# EMPLOYMENT TRIBUNALS

**Claimant:** **Dr M Hassaballa**

**Respondent:** **General Medical Council**

**Heard at:** **East London Hearing Centre (by CVP)**

**On:** **Tuesday 28 November 2023**

**Before:** **Employment Judge S Shore**

**Representation**
For the claimant: Ms I Brown, Counsel
For the respondent: Ms K Nowell, Counsel

# PUBLIC PRELIMINARY HEARING

# JUDGMENT

1. The respondent's applications are determined as follows:

    1.1 The application to strike out the claimant's claims on the grounds that the Tribunal has no jurisdiction to hear such parts of the claim for which the claimant has an alternative right of appeal, pursuant to section 120(7) of the Equality Act 2010, is refused;

    1.1. The application to strike out the claimant's claims on the grounds that the Tribunal has no jurisdiction to hear the claims as they are out of time, pursuant to section 123 of the Equality Act 2010 is refused;

    1.2. The application to strike out on the grounds that the claims have no reasonable prospect of success is refused; and

    1.3. The application for a deposit order is granted.

# REASONS

## History of Case

1. The claimant is a medical doctor and, as such, is subject to regulation by the respondent, which regulates all doctors in the United Kingdom.

2. The claimant worked at Basildon University Hospital. He was investigated in 2018 but no action was taken against him following an investigation.

3. Following a further investigation, on 9 June 2021, the claimant was informed that he would be subjected to a 24-month (reduced to 18 months on appeal) final written warning by his employer (Basildon University Hospital) that related to the way he practiced medicine. The claimant resigned his employment with Mid and South Essex NHS Foundation Trust (MSE), which encompassed Basildon University Hospital, on 25 October 2021.

4. The claimant's Responsible Medical Officer at MSE referred the claimant to the respondent. The matters were investigated by the respondent and will be referred to in this Judgment and Reasons as "the Trust Matters". The respondent's investigation into the Trust Matters were closed with no action on 16 August 2022.

5. In December 2021, the claimant was alleged to have failed to complete a Work Details Form and return it to the respondent.

6. The respondent opened a new investigation into the claimant in December 2021 in respect of the allegation that he had failed to complete a Work Details Form setting out where he worked and failed to return the same to the respondent. The Work Details Form enables the GMC to carry out its statutory function under section 35A(2) of the Medical Act 1983, which includes contacting a doctor's other employers. The claimant was offered a warning for failing to complete his work details form but refused it and was referred to an Investigation Committee to consider if a warning should be placed on the claimant's registration history. I will refer to this matter and the subsequent disciplinary matter together as the Dishonesty Matters. The investigation continued notwithstanding that the Trust Matters had been closed with no action. A hearing was set for 22 October 2022.

7. Whilst preparing for the Investigation Committee hearing, the respondent became aware that the claimant was working for another NHS Trust; United Lincolnshire Hospitals NHS Trust ("UHL") and had not informed that Trust that he was under investigation by the respondent for the alleged failure to complete a Work Details Form.

8. The respondent's Investigation Committee postponed its planned hearing on 22 October 2022 to consider the new information. The claimant presented his claim to the Employment Tribunal on 29 January 2023.

9. The Investigation Committee sat on 27 and 28 February 2023.

10. The matter was referred to a Medical Practitioner's Tribunal (MPT). The MPT heard the case and, on 14 September 2023, determined that the allegations regarding the failure to return the Work Details Form, together with those relating to false representations on his employment forms were proven. It was determined that the Dishonesty Matters impaired the claimant's fitness to practice and that the claimant should be erased from the register.

11. The claimant alleges that the way that the respondent conducted the disciplinary investigations and processes was directly discriminatory because of his race and/or his sex. He has named 5 comparators but relies on hypothetical comparators as an alternative.

12. The claim details are as follows:

    12.1. The claim was presented on 29 January 2023 [19-30].

    12.2. Early conciliation Day A was 22 December 2022.

    12.3. Early conciliation Day B was 17 January 2023.

13. On 20 February 2023, the Tribunal sent the parties a Notice of Claim that listed the final hearing for 15, 17, and 18 April 2024 at Lincoln and made other case management orders on its own initiative.

14. The case came before me at the Midlands East Tribunal on 24 April 2023. I made case management orders, which included transferring the case to East London ET and requiring the parties to set out any applications that they wished to be determined at a public preliminary hearing.

15. My case management order dated 25 April 2023 [3-16] that was sent to the parties on 21 June 2023 contained a full agreed List of Issues [11-15] that set out the claimant's claims of direct discrimination because of race and direct discrimination because of sex. Paragraph 24 of my order required the parties to make representations to the Tribunal and each other if they felt that the List of Issues was wrong or incomplete by 15 May 2023. I appreciate that the order was not sent to the parties until that date had passed, but no representations were received from either party from the date of the order being sent to them until the date of this hearing that suggested that the List of Issues was incorrect.

16. I noted at paragraph 23 of the order that the claimant had provided sufficient further information at the hearing to obviate the need for further information about his claims from him. The respondent was given leave to submit an amended response by 15 May 2023.

17. I listed a further public preliminary hearing (PPH) for the week commencing 13 May 2023 that did not take place because of the late service of the order on the parties (see below).

18. At the hearing on 24 April 2023 the claimant withdrew all claims of harassment related to race, victimisation and detriment for making a protected disclosure, which were dismissed in a Judgement date 25 April 2023 [17-18].

19. The respondent presented an amended Grounds of Resistance [19-30] on 4 May 2023. The respondent applied for the claimant's claims to be struck out on jurisdictional grounds, time grounds and on the grounds that the claims have no reasonable prospect of success. In the alternative, the respondent sough deposit orders in respect of the claimant's claims.

20. On 21 June 2023, Acting Regional Judge Adkinson advised the parties by letter that the case had been transferred to East London and that public preliminary hearing I had proposed for May 2023 would not take place: East London would make further orders. The final hearing listed for 15, 17 and 18 April 2024 was vacated.

21. The purpose of the hearing was to consider whether:

    21.1. The Tribunal has no Jurisdiction to hear those parts of the claim for which the claimant has an alternative right of appeal, pursuant to Section 120(7) Equality Act 2010 ("EqA");

    21.2. The claimant's claim is out of time, pursuant to section 123 EqA and, if it was, whether time should be extended under the just and equitable principle;

    21.3. The claimant's claims have no reasonable prospects of success, pursuant to Rule 37(1)(a) of the Employment Tribunal's Procedure Rules 2013 ("ET Rules");

    21.4. The claimant's claims have little reasonable prospects of success, pursuant to Rule 39 of the Employment Tribunal's Procedure Rules 2013 ("ET Rules");

    21.5. To make any further case management orders, including listing the final hearing.

## Housekeeping and conduct of hearing

22. The hearing was conducted by remote video link. Dr Hassaballa had represented himself up to the date of the hearing but instructed Ms Brown through the charity, Advocate shortly before this hearing. Ms Brown's involvement is limited to this preliminary hearing and Dr Hassaballa continues to represent himself.

23. Prior to the hearing, the respondent had submitted a bundle of 193 pages, a copy of **Michalak v GMC and others** [2017] UKSC 71, and Ms Nowell's detailed skeleton argument. If I refer to any of the documents from the 193-page bundle, I will put the relevant page numbers in square brackets next to the reference.

24. Mr Hassaballa submitted two documents via Dropbox. I could not open one, because the firewall on the ET's IT system detected a virus, but I was able to open the other. Ms Brown confirmed at the start of the hearing that the claimant was relying on neither set of documents, so I made no further attempt to view the claimant's documents that I had been unable to see.

25. Ms Brown submitted her submissions (which included a proposed amended List of Issues), a bundle of evidence concerning the claimant's means and an authorities bundle at 8:08am on the morning of the hearing, having been instructed very late in proceedings. I find that Ms Brown had seen the respondent's documents before she wrote her skeleton because she references Ms Nowell's skeleton in her own document. The authorities bundle contained copies of:

    25.1. **Khan v GMC** [1996] ICR 1032 CA;

    25.2. **Chaudhary v Specialist Training Authority Appeal Panel and ors (No 2)** [2005] ICR 1086 CA;

    25.3. **Igboaka v Royal College of Pathologists** UKEAT/0036/09/SM;

    25.4. **Uddin v GMC** [2013] ICR 793 EAT;

    25.5. **GMC and others v Michalak** [2018] ICR 49 UKSC; and

    25.6. **Ali v Office of the Immigration Services Commissioner** [2021] ICR 452 EAT.

26. I considered all the documents and precedent cases submitted before making this decision.

27. Having read Ms Nowell's skeleton before the hearing, I thought it may be relevant for me to have a copy of the claimant's ET1 in a previous claim he had issued against MSE on 13 April 2021 in respect of claims arising out of the Trust Matters, which was produced by the respondent after I emailed its representative.

28. The hearing stated at 10:02am. Ms Brown opened the hearing by apologising for the late delivery of her three documents referenced above. Ms Brown suggested that further particulars of the claimant's claims were needed. Ms Nowell said she hadn't seen Ms Brown's documents, so I adjourned until 11:45am to give her a chance to read and consider them. On the resumption, Ms Nowell confirmed she was ready and that there was no change in the respondent's position in the light of the documents received from Ms Brown.

29. Ms Nowell suggested that any change to the List of Issues would require the leave of the Tribunal but accepted that the changes were not major and were largely pleaded in the ET1. The respondent had comments about the comparators named.

30. During the hearing, Ms Nowell sought to refer to a document in the claimant's Dropbox file that I had been unable to open; a letter dated 17 October 2023. A copy was provided after the hearing by the respondent's solicitor and copied to the claimant and both counsel.

31. Ms Nowell also referred to a page from http://forebears.io concerning the claimant's family name that her instructing solicitor provided a link.

32. 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 proposed List of Issues produced by Ms Brown was materially different to that agreed at the hearing in April 2023.

33. We worked through the proposed list that included the following amendments (using the numbering from the proposed List of Issues):

    33.1. Paragraph 2.2.3 was the same claim as in paragraph 2.1.3 of the original LoI but worded in a different way. It concerned alleged breaches by the GMC of its policy by taking over 12 months to investigate the claim against the claimant;

    33.2. Paragraph 2.2.4 was the same factual claim that the respondent ignored the claimant's pleas to follow its own procedures and policies from November 2021 to August 2022 that had appeared as paragraph 2.1.4 of the original LoI but now relied on a hypothetical comparator;

    33.3. Paragraph 2.2.5 was a different expression of the previous paragraph 2.1.5 from the original LoI concerning the allegation that the respondent had reinvestigate a claim that had already been concluded. Ms Brown acknowledged that the claim as now expressed was not as expressly pleaded by the claimant in his ET1;

    33.4. The claimants of race discrimination were in the alternative to the claimant's claims of sex discrimination because he says that he was treated less favourably than non-Sudanese doctors. There was no comparison based on his Black African ethnicity – it was his nationality.

34. Ms Brown requested that the final hearing be conducted by CVP. I reminded the claimant of the rules regarding giving evidence by video from abroad and included a link to the Presidential Guidance in the case management order that has been sent to the parties separately.

35. As the time points in the case would require an analysis of the evidence in the case, I decided that this was a matter that was best dealt with by the final hearing which would hear all the evidence.

36. I dealt with the applications for strike out on the jurisdictional point under section 120(7) of the EqA and the strike out/deposit for no or little reasonable prosect of success.

37. Ms Nowell made submissions first and relied on her extensive skeleton argument. We took a break at 1:00pm and resumed at 1:17pm with Ms Brown's submissions. She relied on her extensive skeleton argument and spoke until 1:52pm. I had indicated that I would reserve my decision, given the complexity of the matter, but thought it was necessary to hear the claimant's evidence of his means in case I decided to make a deposit order.

38. The claimant gave evidence on affirmation and relied on the 12 pages of documents produced on the morning of the hearing. If I refer to any of the

documents, I will use the prefix “CB” and the relevant page numbers in square brackets (e.g., [CB 8-9]).

39. As the claimant had not provided a witness statement, I allowed Ms Brown to ask him some questions. Ms Nowell then cross-examined the claimant. I asked the claimant a few questions before we finished the claimant’s evidence at 2:15pm.

40. I made some case management orders and confirmed I would reserve my decision. The hearing closed at 2:30pm.

41. **Note – It is entirely my responsibility that it has taken far too long to produce this Judgment and Reasons, for which I can only offer my sincere and profound apologies to the parties and their representatives. Following the hearing, I had to deal with several personal matters that reduced the time I had available to complete what was a complicated decision, whilst also fulfilling my obligations to ongoing hearings and family duties.**

## General Comments

42. I have dealt with the matters of jurisdiction under section 120(7) of the EqA, the time points and the prospects of success in that order, although the circumstances and facts overlap. I have used my findings under one of the applications in the other applications where relevant.

43. I have dealt with the claimant’s claim at its highest. I have considered the claimant’s case as being that which was put in the proposed List of Issues produced by Ms Brown for this hearing.

44. I have considered the matters before me through the lens of the overriding objective; the relevant Rules of the Tribunal; and the statutory and precedent law.

## Jurisdiction - section 120(7) EqA

45. It has never been disputed in these proceedings that at the times with which the claimant’s claims are concerned, the respondent was a qualifications body for the purposes of section 54 EqA. Neither has it been in dispute that qualifications bodies are prohibited from discriminating against individuals upon whom they have conferred a relevant qualification. S.53(2) EqA states that:

> *“(2) A qualifications body (A) must not discriminate against a person (B) upon whom A has conferred a relevant qualification—*
>
> *(a) by withdrawing the qualification from B;*
>
> *(b) by varying the terms on which B holds the qualification;*
>
> *(c) by subjecting B to any other detriment.”*

46. The Tribunal's jurisdiction under section 53 EqA is, however, subject to the provisions of section 120 EqA, which states:

*"(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—*

*(a) a contravention of Part 5 (work);*

*[…]*

*(7) Subsection (1)(a) does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of an appeal."*

47. It is not disputed that:

47.1. The claimant issued Tribunal proceedings against his former employer (not the GMC) on 13 April 2021 claiming disability discrimination, unauthorised deduction of wages, race discrimination, religious belief discrimination, and sex discrimination. All were withdrawn by the claimant.

47.2. On 21 June 2021, the claimant's former employer wrote to the claimant to advise him that he would be subjected to a 24-month (reduced to 18 months on appeal) written warning for the Trust Matters;

47.3. The claimant resigned on 25 October 2021;

47.4. The claimant's former employer reported him to the GMC in respect of the Trust matters on 18 November 2021;

47.5. On 22 November 2021, the GMC's Assistant Registrar promoted the complaint about the claimant to Stream 1, which required a full investigation of the allegations;

47.6. On 6 December 2021, the claimant was notified of the requirement to provide a Work Details Form. The respondent chased the Work Details Form on several occasions in early 2022.

47.7. On 23 February 2022, the claimant was advised that his failure to provide the Work Details Form would be investigated as a new matter. An Investigation Committee meeting to investigate the Work Details Form was scheduled for 14 October 2022.

47.8. On 16 August 2022, the claimant was informed that the Case Examiner for the respondent had concluded that the "reasonable prospects" test did not warrant ant further action in respect of the Trust Matter. The claimant was offered and refused a warning in respect of the Work Details Form.

47.9. On 14 December 2022, the Investigation Committee meeting was postponed again as the claimant's alleged misconduct in failing to notify his then current employers of ongoing fitness to practice investigations.

47.10. The claimant started ACAS early conciliation in these proceedings on 22 December 2022 and obtained a conciliation certificate on 29 January 2023. These proceedings were presented on 29 January 2023.

47.11. It was not disputed that any act or omission that the claimant claims was less favourable treatment because of race or sex that happened before 23 September 2022 may not have been brought in time.

47.12. It was not disputed that, at the date of this hearing, the claimant could appeal any decision that the GMC may make in respect of the Dishonesty Matters. The MPT erased the claimant from the Register on 14 September 2023.

48. I was invited by Ms Nowell to draw a clear line between the allegations that the claimant made concerning the respondent's alleged malfeasance in relation to the Trust Matters and its alleged malfeasance in respect of the Dishonesty Matters (para 4 of her Skeleton).

49. At paragraphs 41 and 42 of her Skeleton, Ms Brown addresses the continuing act point by firstly stating that the claimant referred to an act (and latterly and omission) by the respondent in October 2022 and December 2022 in his claim form and that these acts 'anchor' his claim as being in time. Ms Brown then went on to work backwards from these acts as being "an arguable case that there was a continuing act of discrimination which culminated in the act/omission in October and December 2022."

50. The claims themselves are described by Ms Brown in paragraph 40 of her Skeleton as being from box 15 of the claimant's ET1 [15] as follows (with her emphasis):

50.1. **"One day prior to my second hearing, which was supposed to be held in October 2022**, I received a letter from the GMC informing me that they decided to postpone the hearing case".

50.2. "I was expecting to receive an outcome of the adjourned hearing, but **I did not receive any correspondence from the GMC in December 2022**".

51. For the sake of context, I would note that the sentence before the reference to being told that that the GMC was postponing the hearing in October 2022 was:

*"In September 2022, the GMC decided to close my case with no further action but decided to implicate me in another case, as I was late to provide them with information about my employer at the time."*

52. I therefore find that the two incidents relied upon in October and December 2022 that appear in paragraphs 2.2.9.1, and 2.2.9.2 (race discrimination) and 3.2 (sex discrimination) of the proposed List of Issues can only relate to the Dishonesty Matter. I make that finding because:

52.1. The claimant acknowledges that by September 2022, the Trust Matter had finished; and

52.2. The respondent advised the claimant that the Trust Matter would proceed no further and the only remaining matter at the time was the failure to complete and submit the Work Detail Form.

53. The Work Details Form part of the Dishonesty Matter started on 6 December 2021 when the claimant was required by the respondent to submit the Form.

54. Without hearing the evidence, I find that it would not be in the interests of justice for me to make a finding on whether there was conduct extending over a period but I have serious concerns that I will return to that the claimant will be able to show that the two disciplinary matters are part of a single line of conduct extending over a period.

55. I will return to this point under the time point heading below and the strike out/deposit points below.

56. Insofar as the jurisdictional question of section 120(7) is concerned, I find that the claimant's claim relating to the Trust Matters is not about the decision of the respondent (as this would have been appealable) but is about the way that the respondent conducted that investigation.

57. The claimant's claim on the Dishonesty Matters is, again, about the procedure, not the outcome (which was not decided until 14 September 2023).

58. The relevant statutory appeal from a decision of the GMC is that under section 40 of the Medical Act 1983, which states:

> ***40 Appeals***
>
> *(1) The following decisions are appealable decisions for the purposes of this section, that is to say—*
>
> > *(a) a decision of [a Medical Practitioners Tribunal] under section 35D above giving a direction for erasure, for suspension or for conditional registration or varying the conditions imposed by a direction for conditional registration*
>
> *[…]*
>
> *(3) In subsection (1) above—*
>
> > *(a) references to a direction for suspension include a reference to a direction extending a period of suspension; and*
> >
> > *(b) references to a direction for conditional registration include a reference to a direction extending a period of conditional registration.*
>
> *(4) A person in respect of whom an appealable decision falling within subsection (1) has been taken may, before the end of the period of 28 days beginning with the date on which notification of the decision was*

*served under section 35E(1) above, or section 41(10). below, appeal against the decision to the relevant court.*

*(5) In subsections (4) […] above, "the relevant court"—*

*[…]*

*(b) in the case of any other person, means the High Court of Justice in England and Wales.*

*[…]*

*(7) On an appeal under this section from [a Medical Practitioners Tribunal] , the court may—*

*(a)dismiss the appeal;*

*(b)allow the appeal and quash the direction or variation appealed against;*

*(c)substitute for the direction or variation appealed against any other direction or variation which could have been given or made by [a Medical Practitioners Tribunal]; or*

*(d)remit the case to [the MPTS for them to arrange for] [a Medical Practitioners Tribunal] to dispose of the case in accordance with the directions of the court, and may make such order as to costs […] as it thinks fit.*

59. In this case, I find the case of **Uddin** the most helpful in assisting me make my decision on whether the Tribunal has jurisdiction under section 53 EqA to hear the claimant's claims. I find the factual matrix in the **Uddin** case like this case in that both claimants were seeking redress from an Employment Tribunal for administrative and procedural action by the GMC. Paragraph 30 of the Judgment in **Uddin** makes it clear that there is no right of appeal under the Medical Act 1983 sections 40 or 38 that led up to but did not include the erasure of his name from the Register.

60. Ms Brown did not reference **Uddin** in her Skeleton argument. Instead, her focus was on the Supreme Court case of **Michalak v GMC and others** [2017] UKSC 71 and her attempt to split the claimant's case into two distinct parts as discussed above. As I have explained above, I am unwilling to do that without hearing the evidence.

61. I therefore refuse the application to strike out the claimant's claims for lack of jurisdiction under section 120(7) ERA.

## Time and Amendment

62. I have already indicated above that I do not find it in the interests of justice to determine the time points in this case without hearing the evidence. I would repeat the point made above, however, that the claimant may have some problems showing that there has been a course of continuing conduct that straddles both the Trust Matters and the Dishonesty Matters.

63. There is extensive jurisprudence on the question of amendments to Tribunal claims. The authorities regarding amendments are set out in several 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.

64. 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].".*

65. 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'*.

66. 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'*.

67. 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."*

68. 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."*

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

69.1. 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];

69.2. 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];

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

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

69.5. 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.

69.6. 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].

69.7. 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].

70. 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:

70.1. The claims relating to October and December 2022 were set out by the claimant in his ET1.

70.2. I find that the exercise is one of rebadging as the claims were made in time.

70.3. On the **Selkent** points, I make the following findings:

70.3.1 I find that this is a rebadging exercise.

70.3.2 For the reasons set out above, I find the balance of injustice and hardship supports the claimant's position.

70.4 The claimant is not represented.

70.5 The real practical consequences of granting the application would be to potentially save the claimant's case of alleged race and sex discrimination on the time points.

70.6 Following the guidance of HHJ Tayler, I find that the amendment sought is a major 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'.

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

70.8 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.

70.9 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.

70.10 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 claimant than the respondent.

71. I allow the amendment to the List of Issues (and therefore the claimant's claims) as I find them to be rebadging exercises of matters already in the claimant's ET1. I make that finding because, after balancing the prejudice to the claimant of denying the application to amend and the prejudice to the respondent of allowing it, I find that the greater prejudice is to the claimant.

## Strike Out/Deposit

72. Rule 39 of the Employment Tribunals Rules of Procedure 2013 deals with deposit orders:

*Deposit orders*

*39.— (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

*(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

*(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

*(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*

*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

*(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

*(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*

*otherwise, the deposit shall be refunded.*

*(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

73. The consequences of a Deposit Order on a claimant who goes on to contest the claim are set out in Rule 76 (I have only reproduced the relevant part) – a claimant who loses a claim at a final hearing in respect of which they have been ordered to pay a deposit is treated as having acted unreasonably in pursuing the claim:

*When a costs order or a preparation time order may or shall be made*

*76.— (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*

*(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively, or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; …*

74. In assessing the prospects of success of the claimant's disability discrimination claims I took his claim at its highest. I also considered the overriding objective.

75. I refuse the respondent's application to strike out the claimant's claims as I find that, although his claims at their highest are not strong, I cannot find that they have no reasonable prospects of success without considering the evidence. That will be a task for the final hearing. There are simply too many points of conflict on the evidence, not least the time points, that would be unwise for me to adjudicate upon without hearing the evidence tested under cross-examination.

76. On the question of a deposit, however, I find that the entirety of the claimant's claims have little reasonable prospect of success. Taking the claimant's claim at its highest, he still has a significant number of evidential matters to prove on the balance of probabilities that I find mean that, when taken together, that his whole claim has little reasonable prospect:

    76.1. The actual comparators that the claimant has chosen in his ET1 [30] do not appear to me to be proper comparators that met the requirements of section 23(1) of the EqA in that there are no material differences with the claimant save for the protected characteristic.

    76.2. The height of the claimant's claims is that the respondent did not investigate the comparators. It is significant that the claimant now seeks to rely on hypothetical comparators.

    76.3. The claimant must show that there was a course of conduct spanning the period of his claims to October and/or December 2022. Those two claims appear weak in themselves, as it is difficult to see the detriment in being told that a new claim that has been added means that the existing claim cannot be heard.

    76.4. The claimant may struggle to show the connection between the Trust Matters claims and the Dishonesty Matters claims.

    76.5. The claimant's excuse for failing to provide the Work Details Form appears weak.

    76.6. I agree with Ms Nowell's submission that the respondent's decision to escalate the Trust's disciplinary findings to a full GMC investigation was in breach of the respondent's policies seems to be a claim with little chance of success.

77. For the above reasons, I find that all the claimant's claims of race and sex discrimination have little reasonable prospect of success and that a Deposit Order is appropriate.

78. I was mindful of the requirement not to set the amount of the deposit to be paid so high as for it to be an obstacle to his obtaining justice. I heard evidence from the claimant about his means. I found his evidence to be vague, contradictory and both internally illogical and inconsistent with the documents he provided in evidence, which were entirely inadequate. The claimant's bank statements showed one month of activity from 19 October to 18 November 2023 and showed £10.489.18 of deposits and £9,919.20 of outgoings [CB 2-8].

79. There were three payments to the claimant of £1,000 each identified as "Borrowed Money" from Mohamed Hassaballa made on 27, 29 and 30 October 2023. The claimant said he had borrowed money for maintenance payments (£800) because he was not working. He could not answer what he had not applied to reduce payments if he had no income. He had pad £1.850.00 and £1,900.00 om PayPal. The claimant said these payments were for batteries so he could plug them in and store energy when the tariffs were low and then use the stored energy when tariffs were expensive.

80. I found the claimant's evidence not to be credible on his income and outgoings.

81. The claimant also produced his application to Advocate, the charity that had provided his legal representation at this hearing [CB 10-11]. The document stated that he had £20 in savings, nil monthly income, and was expecting Universal Credit to start in November 2023, which I find to be unlikely if he is spending nearly £4,000 on batteries to store household electricity.

82. The claimant said he had a car that was free of finance and worth £3,000.00.

83. I find that it is just and equitable to order the claimant to pay a deposit as a condition of continuing his claims of £500.00 in respect of the claims or race discrimination and £500.00 in respect of the clams of sex discrimination. That is a total of £1,000.00.

84. I have prepared a separate Deposit Order.

85. I have also prepared a separate case management order. I have amended the dates that have passed since the hearing.

**Employment Judge S Shore**
**Date: 8 April 2024**