EMPLOYMENT TRIBUNALS

Claimant: **Mr A Folarin**

Respondent: **The Camden Society (London)**

Heard: **Remotely at Nottingham (by video link)**

On: **Thursday 12 October 2023**

Before: **Employment Judge S Shore**

Representation
For the claimant: No Appearance
For the respondent: Miss J Patel, Solicitor

OPEN PRELIMINARY HEARING

JUDGMENT

1. The claimant's application to amend his claim is refused. The claimant's claim of race discrimination is dismissed in its entirety.

REASONS

History of Case

1. The claimant was employed by the respondent, an organisation that provides services to support people with learning disabilities, as a Team Co-Ordinator from 12 January 2015 until 13 September 2022. On 1 August 2022, the claimant was working a waking night shift at a residence that provided support to two people.

2. The respondent had been advised that staff may be sleeping on night shifts. The premises where the claimant worked were visited by Muhammad Maudarbucus, Community Support Leader, and Victoria Robinson, Operations Manager on the night of 1 August 2022. They asserted that they found the claimant asleep on the floor of the lounge covered by a blanket. He was alleged to be snoring. The back door of the property was found to be open.

3. An investigation was undertaken by Melissa Thorogood, an HR Advisor for the respondent. On 5 September 2022, the claimant was invited to a disciplinary meeting for being asleep at work and for leaving the back door of the property open, which was a safeguarding issue.

4. Mr Folarin was dismissed at the disciplinary hearing on 12 September 2022. The claimant appealed his dismissal, but the appeal was rejected.

5. The claim details are as follows:

   5.1 The claim was presented on 15 January 2023.

   5.2 Early conciliation Day A is 6 December 2023.

   5.3 Early conciliation Day B is 5 January 2023.

   5.4 Employment began on 1 December 2015 and ended on 13 September 2022 by summary dismissal.

6. The claimant indicated that he was making a claim of race discrimination in his ET1. The race discrimination claim was not clear. The claimant confirmed his race is “black African”. While he ticked the race discrimination box on his claim, he set out no narrative allegation of race discrimination.

7. On 17 April 2023 there was a telephone case management hearing before Employment Judge Welch. The respondent did not attend for reasons that are of no consequence for this hearing, but the claimant did. EJ Welch made an order that was sent to the claimant on 25 April 2023 requiring him to provide specific details of his race discrimination claims. She set out the questions that he had to answer, depending on what type of discrimination he alleged. She allowed him 28 days to respond.

8. The claimant did not submit anything until 18 July 2023. His submission identified only one allegation of harassment related to race and one of direct discrimination because of race. The information did not contain the information that EJ Welch had told him to include.

9. The case came before EJ Adkinson on 7 August 2023, who set up this hearing to resolve the following issues (in such order as I saw fit):

   9.1 To consider the claimant’s application to amend,

   9.2 To clarify the claims,

9.3 If and to the extent it is appropriate to consider these matters, to consider if any claim for discrimination should be struck out because:

9.3.1 The claimant did not comply with the order of Employment Judge Welch,

9.3.2 A fair trial is not possible on the discrimination or harassment claims.

9.4. To give such further directions as appropriate.

10. EJ Adkinson required the claimant to send to the Tribunal and the respondent no later than two weeks from when the order was sent to him:

10.1. The details of each allegation of direct discrimination and harassment that Employment Judge Welch directed he provide in her order sent to the parties on 25 April 2023; and

10.2. An application to amend his claim to permit him to pursue those allegations, explaining at the very least why he believes the Tribunal should exercise its discretion to allow him to amend his claim to add those allegations and why they were not set out in his claim in the first place.

11. The order was sent on 11 August 2023 [4-10]. The claimant submitted his application to amend and particulars of discrimination claim [47-64] on 25 August 2023. The respondent submitted its response on 14 September 2023 [65-67].

Discussion at hearing

10. The hearing was listed to start at 10:00am. The claimant had indicated that he was going to attend and asked that an observer, Mr Marquis, be allowed to attend.

11. I opened the hearing at 10:00am. Miss Patel was in the waiting room, but there was no sign of Mr Folarin. I asked Miss Patel to turn her microphone and camera off while the Tribunal Clerk made enquiries of the claimant’s situation. Mr Marquis joined the hearing at 10:05am and advised that he was in contact with the clamant who was having difficulty logging in to the video hearing. The Tribunal Clerk advised me that he had rung the claimant twice, but both calls had diverted to voicemail.

12. At 10:13am, Mr Folarin’s name appeared on the list of participants in the video hearing, but I could neither see nor hear him. I put a message in the chat room page, but Mr Folarin did not reply. I asked the Clerk to email Mr Folarin, which he did.

13. As Mr Marquis was in contact with Mr Folarin, I asked him to ask the claimant to respond to the voicemails and email that had been sent by the Clerk. I also suggested that the claimant should check that his operating system was up to date. Mr Marquis said that the claimant was in Africa.

14. Mr Folarin's name briefly appeared on the list of participants at 10:22am but he could not be seen or heard. His name appeared on two other occasions without him being heard or seen. By 10:35am, Mr Folarin had not contacted the Tribunal and had not connected to the hearing in a way that enabled me to see or hear him. I spoke to Mr Marquis and Miss Patel. I asked Mr Marquis to contact the claimant and ask him to respond to the Tribunal's email. I adjourned the hearing to 11:00am to give Mr Folarin time to get in touch with the clerk and resolve his connection issues. I put the following message in the chat box and asked Mr Marquis and the Clerk to communicate it to Mr Folarin:

> *"Mr Marquis. It is not proportionate or a good use of time and expense for us all to sit here waiting for the claimant. Could you please ask him to reply to our Clerk's email. I am postponing the hearing to 11:00am. If he has not connected by that time, I will consider proceeding in his absence."*

15. On the resumption at 11:00am, there was no sign of Mr Folarin or Mr Marquis. Mr Folarin had not contacted the Tribunal. Mr Marquis logged in at 11:02am.

16. Miss Patel asked that the hearing be conducted in the absence of the claimant. She submitted that it was in furtherance of the overriding objective to proceed because:

    16.1 The claimant had not advised anyone that he would be abroad for the hearing;

    16.2 He was aware of the date and time of the hearing;

    16.3 It was his application to amend;

    16.4 The claimant had been required to give further information about his discrimination claims on 25 April 2023 and the matter needed to be resolved.

17. I considered whether to proceed in the claimant's absence. I considered the overriding objective and the fact that the claimant had not applied for an adjournment. I also considered the Presidential Guidance on Seeking a Postponement of a Hearing issued by the President of Tribunals for England and Wales on 4 December 2013. I considered the following factors:

    17.1 The matter of the amendment to the claimant's claim had been live since 25 April 2023 and if I granted an adjournment, it would remain unresolved for at least a month;

    17.2 Both parties had made written submissions in support of and in opposition to the claimant's application to amend;

    17.3 The prejudice to the respondent in adjourning was greater than the prejudice to the claimant of proceeding in his absence.

I decided to proceed in the claimant's absence on the papers submitted by the parties. I did not require Miss Patel to speak to the submissions made in her email to the Tribunal dated 14 September 2023 [65-67]. This was not a case where I would be hearing any evidence. I any event, as the claimant was in an unspecified country in Africa, there was no certainty that I would be able to hear evidence in any event.

18. The respondent produced a bundle of 73 pages, including an index. If I refer to any documents in the bundle, I will include the page reference in square brackets. The claimant had produced a file of papers. I read both.

19. The Claimant is unrepresented. If he had attended, I would have reminded him that the Tribunal operates on a set of rules (I have set out a link to those rules below). Rule 2 sets out the overrunning objective of the Rules (their main purpose) which is to deal with cases justly and fairly. It is reproduced here:

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far that is practicable –*
>
> *(a) Ensuring that the parties are on an equal footing;*
> *(b) Dealing with cases in ways that are proportionate to the complex that are importance to the issues;*
> *(c) Avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) Avoiding delay so far as compatible with proper consideration and the issues, and*
> *(e) Saving expense.*
>
> *The Tribunal shall seek to give effect to the overriding objective in interpreting or exercising any power given to it by these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall cooperate generally with each other and with the Tribunal."*

20. Following the guidance in the case of **Cox v Adecco Limited** UKEAT/0339/19/AT, I decided that my first task was to finalise the claimant's list of potential claims. The claimant's amendment application [62-64] identified the following claims:

> *"As to Discrimination:*
>
> *3. In around December 2021, I had a family emergency and requested for some time off work (4 days), albeit unpaid time away from work to attend to that emergency and Victoria Robinson refused my request. At the same time, Mr Tom O' Hara requested for time holiday and Victoria agreed to his request.*
>
> *4. In around June 2022, at my place of work at the residence of the clients in Queens Avenue, Muswell Hill, London (I have deliberated omitted the*

door number of the property, to protect the clients), Victoria Robinson talked to a member of staff (Tom O'Hara) about my work performance, Tom was my subordinate at work. She talked down on my effort at work to him and made out that I was 'incompetent' as to my duties at work. The conversation took place at the residence whilst I was in a separate room on the same premises. I heard Victoria Robinson assuring Mr O'Hara that my job role as a Coordinator will be given to him. Since my dismissal of 14 September 2022 from The Camden Society London; my job role has been given to Mr O'Hara as a Coordinator.

As to Harassment:

5. In around August 2022, at my place of work at the residence of the clients in Queens Avenue, Muswell Hill, London (I have deliberated omitted the door number of the property, to protect the clients), Victoria Robinson brought my family into our professional working relationship, she admitted in her statement of 1 August 2022 (see, pages 97-98 of the Claimant bundle with original application, paragraph 8) that whether my wife will confirm that I snore, if she were to telephone my wife. Victoria Robinson in the discharge of her duties as an Area Manager cannot reference my family life or any member of my family and/or household whilst conversation of an alleged offence was being discussed or reference them at any instance.

6. On 1 August 2022, at Queens Avenue at my place of work in the residence of the clients, Victoria Robinson whilst in the same premises and talking to me in the early hours of the morning, whilst I carry out my duties to support the clients, she spoke in a harsh tone during our conversation and I was distracted to the extent that I put on the wrong gloves to clean up one of the client's feces and had to ask her if I could be left to do my job. I further made to Victoria that I was uncomfortable and did not want to be rude and mentioned this is getting too much."

21. I considered that the claimant had been given three opportunities to state his case: his ET1 [12-25], the Particulars of Race Discrimination Claim dated 18 July 2023 [45-46], and the Application dated 25 August 2023 [47-64]. Even if he had been in attendance, I would not have considered it just and equitable to have given him a fourth attempt. I find that the claimant made two claims of direct discrimination under section 13 of the Equality Act 2010:

    21.1 He was refused time off for a family emergency "in around December 2021"; and

    21.2 "In around June 2022", Victoria Robinson criticised the claimant's work when speaking to Tom O'Hara and promised Mr O'Hara that he would get the claimant's job.

22. I find that the claimant made two allegations that he asserts are of harassment related to the protected characteristic of race under section 26 of the Equality Act 2010:

22.1 That “in around August 2022”, Victoria Robinson said she would telephone the claimant’s wife to ask if her snored; and

22.2 On 1 August 2022 Victoria Robinson spoke to him in a harsh tone.

23. I then dealt with the claimant’s application to amend. I noted that the order of EJ Adkinson required the claimant to explain “at the very least why he believes the Tribunal should exercise its discretion to allow him to amend his claim to add those allegations and why they were not set out in his claim in the first place.

24. I reminded myself of the entirety on paragraph 8.1 of the claimant’s ET1:

> *“The Investigation Manager, was knee-deep in the investigation and played a role in driving it forward and ought not to have interfered in the 'disciplinary processes' in having undertaken the investigation. It was not for her to engage in any 'capacity' in the appeal process and/or its proceedings. Moreover, it is submitted that, in addition to, her flawed report of 23 August 2022, which perhaps derivatively, gave rise to the correspondence of 5 September 2022 from Louisa Hardy (the Disciplinary Manager) , the Investigation Manager forwarded an email dated 21 October 2022 and timed 12:26pm to the Appellant contrary to the guidance of ACAS in its guidance of conducting workplace investigations.”*

25. I find that the claimant’s argument as to why the Tribunal should exercise its discretion is set out in paragraphs1, 2, and 8 of his Application [62-64] and can be summarised as follows:

25.1 The amendment arises out of the same facts as the original claim;

25.2 It would be in accordance with the overriding objective to grant the application because it would ensure an equal footing between the parties, would save expense, and would avoid delay; and

25.3 The order of EJ Welch required the claimant to provide further clarification of the claim; and “…the application to amend is not entirely unconnected and the Claimant points to section 8.1 of the ET1 Claim Form received by the tribunal in around 15 January 2023, and further the Respondent’s ET3 Ground of resistance points to the same, see paragraph 3 of the Respondent’s ET3 Ground of resistance.”

26. I find that the claimant made no attempt to explain why the claims were not set out in his ET1. His argument was, effectively, that they were arising out of the same facts.

27. I have absolutely no hesitation in finding that the allegations of direct discrimination because of race do not arise out of the same facts as those set out in paragraph 8.1 the claimant’s ET1 [18]. The ET1 starts with criticism of the disciplinary investigation, which arose from an inspection of the premises at which the claimant worked on 1 August 2022. It then criticises the investigation, decision to dismiss and the appeal against dismissal. There is absolutely no factual link between the ET1 and the allegations of direct discrimination. That

means that the amendments applied for cannot be a relabelling or rebadging exercise. They are new claims.

28. I find that the first allegation that purports to be of harassment related to race is nothing of the sort. The claimant explains that his issue with Ms Robinson's alleged behaviour is that he believes that she "…cannot reference my family life or any member of my family and/or household whilst conversation of an alleged offence was being discussed or reference them at any instance." He makes no connection between the alleged behaviour and race. As the claimant was required to provide further information about *race* discrimination and has not made an application to amend to bring any other type of claim, that application cannot be allowed to proceed. The application is dismissed.

29. I find that the second allegation of harassment related to race occurred on the night of the inspection by Ms Robinson and Mr Maudarbucus and generous interpretation of the allegation would be that the new allegation occurred in the timescale covered by the claimant's ET1 in that it is connected to the claimant's dismissal.

30. I find that the first allegation of harassment does not arise out of the same facts as those set out in paragraph 8.1 the claimant's ET1 [18]. The first allegation predates the period covered by the ET1 by about 2 months and has nothing to do with the disciplinary investigation and dismissal. It is not a rebadging or relabelling exercise. It is an entirely new claim.

31. I find that whilst the second allegation is said to have occurred on 1 August 2022, the date of the unannounced visit that led to the disciplinary investigation and dismissal, the claimant makes no connection between the allegation and the disciplinary matter. It is an entirely new claim.

Law

32. There is extensive jurisprudence on the question of amendments to Tribunal claims. The authorities regarding amendments are set out in a number of cases including **Cocking v Sandhurst** [1974] ICR 650, **British Newspaper Printing Corporation (North) Ltd v Kelly** [1989] IRLR 222, **Selkent Bus Co v Moore** [1996] IRLR 661, **Housing Corporation v Bryant** [1999] ICR 123, **Harvey v Port of Tilbury (London) Ltd** [1999] ICR 1030, **Ali v Office of National Stat*istics*** [2005] IRLR 201, **Abercrombie v Aga Rangemaster plc** [2013] EWCA 1148. It was most recently considered by the EAT in **Vaughan v Modality Partnership** [2021] IRLR 97.

33. Mr Justice Underhill considered the appropriate conditions for allowing an amendment in **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/009/07. In particular, he referred to the guidance of Mr Justice Mummery in **Selkent Bus Company Ltd v Moore** [1996] IRLR 661 where he set out some guidance. That guidance included the following points:

> (4) *Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should*

balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

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

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of 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 has to decide whether the amendment sought is one of a minor matter 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 the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, Section 67 of 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 in discovery. Whenever taking any factors into account, 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 the **Safeway** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in **Ali v Office of National Statistics** [2005] IRLR 201 where Lord Justice Waller referred to Mr Justice Mummery's guidance in **Selkent**, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued: "There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time." As Mummery J emphasised in *Selkent*:

'…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'.

35. In **Evershed v New Star Asset Management** UKEAT/0249/09*,* Underhill J stated that it was *'necessary to consider with some care the areas of factual inquiry raised by the proposed amendment and whether they were already raised in the previous pleading'*. He carried out this exercise himself and concluded that the new evidence would be substantially the same as would be given in respect of the original claim, and, accordingly, allowed the amendment. The Court of Appeal approved this approach and agreed that the amendment did not raise *'any materially new factual allegations'. '[T]he thrust of the complaints in both is essentially the same'*.

36. In **Chandhok v Tirkey** [2015] IRLR 195, the Langstaff J referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows:

> *"... The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."*

37. In **Abercrombie & Others –v- Aga Rangemaster Ltd** [2013] EWCA Civ 1148 Lord Justice Underhill pointed out that the **Selkent** factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the caselaw to say that an amendment to substitute a new cause of action is impermissible. Further, at paragraphs 48 and 49 of the *Abercrombie* judgment, Lord Justice Underhill went to say:

> "*Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted.... We were referred by way of example to my decision in* **Transport and General Workers Union v Safeway Stores Ltd** *(UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case*

in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as **British Printing Corporation (North) Ltd v Kelly** *(above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)*

It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case."

38. Most recently, in **Vaughan v Modality Partnership** [2021] IRLR 97 at [24], HHJ Tayler reviewed the authorities on amendment. The following principles emerged:

    38.1 the fact that an amendment would introduce a complaint which is out of time is a factor to be taken into account in the balancing exercise, but is not decisive [§15];

    38.2 the **Selkent** factors should not be treated as a checklist, but must be considered in the context of the fundamental consideration: the relative injustice and hardship in refusing or granting an amendment [§16];

    38.3 the Tribunal may need to adopt a more inquisitorial approach when dealing with a litigant in person [§19];

    38.4 that balancing exercise should be underpinned by consideration of the real, practical consequences of allowing or refusing an amendment [§21];

    38.5 It is important to consider the **Selkent** factors in the context of the balance of justice [§24]

    - a minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing;

    - an amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim;

- a late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

38.6 where the prejudice of allowing an amendment is additional expense, consideration should generally be given to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it [§27].

38.7 an amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice [§28].

39. I followed the jurisprudence set out above when making my decision, Particularly, I considered all the circumstances and the balance of justice. I make the following findings:

39.1 The claims of race discrimination were not set out by the claimant in his ET1, other than by ticking the race discrimination box at paragraph 8.1.

39.2 In order to proceed with any claim of race discrimination, the claimant has to amend his claim.

39.3 I find that the claimant's application for amendment was, at the earliest, made on 25 August 2023.

39.4 I find that the claimant stared early conciliation on 6 December 2022 and obtained a conciliation certificate on 5 January 2023. He presented his claim on 15 January 2023.

39.5 I find all the four allegations of race discrimination first set out in the claimant's Application of 25 August 2023 to be out of time – the time limit set out in section 123 of the Equality Act 2010. I find that the first allegation of direct race discrimination is not an allegation of race discrimination at all.

39.6 On the **Selkent** points, I make the following findings:

39.6.1. I find that this is not a rebadging exercise.

39.6.2. I find that the race discrimination claims were not identified until 25 August 2023, more than eight months after early conciliation started.

39.6.3. The timing and manner of the application – The application was only effectively made when the Application document was filed and served. The respondent had made it clear in its ET3, filed on 17 March 2023 that it required further information about the claim.

39.6.4. For the reasons set out below, I find the balance of injustice and hardship supports the respondent's position. I find it would not be just and equitable to extend time to allow the claims.

39.7. The claimant is not represented.

39.8. The real practical consequences of granting the application would be to save the claimant's case of alleged race discrimination.

39.9. Following the guidance of HHJ Tayler, I find that the amendment sought is not a minor amendment. Granting the application would 'correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing'.

39.10. The amendment sought is late and would cause the respondent more cost and expend more time. It would cost the taxpayer more cost.

39.11. The amendment would result in the respondent suffering prejudice because it would have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

39.12. I find that the prejudice cannot be ameliorated by an award of costs, or other sanction as the entire case now rests on granting or refusing the application.

39.13. I find that this amendment would have been avoided had more care been taken when the claim was pleaded or defined. That is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost. However, the key point is the balance of justice and hardship and I find that the injustice and the hardship is greater on the respondent than the claimant.

40. The application for amendment is refused. That means that the claimant's claim of race discrimination is struck out, as it does not exist as a claim as set out in the ET1 alone.

Employment Judge S Shore
Date: 16 October 2023

Sent to the parties on
Date:
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For the Tribunal Office