Neutral Citation Number: [2025] EAT 78

Case No.: EA-2023-000700-NK

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 13 June 2025

Before :

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

JK **Appellant**

- and –

EALING COUNCIL **Respondent**

- -

MR OSCAR DAVIES (appearing via the Direct Public Access Scheme) for the **Appellant**
MR BEN WILLIAMS (instructed by Capsticks Solicitors LLP) for the **Respondent**

Hearing date 15 April 2025

- -

JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

At a preliminary hearing listed to deal with time limits, an employment judge held that the claimant's claim of unfair dismissal was out of time because, although she had some health problems at the material time, her health was not so poor that it was not reasonably practicable to submit her claim in time. He also held that it was not just and equitable to extend time under s.123 of the Equality Act in respect of complaints of disability discrimination and victimisation and refused to make an anonymity order. The claimant appealed on four grounds and sought an anonymity order in the EAT.

Held:

1. In light of the recent medical evidence, it was appropriate to make an anonymity order in the EAT.
2. The appeal challenging the employment judge's refusal of an anonymity order was stayed, because the appropriate course was for the employment tribunal first to reconsider its decision in light of the new medical evidence.
3. The employment judge had repeatedly referred to granting or refusing an application to amend to introduce complaints of disability discrimination and victimisation, whereas permission to amend had already been granted at an earlier hearing and the issue before him was whether it was just and equitable to extend time under s.123 of the Equality Act. That was a legal error and it could not be said that the result would have been the same if he had addressed the correct question.
4. The employment judge did not fail to have regard to the length of delay.
5. The employment judge had made a material error of fact about the effect of the claimant's health at the material time.

MICHAEL FORD KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This is an appeal against the judgment of the employment tribunal ("ET") sent to the parties on 25 May 2023. Employment judge McGrade (the "EJ") decided four matters following a preliminary hearing held by CVP on 18 April 2023. First, he held that the Claimant's claim of unfair dismissal was out of time and it was reasonably practicable to present it in time, so that it was dismissed. Second, he decided that her claims of direct sex discrimination were out of time but it was just and equitable to extend time for the purpose of s.123 of the Equality Act 2010 ("EqA"). Third, he found that her claims of disability discrimination, including harassment related to disability, and victimisation were out of time but it was not just and equitable to extend time, meaning these complaints were dismissed. Fourth, the EJ refused to make an anonymity order under rule 50 of the then Employment Tribunal Rules of Procedure 2013.

2. At a hearing under rule 3(10) of the Employment Appeal Tribunal Rules 1993, four grounds of appeal were permitted to proceed to this hearing. They were set out in revised grounds of appeal dated 10 May 2024.

3. I shall refer to parties as the Claimant and Respondent, as they were before the ET.

4. The Claimant was represented by Mr Davies, who did not appear in the ET, and the Respondent by Mr Williams who did. I am grateful to them both for their helpful submissions and the sensible way they approached the appeal.

Anonymity Application.

5. In a T461 Form dated 10 March 2024 the Claimant applied for an anonymity order in both the EAT and ET. For the Respondent, Mr Williams helpfully adopted a neutral stance on anonymity, both in the EAT and in the ET.

6. **Anonymity order in the EAT**. I deal first with the application for an anonymity order in the EAT. As Mr Davies explained, the Claimant sought anonymity in relation to the judgment of the EAT.

7. I refused an anonymity order at rule 3(10) hearing on 8 May 2024 for the reasons explained

at the hearing and in the subsequent order, including that the then medical evidence gave little details about the detrimental effect of publicity on the Claimant. That position has now changed.

8. In the present application, the Claimant referred to her diagnosis of anxiety and depression and contends that public disclosure of information about her health condition and treatment has contributed, and will contribute, to a deterioration in her mental health. For this purpose she relied on two medical reports: the first is a letter from her GP dated 24 December 2024 explaining the severe deterioration to her mental health caused by details of her health being made public; the second is a letter from Mr Quetty, a clinical psychologist, dated 7 March 2025 explaining that her symptoms of depression and anxiety became more acute because no anonymity had been granted in the proceedings. The Claimant contends that in the circumstances her right to private life in Article 8 of the European Convention on Human Rights ("ECHR") outweighs the principle of open justice.

9. The EAT has specific power in rule 23A to make restricted reporting order in proceedings governed by s.32 of the Employment Tribunals Act 1996 ("ETA"), relevant to disability (it applies to appeals against employment tribunal to make or not to make a restricted reporting order). The power under rule 23A to grant anonymity extends to ET proceedings as well as EAT proceedings; but it is restricted to a restricted reporting order "until the promulgation" of the EAT's decision: see rule 23A(2).

10. However, the EAT's general power to regulate its own procedure under s.30 ETA, interpreted in accordance with the Human Rights Act 1998, gives it a wider power to grant anonymity and restrict disclosure beyond the promulgation of the decision where necessary in order to protect ECHR rights: see ***A v B*** [2010] ICR 849, EAT and ***A v X*** [2019] IRLR 969. There is guidance on how to exercise such powers in ***F v G*** [2012] ICR 246 (Underhill J) at §§23-24 which, though directed to orders in the employment tribunal, is equally of some relevance to the exercise of powers in the EAT.

11. Applying that guidance, I consider it is appropriate to make the anonymity order sought in the EAT proceedings. I accept on the medical evidence before me that the publication of the Claimant's name in these proceedings will affect her Article 8 rights: in particular, the evidence indicates it will lead to a serious deterioration in her health. That is not sufficient to justify making an order, because I must give full weight to the important principle of open

justice. I bear in mind, too, that for the moment the ET judgment, disclosing information about the Claimant's health, is available on the ET's website, so that to some extent information about her health is already in the public domain. But there is now new medical evidence which may cause the ET to reconsider its decision (see below) and the medical evidence shows that the publication of the Claimant's name in the EAT proceedings will independently contribute to a deterioration in her health. In those circumstances, I consider her Article 8 rights bear substantial weight, and the result of the balancing exercise is in favour of the anonymity order sought.

12. **Anonymity order in the ET.** The ET refused an application for anonymity based on rule 50 of the Employment Tribunal Rules 2013, citing ***BBC v Roden*** [2015] ICR 985: see the reasons at §45. Ground 1 of the appeal sought to challenge this aspect of the ET's decision.

13. However, there is now new evidence which was not available to the ET and which might lead it to reconsider its decision. Although the EAT has a discretion to admit fresh evidence for the purpose of an appeal, the usual course of action is to apply in the first instance for the employment tribunal to reconsider its decision: see the EAT Practice Directions of 2023 and 2024 at §§8.12.2-8.12.3.

14. At my suggestion and after taking instructions, Mr Davies agreed that the appropriate course of action in the circumstances was that I should order that this matter should be reconsidered by the employment tribunal in light of the new medical evidence produced by the Claimant and ground 1 should be stayed pending the ET's decision on reconsideration.

15. Accordingly, as I explained at the hearing, I shall include in the order that the matter be referred to the ET for it to reconsider its decision on anonymity in light of the new medical evidence referred to at §8 and that, in the meantime, ground 1 is stayed.

16. Consequently, the only issues to be dealt with at this stage of the appeal are grounds 2-4, concerning the ET's decision on time limits under s.123 EqA.

Factual Background

17. The factual background to this matter is set out in the EJ's written reasons at §§4-21. In short, the Claimant worked for the Respondent as a social worker, commencing as locum in June 2013 and becoming permanent with effect from 14 March 2013. At the time her employment

ended in January 2022 she was employed as an interim senior social worker.

18. After her employment with Ealing terminated, the Claimant began a new job as a social worker with Westminster on 17 January 2022.

19. The Claimant began early conciliation on 16 May 2022: ET §20. Her claim form was received on 23 May 2022. She did not tick any of the boxes in section 8 of the form but complained of being forced out of her job and of her employer breaching its obligations towards her. In a document sent with the claim form, she set out a narrative history of her employment with the Respondent, complaining of matters such as bullying, sex discrimination and not having equal pay compared with a male predecessor.

20. In its response the Respondent denied the claims.

21. The Claimant later made two applications to amend her claim: the first in an email dated 17 June 2022; the second, asking to tick the box in section 8.1 of the claim form relating to disability and to include complaints of discrimination on ground of disability, in an email of 22 June 2022.

22. On 18 October 2022 a case management hearing took place before EJ Khan, who, among other matters, granted the first application to amend (which only made minor amendments and was not opposed); ordered the Claimant to provide particulars of her claims of constructive dismissal and of disability discrimination; and listed a further case management hearing on 1 February 2023. EJ Khan recorded that the claim of equal pay was not being advanced.

23. The Claimant duly provided the particulars ordered by EJ Khan in a document dated 8 November 2022. The document gave details of the Claimant's disability and of her claims of direct disability discrimination (s.13 EqA), discrimination arising from disability (s.15 EqA), a failure to make reasonable adjustments contrary to ss 20-21 EqA and harassment related to disability (s.26 EqA). It also included details of a claim of victimisation under s.27 EqA.

24. A further case management hearing took place on 1 February 2023 before EJ Burns, who sent a written decision to the parties on 16 February 2023. After setting out the background to the claims, EJ Burns referred to the Claimant's outstanding application to amend and her

document dated 8 November 2011. His decision records the following "I considered the amendment application and decided that the amendment application should be allowed. I gave oral reasons for my decision at the hearing. I did not decide whether or not the claims were in time" (§19).

25. EJ Burns set out the list of issues for the full hearing as an Appendix to his reasons. Issues numbered 1-4 on the list were issues of time limits. The Appendix noted that it was not in dispute that the claims of unfair dismissal, discrimination and victimisation were all presented out of time. Issue number 2 was whether time could be extended to present the unfair dismissal claim under s.111 of the Employment Rights Act 1996 ("ERA"); issue (4) was whether time could be extended for the discrimination and victimisation claims under s.123 EqA.

26. This led to the hearing before EJ McGrade which is the subject of this appeal. The structure of the EJ's reasons is as follows.

(1) The EJ correctly set out the issues listed for the hearing by EJ Burns and identified the dates on which the relevant allegations were first made in the proceedings.

(2) Next, the EJ referred to the factual background of the Claimant's employment with the Respondent, the events surrounding its termination, the date on which the Claimant began early conciliation and her health issues at the time. At §17, relevant to ground 4 of the appeal, he found that, after the Claimant stopped work for the Respondent and then went to Spain, she took up a new role as a social worker on 17 January 2022 and thereafter carried out her duties without any absences.

(3) Under the heading "The law", the EJ cited the provisions of s.111 of ERA and s.123 of EqA and referred to some of the key cases on s.123, such as ***Southwark London Borough Council v Afolabi*** [2003] ICR 800 (on just and equitable extension under the predecessor legislation to the EqA) and ***Adedeji v University Hospitals NHS Foundation Trust*** [2021] ICR D5. The EJ noted that, according to the Court of Appeal in these authorities, two factors will almost always be relevant to extensions of time in discriminations cases: the length of, and reasons for, the delay and whether the delay has caused prejudice to the respondent.

(4) The EJ then went on to refer to guidance on applications to amend. What he said is

relevant to ground 2 of the appeal. He stated at §27:

> "When determining the applications to amend, I have considered the factors outlined in ***Selkent Bus Co Ltd v Moore*** [1996] ICR 836 and ***Abercrombie v Aga Rangmaster Ltd*** [2014] ICR 209. I recognise that ultimately I am undertaking a balancing exercise, as set out in ***Vaughan v Modality*** Partnership [2021] ICR 535."

It should be noted that there were in fact no applications to amend before the EJ, as was common ground.

(5) At §§28-32, the EJ decided that, while the Claimant had mental health problems in the period after her employment with the Respondent terminated, her mental health was not so poor that it was not reasonably practicable for her to have presented a claim for unfair dismissal in time. Consequently, this complaint was dismissed.

(6) Next the EJ considered the sex discrimination claims contained in the original claim form, in which the Claimant complained of being forced to reapply for her role at a lower level of pay than a male comparator. He noted that the extent of delay at §34 and the Claimant's reliance on her ill health to explain the delay (§35). Though he had some concerns about the strength of the claim, in light of the Respondent's explanation he considered it had suffered little evidential prejudice by reason of the late claim, so that it was just and equitable to extend time. There is no cross-appeal against that decision and I was informed the complaint has since been withdrawn.

27. The EJ then turned to claims of disability discrimination. He began by stating at §39 that the Claimant "has sought to introduce claims of direct disability discrimination, discrimination arising from disability, failure to make reasonable adjustments and harassment related to disability in her amendment application submitted on 22 June 2022". At §40 the EJ again referred to the Claimant "seeking to introduce a very substantial number of claims of disability discrimination" and to her amendment application. Referring to his early finding at §31 about the effect of the Claimant's health on whether it was reasonably practicable to bring the unfair dismissal claim, the EJ again found that her ill health was not so poor that she could not have brought a claim in time, nor that she was unaware that her condition could mean she was entitled to legal protection (§40). He then stated the following at §§41-44; I have added emphasis which is relevant to ground 2.

> "41. If I refuse the application, the claimant will obviously lose the right to pursue a very substantial number of claims of disability discrimination, which relate to the period of her employment with the respondent. If I allow the application to amend, the respondent will have to investigate and respond to a very substantial number of allegations of disability discrimination relating to events that took place some time ago. Given the number and the nature of those allegations, and in particular the fact that many of the allegations relate to comments made by individuals at meetings that took place between January and June 2021, I consider it is likely to be very difficult for those individuals to recall now what was said at those meetings.
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> 42. There is also nothing in the documentation before me to suggest that the respondent was aware that the claimant was likely to pursue disability discrimination claims. The pre-grievance complaint includes a complaint that another member of staff had alleged that the claimant had discriminated against her. However, there is no suggestion of any discriminatory conduct towards the claimant. The claimant made a point of recording the positive support she had received from her managers. She continued to correspond with the respondent until May 2021, yet did not at any point allege discrimination. She also made no reference to disability discrimination when she lodged the claim.
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> 43. The respondent's counsel indicated that I should take into account the weakness of the claimant's claim, when deciding whether to grant the amendments. I am not in a position to conclude that all of the complaints submitted by the claimant are weak. I consider some of the later complaints are weak, such as the allegations regarding being locked out of her account, as the documentation suggests that she had been locked out, as she had completed her last working day.
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> 44. I consider the potential hardship to the respondent in having to respond to a very significant number of claims of disability discrimination, stretching over a period of more than a year and involving a number of witnesses, all of which are out of time, is so significant that it outweighs the prejudice that the claimant will suffer, if she is not permitted to pursue these claims. In all the circumstances, I am not persuaded that it is just and equitable to allow the disability discrimination claims to proceed."

28. The EJ then considered the victimisation complaints included with the further and better particulars dated 8 November 2022. His conclusion was at §46 (my emphasis):

> "Many of the same considerations apply to the victimisation claims as apply to the disability discrimination claims. If I refuse the application, the claimant will obviously lose the right to pursue those claims. If I allow the application to amend, the respondent will have to investigate and respond to a very substantial number of allegations of victimisation relating to events that took place some time ago. The further and better particulars referring to victimisation, which have been treated as an amendment application, were not submitted until 8 November 2002, some time after the original claim and first amendment request. I am not satisfied that any satisfactory explanation has been provided for the delay. In all the circumstances, I do not consider it is just and equitable to allow the claims of victimisation to proceed.

29. Finally, the EJ dealt with the application for an anonymity order sought by the Claimant: see §§49-50. In light of my decision on ground 1, that it should be stayed pending a reconsideration of the matter by the employment tribunal, it is not necessary to reproduce those paragraphs.

The Grounds of Appeal

30. It is against that background that I consider the three remaining grounds of appeal.

31. **Ground 2**. Ground 2 is, in essence, that the EJ asked himself the wrong question and misdirected himself by treating the Claimant's claims of disability discrimination, a failure to make reasonable adjustments, harassment related to disability - which I refer to compendiously as the "complaints of disability discrimination" - and victimisation as applications to amend, rather than as applications to extend time under s.123 EqA.

32. The source of the tribunal's power to grant amendments is former rule 29 of the 2013 Rules (now rule 30 of the 2024 Rules), on case management, and former rule 41 (still rule 41) by which tribunals may regulate their own procedure. Neither gives any steer on how the discretion should be exercised but guidance is set out in familiar authorities such as ***Selkent*** and ***Vaughan*** to which the EJ referred at §27. Tribunals should, in general, consider the nature of the amendment, the applicability of time limits and the timing and manner of the application, all as part of an overall balancing exercise weighing the balance of justice and injustice of granting or refusing the amendment. The merits of the claim may be relevant.

33. An extension of time under s.123 EqA has a different statutory source, of course, which expressly directs tribunal to consider whether it is "just and equitable" to extend time. The extensive case law provides guidance on how tribunals should approach the exercise of the discretion in s.123. While the factors set out in s.33(3) of the Limitation Act 1980 may serve to illuminate the exercise, as the Holland J explained in the first appeal to the EAT in ***British Coal Corpn v Keeble*** ([1995] UKEAT 496/98),[1] those factors are not to be applied mechanically or rigidly as some sort of check list in exercising what is a "very broad general discretion" in s.123: see ***Afolabi*** per Peter Gibson at §33 and ***Adeji*** per Underhill LJ at §37. Instead, the best approach is for the tribunal "to assess all the factors in the particular case it

[1]Endorsed in the second appeal to the EAT, ***British Coal Corporation v Keeble*** [1997] IRLR 336 at §8.

considers relevant...including in particular... the 'length of and reasons for the delay'": ***Adeji*** at §37. The merits of a claim may also be relevant to this exercise: see, e.g., ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** [2022] EAT 1321, cited by the EJ at §26.

34. The first - and principal - issue is how, on a fair reading of the EJ's reasons, he dealt with the complaints of disability discrimination and victimisation. I acknowledge at the outset that a tribunal judgment must be read fairly and as a whole, without focusing on individual phrases or being hyper-critical, and that where a tribunal has correctly stated the legal principles, an appellate court should be slow to find it did not correctly apply them: see ***DDP Law Ltd v Greenberg*** [2021] IRLR 1016 per Popplewell LJ at §57.

35. I accept, too, that the EJ's judgment itself refers to a decision that the claims of disability discrimination, victimisation and harassment were "out of time and it is not just and equitable to extend time" (§3). I also recognise that the EJ correctly identified the issue before him as relating to time limits under s.123 EqA in §1(c) of his reasons and that he cited s.123 EqA and cases relevant to it. Finally, at the end of the §44 the EJ expressed his conclusion in terms that it was not "just and equitable to allow the disability discrimination claims to proceed" and he said the same in relation to the victimisation complaint at the end of §46.

36. All this is consistent with the EJ asking himself and answering the correct question under s.123 of EqA. Nevertheless, I have concluded that, despite the matters to which I refer in §35 above, in reaching his conclusions the EJ wrongly treated and addressed the complaints of disability discrimination and victimisation as if they were applications to amend to add complaints (which they were not), instead of addressing the correct question of whether it was just and equitable to extend time. Although he expressed the result in §44 and §46 by reference to s.123 EqA, he took a different, and wrong, legal path to reach that destination. My reasons for that conclusion are the following.

    (1) Nowhere did the EJ state that EJ Burns had already decided to allow the amendment application. Of itself, little can be read into this omission; but it sets the context for what followed.

    (2) It is not clear, if the EJ were only dealing with an application to extend time under s.123, why §27 should have referred to his considering the factors in ***Selkent*** and ***Vaughan*** "When determining the applications to amend" (my emphasis), nor why he

should have said he was "undertaking a balancing exercise" in accordance with ***Vaughan***. This is because there were no applications to amend before the EJ and no balancing exercise to undertake as that exercise had already been undertaken by EJ Burns. In its answer, the Respondent said that this paragraph was "otiose"; but it remains hard to see why the EJ should have mentioned it given that there were no applications to amend before him.

(3) While I do not place any substantial weight on the fact that the EJ at §39 referred to the Claimant seeking "to introduce" claims of disability discrimination - after all, the date of the amendment application set the time when these claims were presented - it is notable that neither in this paragraph nor in §40 did that EJ refer to the amendments having already been allowed.

(4) Other passages in the EJ's reasons are only consistent with his treating the issue before him as being to make a decision on an application to amend. As well as §41 beginning by his asking himself what would happen if he refused "the application" - terminology more apt for an application to amend than a consideration of whether it was just and equitable to extend time under s.123 - the next sentence was explicit on what he was considering: "If I allow the application to amend...".

(5) That the statement in §41 was not an example of Homer nodding is confirmed by §43, when the EJ again referred to matters it had been submitted by the Respondent he should take into account "when deciding whether to grant the amendments". Yet, as Mr Williams candidly accepted before me, his submission to the EJ had not being directed to whether the EJ should refuse an amendment but, rather, was aimed at showing that the EJ should refuse to extend time. In the same vein is §46 where, in dealing with the victimisation claim, the EJ once more referred to the consequences if he refused "the application" and if he allowed "the application to amend". None of these references is explicable if the EJ was addressing the question in s.123 EqA.

37. Mr Williams submitted that, despite these references, in substance the EJ's reasons at §§39-44 show he was addressing the factors relevant to whether it was just and equitable to extend time under s.123 EqA, such as the length and reasons for delay, the prejudice to the respondent and the weakness of the claim. One difficulty faced by this argument was that similar factors are relevant to the statutory question under s.123 and applications to amend. In that light Mr

Williams accepted he could not point to any factor addressed by the EJ at §§39-44 which could not have been relevant to the ***Selkent*** exercise.

38. On balance, I consider the EJ's reasoning on the disability complaints at §§40-44 is more consistent with his undertaking a ***Selkent*** exercise than focusing on "just and equitable" extension under s.123 EqA. For example, in §40 he noted that the Claimant was seeking to "introduce a very substantial number of claims of disability discrimination", a consideration which looks more relevant to factor (a) - the nature of the amendment - referred to in the list of relevant factors in ***Selkent*** (844G) than it does to s.123. The subsequent passages fit with this explanation because EJ went on to consider that the claim was out of time and explanation for the delay (relevant to ***Selkent*** factor (c), the timing and manner of the application) and the respective prejudice to the parties of allowing or refusing the claims to proceed.

39. (To some extent, too, a contrast can be drawn with how the EJ dealt with the sex discrimination complaint, which was out of time but was contained in the original claim form, meaning that the EJ did not treat this as an amendment application. In relation to that claim, the EJ said nothing about an application to amend and focused sharply on the length and reason for delay and its effect on the cogency of the evidence, deciding it was just and equitable to extend time: see §§33-38.)

40. For these reasons, I do not accept that the structure of the EJ's reasoning points towards his addressing the s.123 question rather than an application to amend. Once that submission is rejected, the repeated references in the reasons to "applications to amend" or granting "amendments" in §§27, 41, 43 and 46 of the EJ's reasons - which Mr Williams accepted it was hard to treat as innocuous slips - all indicate that the EJ erred in his approach to the complaints of disability discrimination and victimisation. On a fair reading of the judgment as a whole, without being hypercritical or pernickety, the EJ wrongly focused on whether he should grant applications to amend. This error meant, in essence, that he asked himself the wrong question, wrongly directed his reasons to whether the amendment application should be granted or refused and did not sufficiently focus on the actual statutory language and question under s.123. In my judgement, his decision is not rescued by his conclusion at the end of each section that it was not just and equitable to allow the complaints of disability discrimination and victimisation to proceed (§§44 and 46) and nor by the conclusion in the judgment itself. His reasons display a legal error in the route he followed to reach that end point.

41. Given my conclusion that the EJ addressed the wrong question, the second issue is whether that means his decision must stand. Mr Williams contended that the references to amendment were inadvertent and immaterial because in substance the EJ addressed the very same questions as were relevant to an extension of time under s.123 EqA in §§39-46 of his judgment.

42. There is clearly a degree of similarity between the guidance tribunals should follow on whether to grant an application to amend and the guidance on the application of s.123 EqA. For example, both may well involve balancing the prejudice to the parties and considering the length and reasons for the delay in not making the claim beforehand. I do not accept, however, that the questions to be asked on an application to amend and an application for an extension of time under s.123 are so similar that the ineluctable result of the EJ's findings and reasoning, directed as I have found to what he treated as an application to amend, was that no extension of time would have been granted under s.123 EqA. The statutory question under s.123 is distinct to it and the discretion is framed in very wide terms, of what is "just and equitable", as the authorities recognise. It is perfectly possible for a tribunal to reach different conclusions depending upon the lens through which it views an application. For example, according to ***Selkent*** whether the complaint is out of time and, if so, whether time should be extended is a relevant factor, whereas under s.123 it is the statutory question. In addition, the extent to which the complaint is making entirely new factual allegations probably has more weight in the ***Selkent*** exercise than it does under s.123. The width of the discretion under s.123 may also mean that a claimant is more likely to be given an extension of time than he is to be granted an amendment (or at least that some of the complaints are allowed to proceed because of the shorter length of delay or the limited evidential prejudice). All this is only to show that the EJ might have arrived at a different answer if he had not approached the matters as applications to amend.

43. For all those reasons, I do not consider that the EJ's legally erroneous approach cannot have affected the result or was immaterial, nor that I am able to decide, based on the EJ's findings of fact, what the inevitable result would have been if he had directed himself correctly: see Laws LJ in ***Jafri v Lincoln College*** [2014] ICR 920 at §21. It follows that the question must be remitted to the employment tribunal.

44. **Ground 3**. This ground is that the EJ wrongly failed to take into account the length of the

Claimant's delay when it came to the application to extend time in respect of the claims of disability discrimination and harassment related to disability. The assumption of this ground is that the EJ's reasons were addressing the statutory question under s.123 EqA. My conclusion on ground 2 makes this ground of less importance; but I heard full argument on it and so I briefly spell out my conclusions.

45. The factors to be taken into account under s.123 in a particular case are a matter for the tribunal: see ***DCA v Jones*** [2008] IRLR 128 at §50. There is no statutory lexicon in s.123 of the factors to which tribunals must or must not have regard, so that tribunals have a margin of discretion in deciding what factors are relevant and what weight to give to them on the particular facts. A useful parallel may be drawn with the approach in public law where a statute is silent on the factors to be considered by a public body in exercising a discretion. A decision-maker is only required to have regard to factors which are "so obviously material" that it would be irrational in the ***Wednesbury*** sense to ignore them: see ***R (Friends of the Earth) v Heathrow*** [2020] UKSC 52, [2021] 2 All ER 967 per Lord Hodge and Lord Sales at §116-121. A decision-maker is not under an obligation "to work through every consideration which might conceivably be regarded as potentially relevant": see Lord Hodge and Lord Sales at §120.

46. Nevertheless, as Underhill LJ recognised in ***Adeji*** at §37, the length of and reasons for the delay are almost invariably treated as relevant to the exercise under s.123 EqA - no doubt because they are so obviously material to deciding whether it is just and equitable to extend time in the context of a limitation provision. Nor did Mr Williams contend that in the present case the EJ was not required to have regard to the length of the delay: his argument, rather, was that was just what the ET did in fact do.

47. The EJ noted at §39 when the amendment application was submitted (22 June 2022) and the fact that a number of complaints related to incidents which took place in 2020 and 2021. He further observed at §40 that the complaints took place from around November or December 2020 until January 2022 and the amendment application was not submitted until 22 June 2022. In the end, faced with these references, Mr Davies argued that the EJ failed to pay "sufficient" regard to the length of the delay or failed to examine this issue in sufficient depth. But this was not the ground of appeal and, in any case, the weight to give to this matter is quintessentially a matter for the EJ. I do not consider it can be said he failed to consider the length of the delay, so that this ground fails.

48. **Ground 4**. The ground is that it is said ET made a wrong and material finding of fact at §17 that, after Claimant commenced her work as a social worker with new employer, from 17 January 2022, "she carried out her duties until May 2022, when she submitted the application, without any absences". According to the notice of appeal, "her uncontested evidence in cross-examination was that she did have absences due to sickness during this period".

49. Counsel helpfully agreed the relevant evidence before the ET on this point, based on a roughly contemporaneous note sent by the Claimant to her then counsel. The critical agreed evidence, referring to the time after the Claimant took up her new role, is as follows:

> "During cross-examination, the Respondent's Counsel stated that I [the Claimant] had not been off sick, something that I [the Claimant] challenged as being inaccurate and I [the Claimant] declared that I had been off sick. The Respondent did not ask any other questions in reference to my sickness evidence".

That was, as I understood it, the only evidence before the ET on the point: no evidence was led by the Claimant or the Respondent on the point.

50. On this appeal, the Claimant sought to introduce evidence about other points, such as whether she was in fact on "holiday" in Spain at the end of 2021, as the EJ found at §17. But that was not the ground of her appeal, which related solely to the finding about no sickness absences. The Claimant also sought to put in new evidence, not before the ET, in the form of a witness statement from her line manager with the new employer, to the effect that the Claimant had been off sick on one day had taken other absences due to health reasons during this period. However, I do consider this statement is admissible in accordance with the familiar criteria in ***Ladd v Marshall*** [1954] 1 WLR 1489. Even accepting that the Claimant was a litigant in person who felt some embarrassment about approaching her line manager to assist in her tribunal proceedings, I do not accept that this evidence could not have been obtained with reasonable diligence for use before the ET.

51. The remaining question is whether the EJ made an incorrect and material finding of fact in §17 based on the evidence before him. I consider that he did make an incorrect finding of fact. It seems that on the Claimant's undisputed evidence, she had been off sick after she started her new job and did not carry out her duties in her new job "without any absences". I did not

understand Mr Williams to dispute this.

52. The principal argument for the Respondent was that this finding of fact did not "pollute" the judgment: in other words, that it was immaterial. I do not accept that argument. At §31 the EJ decided the Claimant's mental health was not so poor in the three-month period following termination of her employment that it was not reasonably practicable for her to bring a claim of unfair dismissal (§31). As an explanation for this conclusion, he referred to the fact that the Claimant moved to another role once her employment with the Respondent came to an end and was "clearly capable of coping with the demands of that role" (§31). He expressly incorporated that conclusion and reasons when it came to addressing the complaints of disability discrimination: see §40, where he said "I do not accept the appellant's [sic] health was so poor that she was well enough to lodge a claim, for the reasons I have given in paragraph 31 above". The same reasoning presumably formed part of the victimisation claim, to which he said at §46 that many of "same considerations apply".

53. It was, of course, open to the EJ to reach the conclusions he did at, for example, §§31 and 40 about the effects of the Claimant's ill-health even if the Claimant did have some absences once she started her new job. But his reasons to that conclusion referred to the Claimant's ability to cope in her new role, to which the earlier finding of fact was potentially relevant. As a consequence, and in accordance with ***Jafri***, I do not consider I can say that the result would inevitably have been the same had the wrong finding of fact not been made.

54. For that reason, I allow the appeal on ground 4.

Conclusion and Disposal

55. My conclusions are that (i) an anonymity order is granted in the EAT; (ii) ground 1 is stayed pending a reconsideration by the tribunal of the anonymity order in light of the new medical evidence; (iii) grounds 2 and 4 are allowed; and (iv) ground 3 is dismissed.

56. In the event the appeal was allowed, it was not suggested to me that I should exercise the powers of the tribunal in disposing of the appeal under s.35 ETA. The parties were agreed that the priority should be that the matter is heard by a tribunal sooner rather than later, so that remission need not be to the same tribunal. I therefore remit the time limit issues for rehearing before a different tribunal (though not the sex discrimination claim, which I was informed has been withdrawn in any event).