that would require little, if any, witness evidence from the Respondent given that it largely turns on interpretation of the Claimant's contract. Further, unlike the other complaints the Claimant seeks to add, it does not relate to matters arising many months or years ago. There is therefore very little, or no, prejudice to the Respondent in allowing this particular amendment. As mentioned, Miss Masters relied on the assertion that it is misconceived. It is important for me to be careful not to decide the complaint at this stage, and I make clear therefore that it may or may not succeed. I do not accept however that it is misconceived on my reading of the relevant contractual clause. For these reasons, I allow the Claimant's application to amend her case to add the complaint relating to holiday pay.

Race discrimination

39. Given the way in which the Claimant explained her case at this Preliminary Hearing, as outlined above, it is clear that the complaints of race discrimination were made to the Tribunal considerably more than three months after the matters to which they relate, allowing of course for ACAS Early Conciliation. The only question for me to determine therefore is whether the complaints were submitted within such further period as I think to be just and equitable. The latest date the Claimant relies on is 1 July 2015, some 19 months prior to the submission of her Claim Form in early February 2017.

40. I found the Claimant to be very straightforward when giving her evidence on this matter. The only explanation she sought to offer for why any of her discrimination complaints – whether of race discrimination or the complaints she sought to add by way of amendment – were submitted out of time was that she feared for her job. When one considers that she did in fact pursue with the Respondent various complaints regarding her employment, including by way of formal grievance and including against Mr Hull who is the subject of a number of her allegations, this – as she frankly acknowledged – was not a convincing explanation. That is really the end of the matter. Whether one takes the approach set out in **Rathakrishnan** or the arguably broader approach in **Edomobi,** the Claimant's own case is that there is no explanation for the late submission of any of her discrimination complaints. It is difficult to see therefore how it could be said that she brought them within such further period as is just and equitable. I would dismiss the race discrimination complaints on that basis alone, and it is as I have already indicated a highly material factor in refusing the discrimination-based applications to amend.

41. For completeness there are a number of further matters which it is relevant to note. The first allegation of race discrimination relates to events said to have taken place nearly 8 years before the date on which the Claim Form was

submitted. The alleged perpetrator, Ms Steel, has long since left the Respondent's employment, which would clearly create significant prejudice for the Respondent in defending the complaint. No specific prejudice was argued by the Respondent in relation to the second or third allegations, but I note that the second relates to events said to have taken place over 6 years, and the third around 18 months, before the Claim Form was submitted. Certainly, in relation to the second allegation, it is not difficult to imagine how the cogency of any evidence would be affected by such a long delay.

42. It is also significant to note that the Claimant agreed she could have brought all of her discrimination complaints much earlier than she did. She had legal and trade union advice by December 2014 at the latest, visiting solicitors again in August 2016, and knew of Tribunal time limits in general terms at least, by no later than June 2016. With the exception of those relating to religion and belief, she was also aware of her rights under the Equality Act, at least in outline, by October 2014 or at the latest March 2015. The three allegations of race discrimination were all mentioned in the context of soon to be commenced employment tribunal proceedings during the telephone call with Karen Weir in August 2016. The Claimant agreed that she was thinking of discrimination complaints before her dismissal date, and in relation to the third allegation probably long before. For all of these reasons, it is abundantly clear that she did not act at all promptly once the basis of her possible complaints was clear to her. In those circumstances her assumption that there was a 6-month time limit for bringing discrimination complaints is not a satisfactory basis on which to extend time.

43. The Claimant submitted that it would be grossly unfair to dismiss her race discrimination complaints at this stage, asserting that "more would come out on disclosure". The possibility of evidence supporting her complaints materialising on disclosure is not a sufficient basis on which to extend time, and whilst I recognise of course the seriousness of dismissing at this stage any complaint of discrimination, for all the reasons I have given the balance of fairness and prejudice clearly requires me to do so. The race discrimination complaints are therefore dismissed.

Directions

44. The final hearing of this matter remains scheduled for **29 to 31 August 2017**, in Nottingham. I am satisfied that three days is sufficient time to hear the remaining complaints, including remedy if required. That hearing should not be before me.

45. Miss Masters confirmed that the Respondent does not require further particulars of any of the complaints originally submitted by the Claimant.

46. At the Respondent's request the Claimant is ordered to provide an updated Schedule of Loss to the Respondent, copied to the Employment Tribunal, by **12 May 2017.**

47. Lists of documents were to be exchanged by 21 April 2017. This should now take place by **26 May 2017**.

48. The bundle of documents for the final hearing was to be prepared and distributed by 5 May 2017. This should now take place by **9 June 2017.**

49. Witness statements were to be exchanged by 26 May 2017. This should now take place by **30 June 2017.**

50. The detail of the above directions remains as originally ordered by the Employment Tribunal; it is only the dates for compliance that are now varied.

NOTES

(i) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(ii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iii) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': http://www.justice.gov.uk/tribunals/employment/rules-and-legislation#england

(iv) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

Employment Judge Faulkner

Date: 2 May 2017

JUDGMENT SENT TO THE PARTIES ON
10 May 2017

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S. Cresswell

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FOR THE TRIBUNAL OFFICE