EMPLOYMENT TRIBUNALS

Claimant: Mrs Patel

Respondent: Leicester City Council

Heard at: Leicester Employment Tribunal

On: 24 April 2018

Before: Employment Judge Dyal

Representation:

Claimant: in person, assisted by her son Mr Patel
Respondent: Ms Biring, Solicitor

RESERVED JUDGMENT

1. It is just and equitable to extend time in respect of the Claimant's complaint that her dismissal was an act of discrimination arising from disability within the meaning of s.15 Equality Act 2010.
2. The application to amend to include a complaint of unfair dismissal within the meaning of s.98 Employment Rights Act 1996 is refused.
3. The Claimant was a disabled person with the meaning of the Equality Act 2010 at all material times.

REASONS

Introduction

1. This hearing was listed to determine three issues:

    1.1. Whether it was just and equitable to extend time in respect of the Claimant's complaint of discrimination arising from disability within the meaning of s.15 Equality Act 2010 ('issue 1');
    1.2. Whether an application to amend the claim to include a complaint of unfair dismissal within the meaning of s.98 Employment Rights Act 1996 should be permitted ('issue 2');
    1.3. Whether the Claimant was a disabled person at the material time ('issue 3').

The hearing and the concession on issue 3

2. The Respondent had been ordered to produce a bundle for the hearing but it did not do so. Ms Biring said she had not received the tribunal's case management orders (they were sent by email to the Respondent's solicitor then on the record (but now on maternity leave) on 26 February 2018). The tribunal was presented with loose, unpaginated documents by both parties, comprising a variety of medical records and reports. The tribunal decided to paginate and copy the documents in order to keep the show on the road; it was better to lose some time doing that than to adjourn the hearing to another day. The Claimant produced a short witness statement.

3. It was agreed at the outset of the hearing that the tribunal would deal with issues 1 and 2 first and defer issue 3 pending their adjudication. It was envisaged that, if issue 1 went in the Claimant's favour, issue 3 would then be determined in the course of the day.

4. The tribunal heard the Claimant's evidence in relation to issues 1 and 2. The Claimant was cross-examined on her evidence and asked further questions by the tribunal. The tribunal gave the Respondent a further opportunity to cross-examine the Claimant on her answers to the tribunal's questions but Ms Biring was content that she had already asked what she needed to. The tribunal then heard closing submissions on issues 1 and 2. It became apparent during the Respondent's submissions that Ms Biring was not familiar with *Selkent Bus v Moore* [1996] IRLR 661 nor the rather nuanced case-law on amendments subsequent to that leading case, and therefore not in a position to complete her submissions.

5. There was a discussion of how to proceed and Ms Biring's initial suggestion was for the Respondent to make written submissions on the matter. That did not seem the right course to the tribunal since it meant that there would be no prospect of completing the relatively straightforward agenda in the course of the day, would lead to delay and an unnecessary increase in costs. The better course, the tribunal considered, was to print out copies of the sections in *Harvey on Industrial Relations* that deal with amendments and with limitation and give them to the parties. The tribunal did this at about 12.25pm and adjourned the submissions until 2pm.

6. Further submissions were made at 2pm which took some time to complete, by which point it became clear that there was a real risk of the tribunal being unable to make a judgment and give oral reasons on issues 1 and 2 in the course of the day. The tribunal decided to change approach and hear evidence and submissions in relation to issue 3 and then reserve judgment on all matters.

7. The Claimant gave evidence as to disability. Ms Biring tentatively began submissions before indicating that she would like a short adjournment to consider whether or not the Respondent really wanted to contest disability. An adjournment was granted and upon return Ms Biring conceded that the Claimant was a disabled person at the material times. This was a sensible concession.

Findings of Fact

8. The Claimant was employed by the Respondent as a Contact and Assessment Worker from around 2010 to the date of her dismissal on 19 February 2016. During that time she had intermittent periods of total voice loss in which she could not speak above a whisper. She therefore could not communicate orally in anything other than a very quiet setting. The periods of voice loss could last days, weeks, months or more. In late 2014 she lost her voice again and it did not return until long after her employment terminated in February 2016. There is no clear medical explanation for the voice loss. The problem might be psychological rather than physical but there is no suggestion that this serious problem is anything other than genuine.

9. The Claimant was considered unfit for her duties on account of the voice loss and was on long term absence from late 2014 to her dismissal. The Claimant was content to be redeployed but the Respondent considered that there was nothing suitable.

10. The Claimant was a member of Unison and was represented by a Unison representative in the internal absence management procedure that ultimately culminated in her dismissal. It is fair to assume, then, that the representative had a reasonable working knowledge of the Claimant's case or at the least should have.

11. The Claimant was ultimately notified of her dismissal by letter. Upon receiving the letter the Claimant telephoned the representative and asked what she could do about it. She was plainly inquiring whether there was any form of possible redress. The Claimant's evidence was that her representative simply told her that in light of the amount absence she had been correctly dismissed and that the Respondent "knew best". The clear implication of the advice was that there was no form of possible redress and that was the end of the matter. The Claimant's account is that she was not advised that she could, if she wanted, bring a claim in the employment tribunal, nor advised that there were time limits in the employment tribunal. No mention was made of 'unfair dismissal' or 'disability discrimination' or any other legal claim. No form of redress, litigious or otherwise, was mentioned at all. The employment tribunal was not mentioned at all. The Claimant was not sign-posted to sources of information about possible employment tribunal proceedings nor signposted to other advisors. She was simply left with the impression that she had been correctly dismissed and had no form of redress.

12. The tribunal did find this account of the representative's advice odd and surprising; but ultimately accepts it as truthful. Firstly, the Claimant's account of the conversation with the representative was not challenged in cross-examination. It was suggested that the Claimant should have probed the representative for more advice but that is another point. Secondly, the Claimant's evidence was given in a way that the tribunal perceived to be sincere and truthful. Thirdly, this account of the conversation was less surprising when combined with other aspects of the representative's conduct. The Claimant's unchallenged evidence was that the representative always presented to her as appearing to be on the employer's side rather than hers. For, example she did not meet with the Claimant prior to hearings to discuss the case privately (they did not meet at all). Rather, the representative would simply enter the hearing room with management at the start of the meeting. Further, in her ET1 the Claimant also describes the assistance she received from the union in negative terms. So there was a degree of corroboration in the Claimant's wider account.

13. The Claimant accepts that at the time of her dismissal she had vaguely heard of the employment tribunal. However, she did not know that it was a potential forum for complaint or redress for someone in her circumstances. She did not know about the right to complain of unfair dismissal or disability discrimination. She did not know that there were time limits. It did not occur to her to look into such matters until much later because of the intersection of two things. Firstly, because of the advice that she had received from the representative which she assumed to be correct. Secondly, because of what was going on in her family life.

14. At the time of the Claimant's dismissal her husband was critically unwell. He was suffering from an aggressive form of mouth cancer. He passed away in January 2017. It is necessary to say something of the chronology of his illness to understand its impact on the Claimant during the limitation period:

    14.1. In January and February 2016, Mr Patel underwent a series of major operations.

14.2. In March or April 2016, Mr Patel underwent chemotherapy and radiotherapy which, contrary to expectations, made matters yet worse and resulted in his jaw becoming locked. He was unable to eat thereafter and had to be fed via a tube.
14.3. In July 2016, Mr Patel had a yet further operation. This operation went wrong, his jaw was cracked causing serious ongoing pain and he was remained unable to eat.
14.4. In October 2016, Mr Patel began to bleed from his mouth and required a blood transfusion.
14.5. In December 2016, the bleeding started again. Mr Patel had yet another operation which had potentially life threatening consequences. He asked not to be resuscitated if the worst happened. The treating clinicians took the Claimant's instructions on those wishes, fearing that Mr Patel might not know what he was saying. Mrs Patel confirmed his instructions but with great distress. In the event Mr Patel survived the operation.
14.6. Mr Patel then took advice on whether or not he could undertake a pilgrimage abroad before he died. He was advised that he could if he could cope with the travel.
14.7. In January 2017, Mr and Mrs Patel travelled for the pilgrimage. On third day of the pilgrimage Mr Patel passed away.

15. The tribunal finds as a fact that from the date of dismissal to the date of Mr Patel's passing, the Claimant was consumed by concern for her husband. She also had the very demanding task of providing care for him. He could not be left on his own, he was plainly very poorly and had multiple hospital visits every week. Caring for Mr Patel was very demanding in itself. Although these tasks were not entirely down to the Claimant, because her son and daughter in law could also assist, she was the principal carer. The tribunal finds as a fact that this was a deeply traumatic period for Mrs Patel.

16. In short, the tribunal is satisfied that Mr Patel's ill-health, care and hospital needs, were 'all consuming' and that Mrs Patel was not in any meaningful sense able to dwell on her lost employment or seek redress for it prior to his passing. Her mind and time, quite reasonably, were fully occupied with her husband, his health, his care and then his death.

17. Following Mr Patel's passing there was naturally a period of acute grief. Mrs Patel explained that it was not until around April 2017 that she began thinking of anything else and at that point her thoughts turned to returning to work. She began actively looking for work in April 2017. She met with little success because she had a lengthy gap in her employment history on her CV.

18. However, in October 2017 she met the employment coordinator at an organisation called MyLife where she had applied for a job. He did not offer her a job but they did get into a conversation about the termination of the Claimant's employment with the Respondent. He put the idea into the Claimant's head that her dismissal may have been disability discrimination and encouraged her to make a claim to the employment tribunal.

19. The Claimant thereafter looked into the matter and quickly spoke to ACAS. ACAS advised her that there were time limits but that she could put her claim in and see what happened. The ACAS advisor mentioned "unfair dismissal".

20. The Claimant then attempted to get some assistance from the CAB but they were unable to help. She could not afford to pay for legal representation. She therefore started early conciliation herself on 23 October 2017. That closed on 7 November 2017 and the Claimant presented the home-spun claim form on 14 November 2017.

Issue 1: just and equitable extension of time

Law

21. The applicable statutory provisions appear at s.123 and 140B Equality Act 2010. The tribunal has considered these carefully.

22. In assessing whether or not it is just and equitable to extend time the tribunal may be assisted by the following factors (that have their origins in the Limitation Act 1980), see *British Coal Corporation v Keeble* [1997] IRLR 336, among others:

    22.1. the length of, and the reasons for, the delay on the part of the claimant;
    22.2. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced is likely to be less cogent than if the action had been brought within time;
    22.3. the conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests for information or inspection;
    22.4. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
    22.5. the extent to which the claimant acted promptly and reasonably once he knew whether or not the act or omission of the respondent might be capable at that time of giving rise to an action for damages;
    22.6. the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

23. The burden of proof is on the Claimant to satisfy the tribunal that it is just and equitable to extend time: *Robertson v Bexley Community Centre* [2003] IRLR 434.

24. If the explanation for the delay in presenting the claim is that the claimant was ignorant of his or her rights then that is only likely to be a good explanation if the claimant's ignorance was reasonable: *Perth v Tonsley,* unreported EAT, case 0010/10.

25. However, where the Claimant's advisor is at fault that is a highly relevant factor. Generally the fault of an advisor should not be visited on the claimant. The advisor's culpability should not generally be treated as the Claimant's culpability (see e.g. *Virdi v Commissioner of the Police for the Metropolis* [2007] IRLR 24 [34 – 36, 40].

Discussion and conclusions

26. The claim was presented out of time and the issue is whether or not it is just and equitable to extend time.

Length of the delay and reasons for it

27. The delay was lengthy. The Claimant was dismissed on 19 Feb 2016. The primary limitation period expired on 18 May 2016; the claim was presented on 14 November 2017 nearly 18 months later. However, the tribunal considers that there is a good explanation for the delay.

28. Firstly, the Claimant received inadequate advice from her trade union representative. Even if the Trade Union representative was entitled to take the view on the information before her that a claim to the tribunal would not have good prospects of success (as to which the tribunal expresses no view), it was surely incumbent on her to at least tell the Claimant that one option was to make a complaint to employment tribunal albeit at the Claimant's own risk. The representative did not need to endorse this option in order to

raise it and indeed could have made clear, if that is what she wanted, that she did not endorse it. Unfair dismissal was an obvious cause of action to mention as was s.15 EqA. It is elementary to mention time limits for presenting a claim: they are jurisdictional and are of first importance in any advice that is given after dismissal has happened. At the very least the representative should have notified the Claimant that she could, at her own risk, make a claim to the employment tribunal and that there were time limits for doing so. Even if that is wrong, she should surely have signposted the Claimant to further sources of advice in order to consider her options. Instead, the representative simply left the Claimant with the impression that the employer had been entitled to dismiss her because of her sickness absence *and* that there was no avenue for challenge.

29. Although the Claimant had some vague knowledge that the employment tribunal existed, she had no appreciation that it was forum in which she might get redress for her dismissal or that there was a limitation period for bringing a claim. She sought advice from her trade union following her dismissal, was not told that she had a potential employment tribunal claim and was not told that there were time limits for such a claim. In the tribunal's view, in the circumstances, the Claimant's ignorance of these matters was a reasonable ignorance.

30. Ms Biring submits that this was not reasonable ignorance because it was incumbent on the Claimant to probe her the union for further and deeper advice. This is a fair submission, but in the circumstances of this case the tribunal does not accept it. The Claimant's family life was in turmoil and it is entirely understandable that she simply accepted the impression she was given by her trade union.

31. The second, and interlinked, reason for the delay was the Claimant's husband's ill-health, the need to provide care to her sick and then dying husband, his death and then the period of acute grieving all of which consumed the Claimant from the date of her dismissal until around April 2017. She was not reasonably able to think about matters such as work and work-related matters including tribunal litigation, until April 2017.

32. It might be said at this point, April 2017, that it was incumbent on the Claimant to take steps to find out about her employment rights and how to make a claim. However, the tribunal considers that the Claimant remained in reasonable ignorance of her rights. She continued to be under the impression, based upon apparently expert trade union advice, that she had been permissibly dismissed and that that was the end of the matter. Because of the advice she received, it did not occur to her to take further steps to investigate the lawfulness of her dismissal or the steps that she might take to seek redress.

33. That remained the case until the Claimant spoke to MyLife in October 2017 and was told that she might have a claim against the Respondent. At that point she swiftly took steps to investigate the matter, contacted ACAS, attempted (unsuccessfully) to get legal advice, began early conciliation, ended early conciliation and presented her claim all within a reasonable period.

The conduct of the respondent after the cause of action arose, including the extent (if any) to which he responded to requests for information or inspection

34. This does not appear to be a material factor. There is no suggestion that any requests for information were made. Nothing about the Respondent's conduct in the post dismissal period is material.

The duration of any disability of the plaintiff arising after the date of the accrual of the cause of action

35. There is no evidence that the Claimant was under a disability in the sense intended by the Limitation Act 1980 (i.e. literally lacking mental capacity).

Promptness with which the Claimant acted once she knew of the facts giving rise to the cause of action / The steps take by the Claimant to obtain appropriate advice once she knew of the possibility of taking action

36. The Claimant initially acted very promptly. She took steps to get advice from her trade union upon receiving the letter of dismissal. In light of the advice she received and the family issues set out above she then took no further steps until October 2017 when she spoke to MyLife. Thereafter she acted swiftly. She spoke to ACAS, she tried to get legal advice but failed because of impecuniosity, started and then finished early conciliation, and presented the claim swiftly.

The balance of prejudice

37. If time is extended then obviously the Respondent will be put to the trouble of defending the claim. That is always so if time is extended. There is no specific evidence before the tribunal, however, of any forensic prejudice, by which the tribunal means, additional difficulty in defending the claim as a result of it being presented out of time. The Respondent was specifically given the opportunity to lead evidence of any difficulty it may have in defending the proceedings (see the Case Management Summary and Orders of EJ Clarke dated 21 February 2018) but it did not do so (this is not a criticism).

38. The tribunal would accept that forensic prejudice can be inferred if there is a proper basis for it. Ms Biring submits that there is such prejudice because the Claimant did not complain of discrimination at the time and the Respondent did not have a chance to investigate the matters which are by now stale. This is a fair submission to make but it is ultimately all a matter of degree.

39. The tribunal inquired whether the relevant decision makers were still employed by the Respondent or not or whether there would be any difficulty in calling them to give evidence. Ms Biring did not know. It seems to the tribunal that while the considerable passage of time is likely to make it a bit more difficult for the Respondent to explain itself, this should not be overstated in this case because the act complained of, dismissal, does not come out of the blue. The Respondent accepts that it dismissed the Claimant and Ms Biring says that the Claimant was dismissed because of her long-term sickleave. The dismissal was the culmination of a considered internal process. It is fair to assume that some thought was given to the reasons and adequacy of the reasons for dismissing the Claimant contemporaneously. It is also fair to assume that this internal process generated a paper trail and that the trail will assist the Respondent to explain now why dismissal was thought to be the right course. It will not need to rely upon memory alone.

40. On the other hand, if time is not extended, the Claimant would suffer the severe prejudice of her claim of disability discrimination going unheard and of being left without redress if that claim is well founded.

Conclusion

41. All in all, weighing matters up, the tribunal considers that it is clearly just and equitable to extend time.

Issue 2: Application to amend

Law

42. The leading authority on applications to amend is *Selkent Bus v Moore* [1996] ICR 836. The principles, by way of short summary only, are these:

    42.1. The tribunal has a discretion to allow an application to amend.
    42.2. The tribunal should take into account all of the circumstances including the balance of injustice and hardship of allowing or not allowing the amendment;
    42.3. Relevant circumstances include:
        42.3.1. The nature of the amendment;
        42.3.2. The applicability of time limits: it is essential to consider this when it is proposed to add a new cause of action by amendment;
        42.3.3. The timing and manner of the application.

43. The *Selkent* case itself is the subject of much further comment and analysis in subsequent case-law. An important decision is that of Underhill J (as he was) in *TGWU v Safeway Stores PLC* Appeal No. UKEAT/0092/07. At paragraph 13, Underhill J said this:

> *I should also refer to the discussion of this issue in Section T of Harvey on Industrial Relations and Employment Law, since this was relied on by the Chairman in his Judgment. At paras. 311.03-312.06, the editors adopt a threefold categorisation of proposed amendments which "alter existing claims or add new claims" –*
> *"(i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;*
> *(ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and*
> *(iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all".*
> *The discussion which follows points out that there is no difficulty about time limits as regards categories (i) and (ii), since (i) does not involve any new cause of action and (ii), while it may formally involve a new claim, is in truth no more than "putting a new 'label' on facts already pleaded" (see para. 312.01). Cases in category (iii) are discussed at para. 312.04, where the editors say:*
> *"In that situation, the tribunal must consider whether the new claim is in time and, if it is not, whether time should be extended to permit it to be made (Selkent Bus Co Ltd v Moore [1996] ICR 836 at 843H)."*
> *The paragraph goes on to discuss precisely how the line between a "wholly new claim" and a mere "change of label" is to be drawn. Although not explicit, the implication of the passage as a whole is that if the out-of-time claim cannot be categorised as a mere re-labelling of facts already pleaded then as a matter of law the amendment cannot be permitted. If that is indeed its effect, I agree with Mr. Rose that it goes too far. I do not wish to cast any doubt on the proposition that amendments that involve mere re-labelling of facts already fully pleaded will in most circumstances be very readily permitted: there is plenty of authority to this effect, fully cited in Harvey. But, as I have sought to show, Kelly and Selkent are inconsistent with the proposition that in all cases that cannot be described as "re-labelling" an out-of-time amendment must automatically be refused: even in such cases the Tribunal retains a discretion. No doubt 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, but that will be a discretionary consideration and not a rule of law.*

44. The limitation provisions in respect of a complaint of unfair dismissal are well known. They appear at s.111(2) ERA and s.207B. Not reasonably practicable means 'not reasonably feasible' (*Palmer v Southend-on-Sea Borough Council* [1984] IRLR 119).

45. In *Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379*, Lord Denning MR stated this, and it has become known as the '*Dedman principle'* (at 381):[1]

> *"If a man engages skilled advisers to act for him -- and they mistake the time limit and present [the complaint] too late -- he is out. His remedy is against them."*

46. In *Dedman,* Scarman LJ said this in the context of a claimant who delayed because of ignorance of his rights:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance'.'*

47. In *Wall's Meat Co Ltd v Khan [1979] ICR 52*), Denning LJ said this:

> *"I would venture to take the simple test given by the majority in [Dedman]. It is simply to ask this question: had the man just cause or excuse for not presenting his claim within the prescribed time? Ignorance of his rights -- or ignorance of the time limits -- is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."* [emphasis added]

48. Brandon LJ said this:

> *" ... if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."* [emphasis added]

49. The *Dedman* principle is not limited to advice from lawyers but includes advice from trade union advisors: see e.g. *Times Newspapers Ltd v O'Regan [1977] IRLR 101, EAT.*

Discussion and conclusion on Issue 2

50. The issue of unfair dismissal was first raised before EJ Clarke on 21 February 2018. He decided that the claim form did not raise a complaint of unfair dismissal and that an application to amend would be needed if the matter were to be raised at all.

Nature of the amendment sought

[1] The tribunal notes that it raised and explained its understanding of the *Dedman* principle (applicable to unfair dismissal) and the contrasting jurisprudence summarised in *Virdi* with the parties during submissions. Neither demurred.

51. Ms Biring characterised the amendment as a major one because it sought to add a new cause of action. It does indeed seek to add a new cause of action but a more difficult question is whether it is a mere relabelling of the existing facts.

52. This is difficult to answer in part because the proposed amendment has never been written down. In his submissions to the tribunal the Claimant's son, Mr Patel, who spoke well on her behalf, emphasised that the essence of the unfair dismissal complaint was that when the Claimant was originally interviewed for her job, she was in a period of voicelessness. Therefore, he considers, it was inherently unfair to dismiss the Claimant on the basis that she could not do her job because of being voiceless. This is not a point that is raised in the ET1.

53. A further point is that in an unfair dismissal claim, the tribunal will need to closely consider the procedure adopted. The dismissal might be unfair because the procedure adopted was unfair notwithstanding that, procedure aside, the dismissal was a proportionate outcome. In probability the scope and intensity of the focus upon procedure in an unfair dismissal claim would go at the least a bit beyond the consideration of procedure in a s.15 EqA claim.

54. On balance, then the tribunal considers that the proposed amendment is not a mere relabelling exercise but something slightly more than that. It would, however, be fair to say that the proposed unfair dismissal claim is closely related to what is pleaded.

Time limits

55. The test for extending time is not met. For the purposes of s.111(2) ERA, the Claimant is fixed with the negligent lack of advice by her trade union representative and that was one of two concurrent reasons why she did not present any claim within the primary limitation period or thereafter until November 2017 (see above).

56. If the Claimant had been notified of the right to claim unfair dismissal and the time limits for doing so, she still would have had the family problems to contend with. These would have made it 'not reasonably feasible' to lodge a claim within primary limitation period, and would for some time thereafter have excused the non-presentation of the claim. However, once the Claimant was able to turn her mind to other matters in April 2017, it would have been a straightforward enough matter to claim unfair dismissal in short order at that point, certainly by May 2017 (i.e., had she, counter-factually, received adequate advice from her Union).

57. From May 2017, then, given that the *Dedman* principle applies, the failure to present the claim was a failure to present it within a reasonable period after the primary limitation period had expired.

Timing and manner of the amendment

58. The application was made at the first PH in this matter in February 2018. That is, at a fairly early stage of proceedings. It was made orally and has never been written down. There is a general principle that the proposed amendment should be set out in writing so that the Respondent can understand it. That principle is attenuated here because the proposed complaint is easy to understand even without being written down. The tribunal has given the matters under this heading no real weight therefore.

Balance of hardship

59. The reality is that there is little hardship to either party whichever way this application to amend is determined. If it is allowed it will not put the Respondent to any more work although it will expose it to additional possible remedies. If it is refused, the Claimant will be deprived of the opportunity to claim unfair dismissal and of the potential remedies such a claim brings. However, the remedies in discrimination law (although not identical) are broad, pretty effective and in some circumstances much more favourable that those available for unfair dismissal. The Claimant is able to pursue the s.15 EqA claim.

Conclusion

60. All in all the tribunal considers that the application to amend should be refused.

61. The tribunal considers that time is a significant factor: the unfair dismissal claim is (1) out of time, (2) the test for extending time is not met and (3) the unfair dismissal claim would have been out of time *even if* it had been included in the ET1 when it was presented in November 2017 *and* there would have been no basis for extending time had it been thus presented.

62. The tribunal acknowledges that it has a discretion to allow an amendment even if the matter is out of time and the test for extending time is not met (*Safeway*). It does not think it right to do so in the case. There is no significant prejudice to the Claimant if the application is refused.

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Employment Judge Dyal

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Date 26.04.2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

08/05/18

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FOR EMPLOYMENT TRIBUNALS