EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102084/2020

Held in Glasgow on 30 November 2020

Employment Judge: R McPherson

Mr I Khan	**Claimant**
First Glasgow (No1) Ltd	**Respondents**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's opposed application for amended paper apart to the ET1, intimated Thursday 3 September 2020, is refused.

2. The claim will proceed to a Final Hearing by way of Hybrid Hearing over a period of 4 days which will be allocated by date listing stencil.

REASONS

1. Prior to this in chambers hearing I noted from the ET3, although not the ET1, that reference was made to a named trade union. I took the opportunity, via the Tribunal clerks, disclosing to both parties that prior to my appointment as a Fee Paid Judge, and while in a different firm I had acted for that trade union, and sought the views of both parties as to whether either objected to this matter being considered by myself. Both parties confirmed that they did not object and as such I proceeded to consider the case based on the written submissions issued for the claimant and the respondent First Glasgow (No1) Ltd (FG1).

2. As this was a hearing in chambers, no evidence was adduced however it is considered useful to set out areas which are understood not to be in dispute and or agreed or can otherwise be set out from the Tribunal papers.

3. Mr Khan presented his ET1 on **Tuesday 7 April 2020** following ACAS Early Conciliation (ACAS certificate identifying receipt of EC notification on **Friday 21 February 2020** and issue of the ACAS Certificate on **Saturday 7 March 2020**) following upon the termination of his employment as a bus driver with the respondent on **Friday 29 November 2019.** At the time of presentation of the ET1 the current representative was identified as the representative.

4. FG1 presented its ET3 timeously on **Monday 18 May 2020.**

5. Mr Khan who was employed from **Tuesday 30 November 2004** to **Friday 29 November 2019** asserts a number of claims including unfair dismissal and direct race discrimination (section 13 of the Equality Act 2010: direct discrimination because of race).

6. The ET1 paper apart records, at para 13, that the claimant seeks *"compensation in respect of unfair dismissal and in respect of injury to feelings".*

7. FG1 resist the claims asserted, asserting that that the dismissal was due to conduct and followed a disciplinary process.

8. A case management telephone Preliminary Hearing took place on **28 August 2020** which note was issued to the parties (the August 2020 PH).

9. The claimant's existing pled case identifies at para 11 of the ET1 paper apart, that the claimant was "*aware of two other individuals who were disciplined"* for what were said to be similar conduct matters and who were not dismissed, it being intimated that both were white Scottish (the less favourable treatment being not dismissing).

10. While the ET3 made no specific reference to that alleged less favourable treatment, it set out that the claims and facts were denied, "*save where expressly stated"*. It is noted from the August 2020 PH Note that respondent had asked for details of the identity of the individuals referenced at paragraph 11 of the ET1 paper apart.

11. During the August 2020 PH, the claimants' representative intimated the names of the two individuals in respect of the alleged less favourable treatment by not dismissing. In addition, the Note of the August PH sets out (at paragraph 5) that the *"claimant also wishes to pray in aid"* two named comparators, who the August 2020 PH Note identifies, will be argued to have been *"dismissed then reinstated".* The August 2020 PH Note sets out that these would illustrate a different act of less favourable treatment "*dismissing someone and not reinstating them. This was not, as far as I could see, an act of discrimination which the claimant has yet pleaded"*

12. The August 2020 PH Note records that the claimant proposed at the Final Hearing to rely on his own evidence and that the respondent would be calling the Investigating Officer, the Disciplinary Manager, the Appeal Manager and one other employer JG who it is noted "*the respondent says may be able to deal with the circumstances of relating to the comparators… The numbers and names of witnesses may need review if there is a successful application to amend the particulars of claim"*

13. The August 2020 PH Note set out for the claimant, that it was recognised that the claim "*relating to non reinstatement, an event taking place after the relationship of employment of employment had ended, would require pleading."*

14. The August 2020 PH Note identified that the Final Hearing *was* to be listed for a hybrid hearing from **Monday 14 December 2020 to Thursday 17 December 2020**. However, the Tribunal confirmed on 25 November 2020 that it could *no longer accommodate* those dates and proposed that parties either confirm availability for the period January 2021 to March 2021 or a date listing stencil would be issued for that period.

15. Subsequent to the August 2020 PH, the claimant submitted an application to amend with revised proposed paper apart on **Thursday 3 September 2020**. The proposed amendment to the ET1 paper apart is set out in new penultimate paragraph 12 - with existing paragraph 12 being renumbered as

13 and the final paragraph which was numbered 13, being renumbered paragraph 14.

16. The proposed amendment intimated Thursday 3 September 2020, is set out for ease

"The claimant is aware of the a further two individuals who were disciplined for their actions in using a mobile phone to transmit information while driving who were dismissed and were later reinstate. The claimant believes the failure to reinstate him following his dismissal for the lesser action of using the camera function of his phone while driving to be a further act of direct discrimination"

17. The former paragraph 13 of the ET1 paper apart, other than being renumbered as 14 is not proposed to be amended.

18. On **Thursday 10 September 2020** for the respondent's objection was intimated to proposed amended ET1.

Written submission

19. For the claimant, written submissions set out that this proposed amendment arises because, upon attending at the Preliminary Hearing in August 2020, it became apparent that should the claimant wish to rely upon all 4 comparators supplied, amendment was necessary. The claimant seeks to argues that the failure to reinstate him was also less favourable treatment because of his race. It is argued that the amendment *"provides only slightly more details as to the treatment of*" the former colleagues.

20. For the claimant reference is made to the **Selkent Bus Co Ltd v Moore** [1996] ICR 836/ [1996] IRLR 661 (**Selkent**) and the Court of Appeal decision in **Abercrombie & Others v Aga Rangemasters Ltd** [2013] EWCA Civ 1148 / [2013] IRLR 953 (**Abercrombie**). The claimant references para 50 of **Abercrombie** which (in summary) refers to relabelling "*of the same facts or substantially the same facts as are already in issue*" and para 51, further the claimant makes reference to the Limitation Act 1980 section 35(5). Further it argued that it is any event just and equitable to allow the amendment. For the

claimant is it argued that he amendment application is made less than 5 months after the ET1, the amendment was promptly sought after the August Preliminary Hearing. It is argued that the claimant has provided the details of a number of colleagues who had been dismissed and reinstated and that the claimant had not been aware that the treatment of these individuals would need to be differentiated from those of the former colleagues who were not dismissed for the same conduct (or misconduct). Further this amendment allows early notice of the full details of the claim to allow the respondent to better formulate defences.

21. On **Thursday 10 September 2020** for the respondent's objection was intimated to proposed amended pleadings, in particular it was set out that the claimant now "*seeks to add two additional comparators to the … claim of direct race discrimination. Both individuals were dismissed by the respondent but later reinstated. The claimant's pleadings …. only made reference to two individuals who were not dismissed by the respondent and to whom the claimant seeks to compare himself for the purposes of his direct discrimination claim."*

22. For the respondent additional to **Selkent**, the respondent refers to **Remploy v Abbott** (**Abbott**) para 82.

23. The respondent further sets out that the claimant was represented from the outset and the ET1 and preliminary hearing agenda for the claimant set out and (I understand it to be argued) gave fair notice of two different comparators both of whom were not dismissed. However, what the claimant is now seeking to do was not only two further comparators but further comparators in respect of whom the treatment was different from the pled case in that they were dismissed but were reinstated. The respondent makes reference to **Chandhok v Tirkey** UKEAT/194/04 [2015] IRLR 195 (**Chandhok).** The respondent argues that the claimant had sufficient opportunity to formulate his claim *"including the number and identity of all comparators identified"*

Application to amend

Time Limit Generally

24. In any such claim such discrimination it would be open to a respondent to argue that a claim set out by the claimant in terms of the EA 2010 was not presented within the time limits set out in Sections 123(1)(a) & (b) of the EA 2010, dealing with this issue may involve consideration of subsidiary issues including whether time should be extended on a "*just and equitable*" basis; when the treatment complained about occurred; etc.

25. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **Friday 22 November 2019** is potentially brought out of time, so that the Tribunal may not have jurisdiction to deal with it, the termination of Mr Khan employment is (I understand) agreed to have occurred on **Friday 29 November 2019**. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the Early Conciliation Certificate does not count (Section 140B (3), EA 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B (4), EA 2010).

26. For claims of discrimination, the Tribunal may consider a claim that is out of time if it considers that it is "*just and equitable"* for it to do so. Where the compliant is of an equality clause, neither of these possible extensions apply and described that the relevant provisions for such a claim are set out in s129 and s130 of the Equality Act 2010 (EA 2010).

27. **Section 123** of EA 2010 provides:

> *(1) Proceedings on a complaint brought within Section 120 may not be brought after the end of*
>
> > *(a) The period of 3 months starting with the date of the act to which the complaint relates; or*

> ***(****b) Such other period as the employment tribunal thinks just and equitable.*
>
> *(2) …*
>
> *(3) For the purposes of this section*
>
> *(a) Conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) Failure to do something is to be treated as occurring when the person in question decided on it.*

28. The three-month time for bringing Tribunal proceedings is paused during Early Conciliation such that the period starting with the day after early conciliation is initiated and ending with the day of the Early Conciliation Certificate does not count (Section 140B (3), EA 2010). If the time limit would have expired during Early Conciliation or within a month of its end, then the time limit is extended so that it expires one month after Early Conciliation ends (Section 140B (4), EA 2010).

Pleadings

Time Limit/Amendment

29. I have reminded myself of the EAT decision in **Ladbrokes Racing Ltd v Traynor** [2007] 10 WLUK 62 (**Traynor**).

30. In **Traynor** the EAT indicated that an application to amend in the course of a hearing, called for a full explanation as to why it had not been made earlier. Mr Traynor had been dismissed after 24 years of service and argued that he has not been given an opportunity to improve his performance. Mr Traynor's wife (acting as his representative) sought to raise an issue about the fairness of the employers investigatory and disciplinary proceedings. Despite an objection the Tribunal allowed him to amend his claim, to include an allegation of procedural unfairness and to cross-examine witnesses on that issue.

31. The EAT in **Traynor** indicated that Tribunals should have regard to the following guidance:

(a) a tribunal could enquire whether an amendment to a claim form was sought in the light of the line of evidence which a claimant explored;

(b) the tribunal should enquire as to the precise terms of the amendment proposed. If it did not do so, it could not begin to consider the principles that needed to be applied when considering an application to amend;

(c) it might be advisable to allow the claimant a short adjournment to formulate the wording of the proposed amendment;

(d) the respondent could only be expected to respond once the wording of the proposed amendment was known;

(e) once the wording of the proposed amendment was known the tribunal should allow both parties to address it before considering its response;

(f) the tribunal's response should be that of all members and should take into account the submissions made and the principles of **Selkent**. The chairman and members might need to retire to consider their decision;

(g) the tribunal should give reasons for its decision on an application to amend.

The EAT continued that Traynor had not actually made an application to amend, rather he had sought to follow a line of cross-examination which was not foreshadowed in his claim form.

32. **Traynor** identifies that a Tribunal should have regard to the leading decision on amendment: **Selkent.** In **Selkent**, Mummery J sets out the criteria for a Tribunal's exercise of discretion in relation to amendment commenting that the Tribunal "*should take into account all the circumstances and should balance the injustice and hardship of refusing it".*

33. The EAT in **Selkent** were considering an appeal which arose from an application to amend an existing unfair dismissal claim, where the application

had been made a fortnight before the date fixed for the hearing. The amendment sought to introduce a new allegation that the dismissal related to the claimant's trade union membership or activities and was thus automatically unfair. The Tribunal had allowed the amendment but was overturned on appeal, the EAT commented that that factors which had influenced its decisions were:

"(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 additions 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 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.

(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, s.67 of the 1978 Act.

(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 Rules for the making of amendments. The 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 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."*

34. In **Abercrombie**, a number of claimants had commenced proceedings in 2009 in the Tribunal in arising out of what was argued to be a temporary change to working days. The claims were expressly identified as being for "*unlawful deduction of wages",* i.e. as made under the general jurisdiction in relation to deductions from wages. The "*2009 claims"* could only determine the claim as regards workless days up to the date that the proceedings were commenced, so the claimants commenced further proceedings to cover the period up to the expiry of what was argued to be an extended agreement (the "2010 claims"). The Tribunal rejected the 2009 claims for guarantee payments, holding amongst other matters that there had been a temporary contractual variation. It dismissed the 2010 claims because, among other matters, it held that they were presented out of time. The EAT dismissed the claimants' appeal ([2013] IRLR 13). The claimants appealed to the Court of Appeal.

35. Para 51 of **Abercrombie** to which the claimant refers sets out LJ Underhill comments as follows:

51. As to point (c), the judge says that the application to amend 'could have been addressed with much greater expedition'. I have to say that I do not regard that conclusion (which is not amplified anywhere earlier in the reasons) as open to him on the facts. As appears from paragraphs 16–17 above, the amendment only became necessary at all as the result of the respondent's very belated application to amend to take the point under the 2002 Act. That application was first made at the very end of June 2010. The claimants' application in response was adumbrated in Mr Segal's skeleton argument served in October 2010. It was dealt with at the next hearing, though as it turned out that was not until June 2011. That timetable seems to me unexceptionable. In any event the respondent at no point suggested – nor

could it realistically have done – that it had suffered any prejudice as a result of the interval of two or three months between the service of Mr Porter's skeleton taking the 2002 Act point and the service of Mr Segal's skeleton intimating an intention to seek permission to amend in response.

52. In summary, I cannot, with respect, agree with Silber J that the refusal of the claimants' application for permission to amend was within the scope of the employment judge's discretion. The respondent had been granted permission to amend, very late, to take a thoroughly technical point on the provisions of the 2002 Act. In my view justice required that the claimants be permitted to amend to plead the best available answer to that point. No new issues of fact were involved and the grant of the application involved no prejudice to the respondent – beyond the obvious but immaterial prejudice that amendment would deprive it of what might otherwise be an answer to the claim"

53. In **White v University of Manchester** [1976] IRLR 218 EAT (**White**), J Phillips, considering Further and Better Particulars which could be required to remedy deficiencies as to fair notice comments that *"We fully understand, accept and would endorse … that one of the characteristics of Industrial Tribunals is that they should be of an informal nature. It may be that there are many cases, particularly where the parties are unrepresented, or represented otherwise than by solicitor or counsel, and especially where the issues are simple, where particulars may not be necessary. We do not wish to say anything to encourage unnecessary legalism to creep into the proceedings of Industrial Tribunals; but, while that should be avoided, it should not be avoided at the expense of falling into a different error, namely that of doing injustice by a hearing taking place when the party who has to meet the allegations does not know in advance what those allegations are. The moral of all this is that everybody involved, whether it be solicitors, counsel, non-professional representatives, or the parties themselves where not represented, should bring to the problem common sense and goodwill. This involves, or may involve in anything except the simplest cases, giving, when it is asked, reasonable detail about the nature of complaints which are going to be made at the Tribunal…. It is just a matter of straightforward sense. In one way or*

another the parties need to know the sort of thing which is going to be the subject of the hearing. Industrial Tribunals understand this very well and, for the most part, seek to ensure that it comes about. … by and large it is much better if matters of this kind can be dealt with in advance so as to prevent adjournments taking place which are time-consuming, expensive and inconvenient to all concerned."

54. As the Employment Appeal Tribunal observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) the purpose of the ET1 (and ET3) *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it".* Further as Langstaff J **Chandhok**, which the respondent referred to the parties must set out the essence of their respective cases in the ET1 and in the answer to that (the ET3) and that (to give the slightly fuller quotation) "… *an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

55. For the respondent, reference was made to para 82 of **Abbot**. The full paragraph 82 in Abbot is set out for ease:

> *"DISCUSSION AND FINAL CONCLUSIONS: TAKING POINTS NOT IN THE ET1*
>
> **[*82]*** *In my opinion, it is contrary to principle to permit a point to be taken in the Employment Tribunal or on appeal unless it has been pleaded. As a general rule the addition of further Particulars of an existing allegation will require an amendment to be made. If the fresh points can properly be considered to be particularisation of an allegation already pleaded, a more liberal approach may be taken in considering whether to grant permission to amend, than in cases where the point is a "new" point, or will require the parties to produce further evidence or disclosure and*

prejudice the timetable set for the proceedings or cause further delay. Further as I have already observed, it is not easy to see how the Employment Tribunal could take a point that depends on factual investigation unless the parties have prepared and led some evidentiary material. The question, for example, of whether the Respondent was in breach of its obligations in relation to seeking suitable alternative employment cannot be determined in a factual vacuum. In straightforward cases it may properly be left to the Employment Tribunal to determine for example all the Burchell points or various heads of compensation for unfair dismissal, but in a complex case such as the present case where the parties are legally represented and have pleaded their case with some particularity, any addition to the Particulars will require an amendment, which will have to be applied for and considered in the usual way on conventional grounds. I ask forensically how the Employment Tribunal might have been expected to consider the question of alternative employment if the parties had not raised it. The point could only properly be determined, if the Employment Tribunal were bound to determine the point, if it had been drawn to the attention of the parties, who would then have had to consider what evidence if any might be required and to make appropriate submissions."

56. The EAT decision in **Abbott,** followed a hearing before the EAT in 2015 related to a large number of individuals claims arising out of events in 2012 and 2013.The EAT noted that there had been case management in 2014 with witness statements being prepared and a hearing date set for late 2014, when the claimants application to amend was sought and granted regarding allegations regarding redeployment to "*other than to other factories".*

57. The respondents in **Abbott** argued that they were prejudiced including on the basis that managers had been dispersed and documents and email archives were no longer available. The Tribunal had considered that it was bound by the decision in **Langston v Cranfield University** [1998] IRLR 172 (**Langston**) to investigate in any case of unfair dismissal by reason of redundancy, as implicit in that claim, that the unfairness incorporated unfair

selection, lack of consultation and failure to seek alternative employment on the part of the employer, even if not specifically pleaded or raised as issues by the claimants.

58. The EAT in **Abbott** held that the Tribunal had fallen into error, firstly by allowing amendments that had not been fully formulated or particularised and by considering them together rather than examining each proposed amendment separately. Without properly formulated and particularised draft amendments it was impossible for the Tribunal (or the Respondent) to consider how the amendments would affect the existing case management model and whether or not they could be accommodated by a limited number of lead or test cases, the effect on existing hearing dates, prejudice to the Respondent, for example in identifying necessary witnesses and having access to relevant documentation and information. Further the Tribunal should have considered the reasons for the delay by the Claimants in putting forward the suggested amendments and when they or their legal representatives were first aware of the relevant factual basis for the "new" allegations. It was also necessary to consider the effect on any increase in likely costs to the parties and on expenditure of the resources of the Employment Tribunal.

59. The EAT in **Abbott** held that the decision in **Langston** had no blanket application and no application to a case such as the instant case in which the parties were legally represented, had defined in their pleadings the issues they wanted decided by the Tribunal and where there had been extensive and comprehensive case management on the basis of the pleadings.

60. The EAT in **Abbott** held that permission of the Tribunal was necessary to add new Particulars in any event and it had to consider whether or not to allow amendment on conventional principles as set out for example in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661.

61. The EAT in **Abbott** concluded that notwithstanding the reluctance of the Employment Appeal Tribunal to interfere with discretionary case management

decisions of Employment Tribunals, the decision in the instant case to grant permission to amend was sufficiently flawed as to require being set aside

Issues in relation to Time Limits

62. Section 123 (1) (b) of EA 2010 is set out above.

63. Reference has been made to the Limitation Act 1980, in this regard I have reminded myself of the EAT decision in British **Coal Corporation v Keeble [1997] IRLR 336**. In that case the EAT suggested that Employment Tribunals would be assisted by considering the factors listed in s.33(3) of the Limitation Act 1980 which in turn consolidated earlier Limitation Acts. Section 33(3) deals with the exercise of discretion in civil courts and personal injury cases in England & Wales and requires the court to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular:

(a) the length of and reasons for the delay; and

(b) the extent to which evidence which may adduced for either side is likely to be less cogent than if the action had been brought within the time allowed; and

(c) the conduct of the party defending the action after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the party bringing the action for information or inspection for the purpose of ascertaining facts which were or might be relevant to the party bring the action's cause of action; and

(d) the duration of any disability of the party arising after the date of the accrual of the cause of action; and

(e) the promptness with which the party bringing the action acted once s/he knew of the facts giving rise to the cause of action; and

(f) the steps, if any, taken by the party bringing the action to obtain appropriate professional once s/he knew of the possibility of taking action.

64. While I observe that the Limitation Act 1980 to which **Keeble** refers, does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973 (the 1973 Act)**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, s19A simply stating:

"19A Power of court to override time-limits etc.

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

65. Section **123** of **EA 2010** does not make reference to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

66. It is observed that the onus is on a claimant to establish that it is just and equitable for time to be extended (paragraph 25 of **Robertson v Bexley Community Centre (t/a Leisure Link**) [2003] IRLR 434, CA)

67. As set out in **Outokumpu Stainless Ltd v Law** UKEAT/01999/07, evidence is required to be placed before the Tribunal in support of an application.

68. Further the EAT held in **Caterham School v Rose** UKEAT/0149/19 (**Rose**), decision issued 22 August 2019, that when considering, under s123 of the EA 2010, whether discriminatory acts extend over a period of time (to determine if it is just and equitable to extend time to hear a complaint), a tribunal ordinarily should hear evidence. Ms Rose had resigned on 24th August 2017, and put in a claim on 29th December 2017, which, allowing for ACAS conciliation, was out of time. At a Preliminary Hearing, some claims were dismissed, but for discrimination complaints alleged to be acts extending over a period, the tribunal found that it was just and equitable to extend time, having

considered only the pleadings. The EAT held that the tribunal made an error of law by deciding it was just and equitable to extend time on that basis, rather than on the basis of evidence. The, EAT observed (at para 59) that there were differences , between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, in summary *"A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. If a strike out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be."*

69. In **O'Neill v Jaeger Retail Ltd** [2019] UKEAT/0026/19 (**O'Neill)**, an issue had arisen as to why the claimant in that case had not taken earlier steps, the claimant had relied upon the state of her mental health as relevant, and in particular, on a GP's letter of June 2018. The Tribunal accepted that various personal circumstances, including bereavements, had had a significant impact, but did not consider that the GP's letter showed that her mental health had had a material impact beyond mid-January 2018 at the latest. The EAT observed that it would be important for the Tribunal, at the re-hearing, to have the benefit of sight of all the relevant contemporaneous medical evidence that might be available, whatever it might or might not show, in particular, the GP's records, and not just a single letter.

70. Factors which are almost always relevant to an exercise of the discretion are the length of and the reasons for the delay, and whether the delay has prejudiced the respondent (**Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 at paragraph 19).

71. However: *"There is no … requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that*

can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard (Abertawe at para 25)". Thus, it is not necessary for a Tribunal to consider the checklist of factors set out in Section 33 of the Limitation Act 1980, given that that Section is worded differently from Section 123 of the Equality Act 2010, so long as it does not leave a significant factor out of account.

72. In **Robertson v. Bexley Community Centre t/a Leisure Link** [2003] IRLR 434 the Court of Appeal identified that for Tribunals considering the exercise of this discretion *"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 claim unless the claimant convinces it that it is just and equitable to extend time. So the exercise of discretion is the exception rather than the rule."*

Discussion and Decision

73. I note that prior to consideration of this application to amend, the Tribunal had required to notify the parties that the Final Hearing which was to be listed for a hybrid hearing from **Monday 14 December 2020 to Thursday 17 December 2020** could, as of 25 November 2020 no longer be accommodated for those dates and the Final Hearing will not be allocated for dates in the period January 2021 to March 2021. The issue of proximity to the Final Hearing is thus less significant.

74. However, and while consider **Selkent** and other authorities as set out above on amendment and operation of time limits, I note that the Claimants' application does not give fair notice in that it does not identify the proposed individual comparators at all. Nor indeed does it identify on what basis those proposed individuals could be comparators in relation to a claim of direct discrimination. It does not set out, unlike at para 11 of the ET1 that such new proposed comparators are for instance white and Scottish. That is not something which can be simply read into the pleadings particularly absent any other specification including identification by name. While the Tribunal notes

that existing "*dismissed"* comparators are also unidentified in the pled case, it would appear from the Note of the August 2020 PH the respondent does not to take issue those comparators not being named and is only (to quote Chandhok) "*to be found elsewhere than in the pleadings"*. That being said the issue before the Tribunal today is in relation to a proposed amendment.

75. The respondents, were the present amendment allowed, would face a claim where there is no fair notice of the identity of the alleged comparators or indeed when the alleged comparator treatment occurred. It is not clear on what basis the claimant considers that an employer could carry out investigation of such a position "*in order to better formulate defences".* The comparators may be those individuals referenced in the Tribunal note of the August 2020 or they may be other individuals. It is not clear what the relevance of the two other alleged individuals would be, it is not offered to be pled that either were white Scottish, nor indeed the approximate period in which the alleged comparator treatment is alleged to have occurred. The respondent is entitled to fair notice of the claim which it expected to meet.

76. Further and unlike the position in **Abercrombie** it cannot be said that no new issues of fact were involved and the grant of the application would involve no prejudice to the respondent. The respondent would be expected to answer an allegation where no specification is given of the alleged comparators- by name or date of when the alleged comparator events took place.

77. The respondent cannot reasonably be expected to respond and or prepare for a Final Hearing in respect of such matters which may potentially be found elsewhere than in the pleadings.

Conclusion

78. In all the circumstances the amendment, as formulated and intimated Thursday 3 September 2020 is refused.

79. A tribunal is required to receive the submissions of the parties before it. It is required to form a judgment as to the submissions which have persuasive force in coming to a conclusion. It is not required to set out extensively the

submissions of the parties in every case. It is required to explain the basis upon which it reaches its conclusion. Sometimes that requires it to set out submissions in summary and on other occasions more fully.

80. In coming to this view the Tribunal has applied the relevant case law.

R McPherson
Employment Judge

30 November 2020
Date of Judgment

Date sent to parties **30 January 2021**