

## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4106804/2013 Held at Glasgow on 30 November 2016

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Employment Judge Shona MacLean

Mr AJ Macintosh

Claimant  
Represented by:  
Ms Hughes  
Student Adviser

National Waiting Times Centre Board

Respondent  
Mr Watson  
Solicitor

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

10 The judgment of the Employment Tribunal is that the claimant's application to amend should be allowed under deletion of the words, "And I am owed arrears and other payments"; paragraphs 7 and 9 to the extent that they refer to concerns raised before 9 July 2013; and paragraph 20 (c) an award for aggravated damages and paragraph (d) compensation for personal injury.

### **REASONS**

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#### **Introduction**

1. This Preliminary Hearing was arranged to determine an application made by the claimant on 12 February 2016 under rule 29 schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) to amend his claim. The respondent opposed the application.

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2. Ms Hughes represented the claimant. Mr Watson represented the respondent. He was accompanied by Mr Miller. The respondent lodged productions to which the Tribunal was referred. The representatives helpfully provided submissions in writing which are summarised below.

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3. The Tribunal found the following facts to be established or agreed.

**E.T Z4 (WR)**

### Findings in Fact

4. On 9 July 2013, the claimant raised a grievance about an incident with Sharon McCabe that took place earlier that day (production 1). Jane Rodman, placed the claimant on special leave. While on special leave, the claimant received correspondence from the respondent that he said was slanderous, discriminatory and unsubstantiated.
5. The claimant was admitted to Dykebar Hospital on 27 July 2013. He remained there until 13 September 2013. He then spent two weeks' intensive home care.
6. The claim form was presented by the claimant on 8 October 2013 (productions 3 to 13). The claimant complains of discrimination on the grounds of the protected characteristic of disability. Section 8.2 of the claim form included the following:
- “On 9 July 2013 I raised a grievance about bullying, harassment and victimisation which I am waiting on being investigated. I also wish to now formally raise a grievance for disability discrimination. This is based on the fact that I had a disagreement with my manager Sharon McCabe as she decided that I was aggressive and therefore becoming mentally unwell. Jane Rodman senior cardiology manager then contacted me by phone on 10 July and advised I was to be put on special leave with no explanation.....I then received correspondence from my employer with false allegations in which it says that during the disagreement with Sharon McCabe I was potentially aggressive towards her. This is slander discriminatory and unsubstantiated.....”*
7. A response was presented on 7 November 2013.
8. On 16 December 2013 SF Wilson & Co advised that they were representing the claimant. They submitted an agenda for a case management Preliminary Hearing but withdrew from acting on 28 January 2014.
9. A case management Preliminary Hearing took place on 20 February 2014 and the claimant was ordered to prepare an amendment setting out the

PCPs on which he relied. The claimant made the application to amend on 9 March 2014.

10. A case management Preliminary Hearing was held on 6 June 2014 at which the claimant was represented by his brother. The Note of the Employment Judge set out the issues to be determined by the Tribunal (productions 14 to 17). The Note refers to the application to amend by the claimant to which the respondent objected in summary because the allegations were out of time, they expanded the scope of the claim and the claimant had had the benefit of legal advice when preparing the claim form. The application was withdrawn. The Note goes on to state:

*“The alleged discriminatory acts are therefore relatively short compass. They are:*

- (1) *The placing of the claimant on special leave following a disagreement with Sharon McCabe on 9 July 2013.*
- (2) *The subsequent correspondence relating to the special leave.*
- It is the claimant’s position that there was no reason for him to be placed on special leave as he was mentally fit and well. He alleges that the subsequent correspondence contained false allegations that are slanderous and unsubstantiated.”*

11. Parties were invited to contact the Tribunal if either did not agree with the issues as set out by the Tribunal. Neither did so.

12. A hearing on the merits took place between 26 and 29 August 2014. A judgment was issued on 22 October 2014. The respondent appealed to the Employment Appeal Tribunal (the EAT). Part of the grounds of appeal was that the Tribunal had decided the case based on a matter not pled. The EAT judgment issued on 27 August 2015 noted (production 35):

*“A fair reading of the form ET1 does not include a complaint that a grievance was ignored”. No allegation of discrimination is made in relation to the grievance.”*

13. The case was remitted to a freshly constituted Tribunal. The parties were bound by the pleadings and the preliminary hearing decision which produced a list of issues. If either party wish to introduce other matters an application to amend was needed. The scope of remission from the EAT refers to the pleadings and the preliminary hearing decision which produced a list of issues (productions 18 to 42).
14. Subsequent correspondence clarified that the issues to be considered at the hearing were those set out as 2, 3 and 4 in the list of issues) productions 16 and 17):
- a. Did the respondent, by placing the claimant on special leave on 9 July 2013 or in the subsequent correspondence relating to that leave treat him unfavourably because of something arising in consequence of his disability?
- b. If so was the treatment of the claimant a proportionate means of achieving a legitimate aim?
- c. Did the respondent, by placing the claimant on special leave on 9 July 2013 or in the subsequent correspondence relating to that leave, engage in unwanted conduct related to disability that had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile or degrading or offensive environment for the claimant?
15. The application to amend the claim form was sent to the Tribunal on 12 February 2016. The amendment comprises productions 47 to 50. The application is opposed.

### **Submissions**

16. The representatives' submissions have been set out in writing. In summary, their positions were as follows.

*The Claimant*

17. The Tribunal was referred to the first line in Section 8.2 of the claim form which mentioned to his grievance. This was the initial reason he sought legal advice and it forms the basis of the rest of the claim. Instead of dealing with the grievance the respondent suspended him from work. The reference to the grievance demonstrates the fundamental importance that the claimant attached to this aspect of his claim. Although the claim form does link this sentence to the narrative of the events that follow, the fact that this is stated first demonstrates that, in the claimant's mind, his grievance and the respondent's failure to investigate it, formed a central part of his claim of discrimination.
18. The claimant was not legally represented when he presented the claim form. He did not attend the Preliminary Hearing in June 2014. It was accepted that the Tribunal set out the issue for consideration at that preliminary hearing and this did not include the respondent's failure to deal with the claimant's grievance. However, at no point did the Tribunal expressly state that the way in which the respondent dealt with the claimant's grievance would be specifically excluded as forming part of the alleged discriminatory conduct. The consequences of this would have been apparent to a solicitor or legal representative but they were not apparent to the claimant. The claimant fully believed that the issue would be considered as part of the alleged discriminatory treatment, on the basis that he had already referred to this issue in his claim form. The respondent's failure to deal with the claimant's grievance arose at the same time as the other issues being considered as forming part of the alleged discriminatory treatment took place. To an unrepresented claimant, it was therefore not apparent that the respondent's failure to deal with the grievance would not be considered as forming part of the discriminatory treatment. This only became apparent to the claimant during the employment appeal process.
19. The claimant was only legally represented from 16 December 2013 until 28 January 2014. With the Christmas holidays the claimant had little opportunity to contact and communicate with his legal representative. The

claimant subsequently decided not to continue with the legal representative due to a lack of confidence in his representative and for financial reasons.

20. Although in March 2014 the claimant made an application to amend in relation to a claim for reasonable adjustments. The claimant thought that that the grievance would form part of the alleged discriminatory treatment that took place. The claimant had no reason to believe this was not the case until the employment appeal process took place.
21. In the claimant's mind, the grievance and the respondent's failure to deal with it formed a central part of his claim of discrimination. Central to the claim is the allegation that the respondent acted in a discriminatory manner by deciding not to investigate matters with the claimant before deciding to accept Ms McCabe's version of events in respect of the incident of 9 July 2013. The fact that a grievance was lodged by the claimant, setting out his version of events in respect of the incident in question, should have alerted the respondent to the fact that investigation before action was required. It would have been apparent that there were two very different accounts of what happened on 9 July 2013. To remove the respondent's treatment to the claimant's grievance would be artificial as it forms part of the whole sequence of events and to remove this from consideration would greatly prejudice the claimant.
22. Any discussion of the special leave in the hearing began with a discussion of the events that led up to it, namely the submission of the grievance by the claimant. The two are inextricably linked and it is simply not possible to look at one without the other.
23. Central to the claim is the issue of the claimant being placed on special leave and whether this caused him to be treated unfavourably by the respondent because of his disability. It is therefore important to discuss the content of the claimant's grievance, and the part this played in the minds of those taking the subsequent action in relation him It is also important that consideration is given as to how the grievance was handled so that this can be contrasted with how other employee's grievances have been dealt with

by the respondent and in what circumstances it has placed other employees on special leave.

24. The amendment does not substantially expand the factual basis on which the case proceeds. The claimant's position was that expanding on the background provided in the claim form does not constitute the making of entirely new factual allegations and does not seek to substantially expand the factual basis on which the case proceeds (See *Selkent Bus v Moore* [1996] IRLR 661).
25. It was not reasonably practicable for this amendment to be made before the end of the relevant period of three months (See *ASDA Stores Limited v Mrs S Kauser* UKEAT/0165/07: the test is whether, on the facts of the case, it was reasonable to expect that which was possible to have been done).
26. It was not reasonable in this case given that the claimant did not have legal representation for almost the entirety of his case, except a short period over Christmas 2013/14. Further, in the claimant's mind the grievance was included in the claim form and formed part of the set of events in their entirety. Further the grievance remains central to the Tribunal determining the mental processes of those who are alleged to have taken discriminatory action.
27. In the respondent's submissions at the EAT it was argued that to determine whether the alleged unfair treatment arose '*because of something arising in consequence of the claimant's disability*' the Tribunal was '*required to assess the mental processes of those who were alleged to have taken action*'. The claimant's grievance had been read by those involved with '*taking action*' in this context. To eliminate consideration of this issue would not allow for a full and fair determination of whether discrimination occurred and would therefore prejudice proceedings.
28. The amendment does not substantially expand the factual basis on which the case proceeds but instead specifies in more precise detail the facts and circumstances giving rise to the unfavourable treatment that the claimant suffered. On the basis that the amendment is based on the same facts and

circumstances as those already pled, it is not accepted that additional time will be needed for the claim to be heard and that the four days already set aside will be sufficient.

- 5 29. Further, in paragraph 6 of the Tribunal judgment it was stated that, "*The Tribunal did require to make Findings in Fact in respect of how the respondent dealt with the complaint raised by the claimant against Sharon McCabe and to draw conclusions from these dealings.*" This hearing was set over four days and clearly examined the grievance within that timeframe.
- 10 30. It was pled in the claim form that the claimant raised a grievance and as the respondent would not be placed at a significant disadvantage if the amendment was allowed, as it would have had notice from the claim form that the grievance, and the respondent's treatment of this, formed part of the facts and circumstances of the claim.
- 15 31. The granting the application to amend would assist the Tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective because it would allow the claimant to fully and comprehensively state his case. By not allowing the amendment will prejudice the claimant's interests on the basis that the grievance and the  
20 respondent's treatment of the grievance is central to the Tribunal determining the mental processes of those who are alleged to have taken discriminatory action.
- 25 32. The EAT decision at paragraph 47 states that, "*If either party wishes to seek to introduce other matters an application to amend will be needed*". This is what the claimant is asking to clarify the issues.
- 30 33. The claimant's position on allowing the amendment to include a personal injury claim is largely similar as above. The circumstances leading up to the claimant submitting his claim form; he had only 24 hours to write this with no legal representation; he only had legal representation for a very short period in the run up to the hearing and subsequently decided not to continue with his legal representative due to lack of confidence; without legal



representation the claimant was unaware that he needed to submit a claim for personal injury claim form referred to the affects the acts of the respondent had on his health.

34. The Tribunal was referred to section 8.2 of the claim form:

5        *“This untrue allegation caused my mental health to deteriorate rapidly and subsequently I was admitted into Dykebar hospital.....This triggered a panic attack following my treatment on 9th July...in addition I have been prescribed an excessive dose of my mental health medication.”*

10       35. In the response, the respondent has stated that the cause of the deterioration of the claimant’s mental health are not known and not admitted. Although these sentences do not specifically use the words personal injury, they do speak to deterioration in the claimant’s health and it is his position that this is due to the discriminatory acts of the respondent.

15       36. Accordingly, the respondent would not be at a disadvantage by its inclusion as it is not an entirely new factual allegation. Again, this is in accordance with *Selkent Bus (above)*. Further, it was not reasonably practicable before the claimant obtained legal representation given that the claimant had discussed the impact these discriminatory acts had on his health in the claim form and did not know that a separate personal injury claim could be made or needed to be made. He did, however, specifically detail in the claim form how the discriminatory acts had, and continued to, affect his mental health. Allowing the amendment to include personal injury does not constitute the making of entirely new factual allegations and does not seek to substantially expand the factual basis on which the case proceeds.

25       37. Allowing the amendment will not prolong the hearing process as it will be necessary to establish the effect the actions of the respondent has had on the claimant to decide on a remedy. The claimant’s position that he has been unable to work since the initial incident and this speaks to his personal injury as well as his loss of earnings.

*The Respondent*

38. The amendment application seeks, in part, to expand the scope of the claim to incorporate the issue (the way in which the claimant's grievance was dealt with) which the EAT ruled had been erroneously considered by the Tribunal.
39. The application also seeks to substantially expand the factual basis on which the case proceeds and to add allegations of discrimination.
- a. It seeks to introduce an unspecified claim that the claimant was owed arrears of pay and other payments.
  - b. It states that: "*because I have a disability, when I raised concerns in the course of my employment, my mental health and fitness for work were automatically questioned*" (, production 48 paragraph 9). This alludes to incidents other than the situation of 9 July 2013 which forms the agreed basis for the claim.
  - c. Paragraph 11 seeks to introduce the entirely new basis of claim pertaining to the respondent's handling of the claimant's grievance.
  - d. The remainder of the amendment a detailed narrative making several allegations which concludes with the remarks: "*I believe this unfavourable treatment was discriminatory because of something arising in consequence of my disability*" (paragraph 18) and "*I also believe that the respondent's conduct amounted to unlawful harassment*" (paragraph 19). The preceding narrative outlines allegations including:
    - the claimant being spoken to by his line manager, Sharon McCabe, in a harassing manner (paragraph 7);
    - the respondent automatically accepting the version of events from Ms McCabe relating to the events of 9 July 2013 (paragraph 12);
    - the respondent not explaining why an Occupational Health (OH) referral had been made (paragraph 13); the respondent seeking input from OH instead of input from a consultant psychiatrist (paragraph 14);

- the respondent failing to investigate matters thoroughly before making the OH referral (paragraph 14); and
- the respondent failing to ask the claimant's permission to contact OH or his consultant psychiatrist (paragraph 15).

5 40. The claimant is therefore seeking to introduce several new discriminatory acts.

41. The Tribunal was referred to *Selkent (above)* for the factor that should be considered when deciding whether to exercise its discretion to allow the amendment.

10 42. The Tribunal must consider the interests of justice and the relative hardship of granting or refusing the amendment. The respondent submits that there is considerable injustice and hardship for the respondent in allowing the amendment.

15 a. It is likely that a case management preliminary hearing will be required (with resulting cost to the respondent).

b. The respondent would be required to amend its ET3 response, with resultant costs and delay to the proceedings.

c. The amendment sought by the claimant would also require the parties to completely reframe the agreed list of issues for the case.  
20 The claimant has not yet suggested a proposed reframing of the list of issues that have formed the basis of the case since June 2014.

d. The respondent's witnesses will be expected to give evidence on factual matters from three and a half years ago. They cannot reasonably be expected to remember all the relevant facts from that time.  
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e. There will be increased costs to the respondent in assessing these matters (by speaking to witnesses and gathering relevant documentary evidence), and in dealing with the new allegations at the Tribunal hearing (including in examination-in-chief, cross-examination and submissions).  
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- f. The expansion of the claim as envisaged will necessarily mean that the time needed for the hearing will be longer than that originally required (four days).
- g. Inclusion of the new allegations would increase the potential liability for the respondent, which is unfair in circumstances where the claimant has not given any good explanation why such a substantial amendment comes at this stage.
43. The refusal of leave to amend would not cause hardship to the claimant as it would not prevent the claimant from pursuing the other elements of the claim – those that he chose to focus on in his claim form and agreed as part of the preliminary hearing on 6 June 2014. If the amendment is refused, the parties can simply proceed to a date listing for the case. This conforms to the overriding objective to avoid delay and save expense.
44. The amendment sought extends the ambit of this case beyond that originally pled, to a significant extent. A four-page paper apart to the claim form will replace what was previously half a page. This includes facts and allegations that were not previously pled and a noteworthy new basis of claim pertaining to the claimant's grievance. The amended claim would require the Tribunal and the parties to make new and different lines of enquiry. The documentary and oral evidence which will be required, if the application is allowed, will be more extensive than if the case remains focussed on the terms of the claim form (which concentrates on events leading up to the claimant's suspension on 9 July 2013, and subsequent correspondence).
45. The application was made nearly two and a half years after submission of the claim, nearly two years after the preliminary hearing determining the relevant issues, eight months after the EAT judgment, and more than three months after further correspondence from the Tribunal confirming the scope of the remission. No good reason is given for why the application was not made earlier.
46. The overriding objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay is

inconsistent with those objectives. The facts that form part of the amendment application have been known by the claimant for some time.

47. The amendment sought does not appear to introduce wholly new legal claims (except for the unspecified claim referable to arrears of pay and other payments), nor attach a new legal label to previously pled facts, but it does seek to introduce additional acts of discrimination.
48. The Tribunal was referred to *Chaudhary v Secretary of State for Health UKEAT/0512/04/RN*. This case concerned a claimant who applied to amend his race discrimination claim to add two further comparators. The EAT referred to this as “*opening up a new cause of action under the banner of the direct discrimination claim*”. This is comparable with the present claim where the claimant is seeking to open new causes of action under the banner of the discrimination arising from disability claim, and possibly (additionally) the harassment claim.
49. In refusing the application in *Chaudhary*, Tribunal took into account the fact that the amended claim was well out of time. The EAT upheld the Tribunal’s decision not to allow the amendment and endorsed its approach.
50. On a similar basis it is submitted that the relevant time limit set out in section 123 of the Equality Act 2010 is engaged in respect of the amendment sought by the claimant. The new allegations are from July 2013 and are time barred. It is submitted that it would not be just and equitable to extend the time limit to allow the amendment.
51. The case of *Robertson v Bexley Community Centre [2003] IRLR 434* highlights that a Tribunal has to be satisfied that there are good reasons for exercising their discretion on just and equitable grounds. The Court of Appeal in the case stated that -
- “*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When Tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to*

*exercise the discretion. Quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule”.*

5 52. The amendment should, the respondent submitted be approached from this perspective.

53. The case of *British Coal Corporation v Keeble & Others [1997] IRLR 336* provides guidance on the factors to consider in whether it is just and equitable to extend time to permit an out-of-time discrimination claim to proceed. These are as follows:

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a. The length of and reasons for the delay: There has been considerable delay in seeking the amendment in this case. The facts at issue are from July 2013. The claim form was presented on 8 October 2013. A preliminary hearing of 6 June 2014 clarified the issues in the case.

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b. The extent to which the cogency of the evidence is likely to be affected by the delay: Inevitably there will be difficulties for both parties in terms of recollection of events from July 2013.

c. The extent to which the party sued had co-operated with any requests for information: It is apparent that the reason for the late amendment is not related to an ignorance of facts resulting from a delay (by the respondent) in dealing with requests for information.

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d. The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action: There is no indication that the claimant did not know the material facts at the time of drafting the original claim form. He experienced the alleged events. The amendment therefore relates to matters within the claimant's knowledge at the time that he presented the claim form.

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e. The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action: The claimant took legal advice early on in proceedings (October 2013). The claimant was represented by a solicitor from 16 December 2013 until

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28 January 2014. A case management agenda for the claimant was submitted by his solicitor, Mr Wilson, during that period. Had he wished to amend his application then he had the legal assistance to do so. No reasonable explanation is given as to why the claimant was not able to continue with that assistance, or seek assistance from another source, between the end of January 2014 and early 2016 when he obtained new legal representation. In the meantime, he was represented by his brother who is understood to have a background as a representative dealing with health and safety at work issues. The claimant's brother dealt with the Tribunal hearing, referred to case law and relevant legislation, and would also therefore, it would appear, could have advised on a potential amendment to the claim. The claimant (at a time when he was represented by his brother) was able to submit an application to amend the claim, in relation to a claim for reasonable adjustments, in March 2014; so he was aware of the requirements in this regard.

54. Base on the *Keeble* tests, it would not be just and equitable to extend the time limit.

55. The application should be refused. If it is granted a case management preliminary hearing will be required to address case preparation.

### **Deliberation**

56. From the submissions, the Tribunal noted that there was no issue that under rule 29 of the Rules it had a broad discretion to allow amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the overriding objective of dealing with cases justly and fairly under rule 2. The case has been remitted to a freshly constituted Tribunal. It has been agreed that a hearing on the merits is to be arranged but this has not yet been fixed

57. It was also agreed that when considering the application, the Tribunal should have regard to the guidance of the EAT in *Selkent (above)*.

58. The Tribunal considered that in exercising any discretion it had to have regard to all the circumstances of the case, in particular any injustice or hardship which would result from the amendment or the refusal to make it. This involves a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application.
59. The Tribunal considered the nature of the amendment. It seeks to amend section 5.1 of the claim form by adding the date the claimant's employment terminated which post-dated the presentation of the claim form. At section 8.1 of the claim form the claimant had ticked the box "*I was discriminated on the grounds of disability*". The amendment seeks to add "*I am owed arrears of pay and other payment*". It also inserts an amended paper apart at section 8.2 and at section 9.2 it states that a schedule of loss is to follow. At this stage the Tribunal considered that the amendment provided some additional information but also included a new claim in respect of payment of arrears of wages and other payments.
60. The Tribunal then referred to the proposed amended paper apart. Paragraphs 1 to 6 in the Tribunal's view provided additional background information none of which is likely to be in dispute.
61. In the claim form the claimant refers to raising a grievance about bullying, harassment and victimisation on 9 July 2013. This related to a disagreement with Ms McCabe "*as she decided [the claimant] was aggressive and becoming mentally unwell*". In paragraphs 7 and 9 of the amended paper apart the claimant referred to struggling with his workload during his employment and when he raised his concerns his mental health and fitness to work were automatically questioned. It also referred to the Ms McCabe speaking to the claimant on 9 July 2013 in a harassing manner. The Tribunal considered that none of this was not foreshadowed in the claim form and were new facts which must have been known to the claimant at the time the claim form was presented.



62. Paragraph 10 provided in the Tribunal's view additional information of the claimant's understanding about being placed on special leave.
63. The claim form present on 8 October 2013 states in the first sentence of section 8.2 that the claimant raised a grievance on 9 July 2013 and he was  
5 "*waiting on it being investigated*". The claim form narrates that the claimant received correspondence from the respondent with false allegations: Ms McCabe's recollection of the discussion on 9 July 2013. The claimant considered the false allegation to be discriminatory and unsubstantiated and that untrue allegation caused the claimant's mental health to "*deteriorate*  
10 *rapidly*" and he was admitted to Dykebar Hospital on 27 July 2013.
64. The Tribunal agreed with the respondent that at paragraph 11 of the amended paper apart of the claimant seeks to introduce a new basis of claim in relation to the handling of the grievance. However, it considered that paragraph 12 relating to the alleged discriminatory act of the  
15 respondent accepting Ms McCabe's version of event on 9 July 2013 was foreshadowed in the claim form.
65. Paragraphs 13 to 15 of the amended paper apart referred in the Tribunal's view to new discriminatory acts relating to the occupational health referral. However, the Tribunal noted that the occupational health referral was the  
20 subject matter of the subsequent correspondence relating to the special leave.
66. Paragraph 20 seeks compensation for financial loss. There was specification of the arrears of pay or other payments. It also refers to claim for personal injury to which no reference is made in the claim form.
- 25 67. From the above the Tribunal considered that the amendment comprised of:
- a. Expanding on facts contained in claim form.
  - b. Adding new facts most of which were known when the claim form was presented. The only fact post-dating the presentation of the claim form was the date of termination of employment.
  - 30 c. Raising new cause of action.

68. While the Tribunal accepted that the amendment included facts and allegations not previously pled it was not convinced that it would require the Tribunal and the parties to make new and different lines of enquiry or that it would necessarily expand on the documentary and oral evidence. It seemed to the Tribunal that evidence would in any event be required about why the respondent placed the claimant on special leave and this would involve knowing the respondent's assessment of what happened 9 July 2013 which was subject of a grievance.
69. Turning to the timing and manner of the amendment the Tribunal considered when it was made and why it was not made earlier. The Tribunal acknowledged that the application was made nearly two and a half years after the claim form was presented and eight months after the EAT Judgment.
70. While the claimant has had the benefit of some legal advice for most of the proceedings he had been represented by his brother who is not legally qualified. Further the claimant is disabled and has poor health making it challenging for those representing him to obtain instructions. The Tribunal accepted that it was not apparent to the claimant that the respondent's failure to deal with his grievance was not being considered as part of the discriminatory treatment given that from his perspective it was linked to the respondent's decision to place him on special leave.
71. The Tribunal appreciated that the lateness of an application to amend is a relevant but not insuperable reason for refusing an amendment application. The situation was unusual in that while there had been a significant delay the hearing before a freshly constituted Tribunal has not been fixed.
72. The Tribunal considered that there was an issue in relation to time bar in respect of claim for arrears of pay and other payments. The claim lacked any detail and there was no explanation when the payment became due. The Tribunal considered that the last date must have been on or around the date of termination. There was little explanation for the delay other than the claimant was not legally represented.

73. In relation to the rest of the amendment the Tribunal considered that the claimant was seeking to introduce additional acts of discrimination albeit he was not introducing a new claim. The alleged new acts of discrimination took place in July 2013. Both parties will have difficulty in recollecting events. However, they will require to do so in any event even if the amendment is not allowed.
74. There was no suggestion that the reason for the late amendment was due to ignorance of the facts themselves or delay in any response from the respondent. The claimant knew about the facts and they were within his knowledge at the time. He did not however appreciate that the respondent's handling of his grievance was not included in his claim form. The claimant did have legal advice during the proceedings. He was also represented by his brother who was not legally qualified but conducted the hearing and the appeal before the EAT.
75. The Tribunal then turned to consider the interests of justice and the relative hardship of granting and refusing the amendment. If the amendment is permitted there will be further case management and resultant expense for the respondent. The respondent's potential liability might increase. If the amendment is refused the claimant will be advancing a case which is different from the one that he thought, he was advancing when he presented his claim in October 2013. The Tribunal's understanding is that the other than the introduction of the claim from payment of arrears and personal injury claim the claimant's evidence is the same as he gave at the original hearing. He only seeks the amendment to ensure that case reflected in his claim form.
76. Looking at the whole surrounding circumstances and balancing the hardship and injustice to both parties the Tribunal concluded that amendment should be allowed under deletion of:
- “And I am owed arrears and other payments”
- Paragraphs 7 and 9 to the extent that they refer to concerns raised before 9 July 2013.

Paragraph 20 (c) an award for aggravated damages and (d) compensation for personal injury.

#### **Further Procedure**

- 5 77. The respondent is permitted until 2 May 2017 to respond to the amendment to the extent it has been allowed. The case should then be listed for a case management preliminary hearing to make arrangements for the liability hearing.
- 10 Employment Judge: Shona MacLean  
Date of Judgment: 31 March 2017  
Entered in register: 03 April 2017  
and copied to parties