EMPLOYMENT TRIBUNALS

Claimant: **Miss J Woollven**

Respondent: **Archant Community Media Limited**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 15 February 2021**

Before: Employment Judge Midgley

Representation
Claimant: In person
(Miss V Hughes, McKenzie friend)
Respondent: Mr A Watson, Counsel

JUDGMENT

The claimant's applications to amend the claims are dismissed.

REASONS

The Application

1. In this case the claimant, Mrs Woollven, seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. The claimant applies to amend her claims to add six individual respondents and two corporate respondents.

Procedure, hearing and evidence

2. The hearing was conducted using the Cloud Video Platform. The respondent had prepared a bundle of 342 pages consisting of the pleadings and orders, correspondence between the parties and the Tribunal, and contemporaneous documents relating to the CVA and other relevant matters.

3. At the outset of the hearing, having taken time to read the key documents from the bundle, I advised the claimant that as a matter of law she was unable to pursue claims of failure to make reasonable adjustments or constructive

unfair dismissal against individual respondents as such claims could only be brought against an employer. The claimant accepted that and withdrew the application to amend in so far as it raised such claims against the individual respondents.

4. The claimant then developed her application reading from notes which she had prepared for that purpose. Mr Watson then developed the respondent's application and replied to the points raised by Ms Woollven. I permitted the claimant to respond to Mr Watson's submissions to ensure parity.

5. I then took time to consider the documents and the arguments before giving an extempore judgment by which I dismissed the application. Ms Woollven requested written reasons for the decision. A Judgment dismissing the application was prepared but due to administrative backlog it had not been sent to the parties at the time that these reasons were prepared.

6. I also raised the implications of section 109 and 110(2) EQA 2010 and the decisions of London Borough of Hackney v Sivanandan and ors [2013] ICR 672 (CA), and Ross v Ryanair Ltd and anor [2005] 1 WLR 2447, CA relating to apportionment and joint and several liability with the parties and invited their submissions on their effect on the present application.

The claims

7. The general background and procedural history of the claim as it stands before the determination of this application is as follows.

Background to the claim.

8. In November 2016 the claimant, Mrs Woollven, issued proceedings against the respondent ("the First Claim"). Between the 25 September 2017 and 2 October 2017, a Tribunal in Southampton heard and determined those claims and, by a Reserved Judgment on 26 October 2017, dismissed them.

9. The claimant appealed that decision to the Employment Appeal Tribunal, but her appeal was dismissed on 26 November 2018.

The claims in these proceedings

10. Subsequently, on 25 May 2019, the claimant issued fresh proceedings in the Tribunal bringing allegations of disability discrimination contrary to the Equality Act and constructive unfair dismissal ("the Second Claim"). Those proceedings followed conciliation through ACAS which began on 16 April and concluded with the issue of a certificate on 16 May 2019.

11. The nature of the factual allegations was clarified through the provision of amended particulars of claim. In summary (the list below is not intended to be exhaustive), the claimant alleged that:

    a. On 11 May 2017 that her 'private' emails to managers were redirected by three individuals who were employed at different levels of the respondent's HR department (namely Ms Cross, Mrs Wilmott or Ms

Rich) to their email inboxes. The claimant argued that she had discovered that action in August 2017.

b. In addition, the claimant complained that each or one of those individuals had written emails in reply to her private emails and directed the various managers to whom the claimant's emails had been addressed to send their emails in reply to the claimant.

c. Secondly, the claimant alleged that on 20 September 2017 she emailed the Chief Financial Officer, Mr McCarthy, and the Chief Executive Officer, Mr Henry, raising her concerns about the matters described above. The claimant alleged that Mr Henry indicated that they would be resolved after the ET proceedings had concluded (those proceedings being the First Claim), but between 17 and 18 December 2017, Mr Henry refused to address her concerns after the conclusion of the First Claim.

d. Thirdly, on the 14 February 2018, Mr McCarthy dismissed a grievance that she had raised in relation to those matters and she makes various complaints about the rejection of that grievance.

e. Fourthly, the claimant alleges that on 15 and 22 February 2018, Mr Henry refused to investigate the matters that had formed the subject of her second grievance.

f. Fifthly, on 8 March 2018, the claimant's grievance appeal was rejected, and she makes complaints about that rejection.

g. Finally, on 12 March, the claimant complains that Mr Bax refused to investigate her third grievance.

12. The claimant brought complaints of direct discrimination and a failure to make reasonable adjustments and to discrimination arising from disability and victimisation in respect of those factual allegations.

13. The claimant resigned on 29 March 2019, the effective date of termination being 1 April 2019. She alleged that the matters in paragraph 6 above amounted to a breach of the implied term of mutual trust and confidence and alleged that she had been constructively dismissed.

14. The claims in the Second Claim were considered at a preliminary hearing by Employment Judge Emerton on 18 September 2019. Employment Judge Emerton advised the claimant that if she needed to clarify the basis of some of her claims but if, in so doing, she raised further allegations or provided clarification which extended beyond the allegations in the ET1, she would have to make an application to amend the claims. The claims were therefore listed for a final hearing commencing in June 2020 for a period of ten days and a preliminary hearing on 24 January 2020 to determine whether the claimant had a disability and any application to amend the claims.

15. The preliminary hearing came before Employment Judge Harris on 24 January 2020 and at that stage the final hearing was relisted for the 6 – 17 July.

16. A further preliminary hearing took place before Employment Judge Cadney on 20 June 2020, as a consequence of the Covid 19 pandemic, and the final hearing was relisted for 11 – 22 January 2021, with a pre-hearing review on 23 November 2020 to ensure that the case was ready for the final hearing.

The respondent's insolvency

17. On 18 September 2020, the respondent was placed into a Company Voluntary Arrangement ("CVA") in relation to the extensive liabilities regarding its pension provision.

18. By an agreement between Archant Community Media Holdings Limited (in administration) (as seller), Christopher Pole and Howard Smith both of KPMG LLP (as joint administrators of Archant Community Media Holdings Limited (in administration) and TRL 2019 Ltd and Dalriada Trustees Limited (as trustee of the Archant Pension & Life Assurance Scheme) (as buyers) dated 28 August 2020, which completed on 20 October 2020, TRL 2019 Ltd became the majority shareholder of the respondent.

19. Rcapital Nominees Limited is the sole shareholder of TRL 2019 ("TRL").

20. Following the CVA there was a change of control of the respondent on 20 October 2020 to TRL, by reason of the share-transfer.

21. The claimant was notified of her right to claim against the respondent in insolvency by letter from the Supervisor in the Voluntary Arrangement dated 13 November 2020.

22. The claimant was required to prove any claim as against the respondent in the Creditors' Voluntary Arrangement by 18 December 2020. She did not do so.

The applications to amend

23. As a consequence of the respondent's insolvency, at the preliminary review hearing on 23 November 2020 EJ Cadney vacated the final hearing and the claims against the respondent were stayed until 31 May 2021. At the hearing the claimant indicated that she wished to amend her claim to include individual respondents who were employees of the respondent and against whom she had made complaint in the Second Claim.

24. The applications to amend were subsequently made on 5 November in relation to Messrs Bax, Henry, McCarthy, Hastings, Rich, and Wilmott. On 7 November 2020 a further application to add Tara Cross was made, and on 7 December the claimant applied to amend the claim to include a corporate respondent which at that stage was merely identified as "R Capital."

25. On 13 January 2021, the claimant provided further clarification of the application to amend regarding R Capital in which she identified (by reference to the Creditors' Voluntary Arrangement) that the correct respondents were Rcapital Nominees Limited and TRL 2019 Limited.

The applicable law

26. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

27. In Cocking v Sandhurst (Stationers) Ltd and Anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.

28. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.

29. In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment - see Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT in which Mummery J explained that relevant factors would include:

    1 - The nature of the proposed amendment - applications to amend range, 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 for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and

    2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

    3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

30. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed

position with regard to each of these elements is as follows, addressing each of them in turn:

31. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting 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 (often called "relabelling"); 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.

32. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless, whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

33. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, 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".

34. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

35. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand-new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

36. On the applicability of time limits and the "doctrine of relation back", the doctrine of relation back does not apply to Employment Tribunal proceedings, see Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA

Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole:

> "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."

37. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

38. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

39. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and Anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

40. In Reuters Ltd v Cole UKEAT/0258/17/BA, the EAT observed that the test for direct discrimination and the wider factual enquiry needed for such a claim were more onerous to those for a claim of failure to make reasonable adjustments as a direct discrimination claim imposes stringent tests of knowledge and causation and requires the employee to show that he has been treated less favourably than a comparator. That would require the tribunal to undertake a wider factual enquiry than in relation to a claim under sections 15 or 20 EQA 2010, and in particular a comparative exercise to determine whether the claimant had been treated less favourably and if so whether this was on the ground of disability.

41. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT at paragraph 16 which are of general application to applications to amend:

> "The claim, as set out in the ET1, is not something 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 … the claim as set out in the ET1.
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> [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute.
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> [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

42. The EAT has confirmed in London Luton Airport Operations Ltd (1) Ms R Daubney (2) v Mr Peter Levick UKEAT/0270/18/LA that the parties are entitled to expect that Employment Tribunal litigation will be conducted in accordance with issues which have been defined at a Preliminary Hearing –

see Scicluna v Zippy Stitch Ltd & Ors [2018] EWCA Civ at paras 14 – 16 and 24 - The list of issues can of course be amended or augmented; but whether to do so is a matter of case management which should not be ignored.

43. Furthermore, adding a new respondent to a claim under Rule 34 does not equate to instigating a new claim for the purposes of the test in Selkent v Moore in terms of whether there is a new claim or relabelling of a claim or clarification of an existing claim (see Transport and General Workers' Union v Safeway Stores Limited). Secondly, in Alli v Office of National Statistics it was held that if a new claim against new respondents is factually closely linked to the existing claim, then justice would require amendment to be allowed even if the claim were potentially out of time subject to the ongoing requirement to consider the balance of hardship.

44. Finally, in Drinkwater Sabey Limited v Burnett and Anor, it was held that genuine errors rather as to the correct identity of the respondent or their name should not be grounds for declining an application to amend.

Discussion and conclusion.

45. I first consider the nature of the claims that the claimant seeks to add by way of amendment in relation to each of the individual respondents taking them in the order in which they appear in the bundle, identifying whether the allegations are new allegations or relabelling of existing facts, whether the claimant has shown a prima facie case that they were brought within time in the Second Claim, and whether on a summary view taking the claimant's case at its highest they have any merit.

46. Firstly, as against Mr McCarthy the claimant seeks to add allegations pursuant sections 13, 15, 26 and 27 of the Equality Act which are factually identical to those pursued against the respondent in the Second Claim, namely that

    a. on 29 August 2018, he refused to answer questions in relation to the redirection of her emails; and.

    b. on 14 February 2019 Mr McCarthy failed adequately to consider the nature of the claimant's first grievance when he rejected it.

47. If those matters formed conduct extending over a period for purposes of section 123 EQA 2010 then the claims would potentially be in time.

48. Secondly, against Mr Henry the claimant seeks to add claims contrary to sections 12, 15, 26 and 27 EQA 2010 that are identical in terms of the factual allegations to the claims made against the respondent in the Second Claim, namely that he:

    a. refused to answer questions in relation to the redirection of emails in the period between 29 August 2018 and 7 January 2019;

    b. refused between 3 and 7 January 2019 to investigate or delegate the investigation of matters about which the claimant raised complaints;

c. stated on 15 February 2019 that the claimant was seeking to relitigate matters that had been determined the First claim and was unwilling to engage in a facilitated return to work for the claimant; and

d. refused to investigate or delegate an investigation into the matters about which the claimant complained and stated that any further correspondence on the issue would be ignored on 22 February 2019.

49. If those matters were to form conduct extending over a period for purposes of section 123 EQA 2010 then the claims would potentially be in time.

50. Thirdly, in relation to Mrs Wilmott, the claimant sought to add claims pursuant sections 13, 15, 26 and 27 of the Equality Act which are factually identical to those pursued against the respondent in the Second Claim, namely that

a. she 'may have' intercepted and replied to emails in the period 11 May to 1 April 2019. That allegation is so vague that it would not permit a primary inference of discrimination to be drawn given that it is not advancing a positive case but only a putative one; and

b. on 1 June 2017, she forwarded an email to Mr Henry which she had written in reply to an email to the claimant and instructed Mr Henry to send the email as though it was sent from him.

51. If the claim at paragraph 42(a) above were to be struck out on the basis indication, the claims against Mrs Wilmott would potentially be significantly out of time.

52. Fourthly, in relation to Mr Bax, the claimant sought to add claims pursuant sections 13, 15, 26 and 27 of the Equality Act which are factually identical to those pursued against the respondent in the Second Claim, namely that he refused to progress the second grievance on 12 March 2019. That claim would potentially be in time.

53. Fifthly, in relation to Ms Hastings, the claimant sought to add a claim pursuant sections 13, 15, 26 and 27 of the Equality Act which are factually identical to those pursued against the respondent in the Second Claim, namely that she failed to quickly consider the grievance appeal on 8 March 2019. Again, that claim mirrors the allegations made in the first proceedings and would be in time.

54. Sixthly, in relation to Ms Rich, the claimant sought to add claims pursuant sections 13, 15, 26 and 27 of the Equality Act which are factually identical to those pursued against the respondent in the Second Claim, namely that:

a. She "may have" intercepted emails and directed staff to send replies to them which she had drafted between 11 May 2017 and 1 April 2019. For the same reasons as I have given in relation to the identical allegations against Ms Wilmott, those do not even amount to a putative basis for a claim.

b. She repeated a rumour in relation to the credibility and genuineness of the claimant's disability an email in September 2017 a matter which the claimant discovered in December of that year.

55. That claim would potentially be out of time, therefore.

56. Finally, in relation to Ms Cross, the claimant sought to add claims pursuant sections 13, 15, 26 and 27 of the Equality Act which were not made in the Second Claim, namely that as Data Protection Manager Ms Cross must have had knowledge of the matters relating to the interception of the claimant's email and participated in the events and, therefore, she was in some way liable. Again, that does not seem to me to amount to a claim that is more than putative.

57. Although there are aspects of the claims against individual respondents that are in time and aspects which are not, the essential nature of the claimant's complaint is about the manner in which her emails were intercepted and the way in which her grievances in relation to those matters were addressed or not addressed. Applying the test in Hendrix, the claims are linked by common protagonist and themes and there is potentially continuing cause of conduct. I assume for the purposes of this application that that the claims are potentially in time, subject to limitation arguments being run at the final hearing, save where I have indicated they are clearly out of time.

58. The claims against the corporate respondents are in a different category in the sense that the claimant seeks to argue (as a consequence of the content of the CVA) that the two named potential corporate respondents, Rcapital Nominees and TRL 2019 Limited, became or were in some way liable for the acts of the individuals as a consequence of a TUPE Transfer and/or were her employer. These are entirely new claims.

59. Furthermore, the claimant was unable to point to any primary evidence which could establish, even on a putative basis, either that liability transferred to the R Capital Nominees or TRL 2019 as a consequence of the share purchase agreement or that there was a TUPE transfer of her employment to either. There was no evidence adduced at the hearing to demonstrate that there had been any transfer of any of the respondent's assets or staff to Rcapital Nominees Ltd or to TRL, rather, following the CVA there was a change of control of the respondent on 20 October 2020 to TRL, by reason of the share-transfer. Indeed, the respondent continues to trade (albeit subject to the terms of the CVA) and it continues to employ the staff it formerly employed.

60. There was no evidence before me to demonstrate that there had been any transfer of any undertaking, business or part of an undertaking or business within the meaning of Regulation 3 of TUPE (either to R Capital Nominees or to TRL). Even had there been such evidence, it would not have assisted the claimant, as she has never been employed by TRL or by Rcapital Nominees Ltd; she resigned more than 18 months before TRL acquired any shares in the respondent.

61. I turn then to my conclusions in relation to the issues that I have to decide in light of the facts that I have set out.

62. Firstly, it seems to me and this is not a new claim but is a relabelling of an existing claim applying Transport and General Workers' Union v Safeway Stores for the purposes of the Selkent v Moore test.

63. Secondly, this claim is very close to the existing claims in that it contains identical allegations to those that were set out in the claim that was brought within time which was due to be heard in January 2021. The only exception to that is the claim against Ms Cross which is on the face of it hopeless and a new claim.

64. Thirdly, in the sense that the individual respondents (or at least the majority of them) were to be called as witnesses in response to the claims and they address the allegations which are factually identical that the claimant seeks to bring against them as individuals there is little or no forensic prejudice to the respondents because their statements have been prepared and the documents relating to the issues were available to them at the time, they prepared those statements. The fact that the claim may potentially be out of time (applying the decision in The Office of National Statistics v Ali) is not of itself a reason to reject an application to amend.

65. However, allowing for all of those matters, it seems to me there would be considerable legal or liability prejudice to the individual respondents if the claims were to proceed. That is because at the time that the claims were issued in May last year the respondent had accepted vicarious liability for the acts of all of the individually named employees. Now that the respondent is placed within a CVA and the claimant seeks to add individual respondents, they may find as a consequence of the applications of section 109 and 110 EQA 2010 and Sivanandan and Ross that they are jointly and severally liable for the acts of other respondents to the claim and that any apportionment in relation to those claims would have to be determined at a separate hearing at a County Court as the Employment Tribunal has no jurisdiction over those matters.

66. In addition, it seems to me that the timing of the application is pertinent to the balance of prejudice. The claimant knew at all times up to and including the issue of the First Claim who the individuals were that she said had mistreated her and it was open to her at that stage to include them as individual respondents. She fairly says that the need and to add them as individual respondents crystallised upon the communication of the CVA and the fact that she could seek to recover only five pence in every pound that was owed or found owed.

67. She learnt of the CVA in September 2020 but did not apply to amend to include the individual respondents until November and December 2020. That must be viewed in the context that many of the acts about which she claims occurred as early as 2017 and at the time when the claimant knew precisely who had done what. In addition, the claimant opted not to seek to prove any claim against the respondent in the CVA.

68. Put simply, the insolvency of the respondent means that it is not in a position to meet its liabilities in respect of any claim that the claimant may bring. Either the proposed individual respondents are forced to accept that liability or the

claimant is left in a position where she is unable to pursue the claim against them.

69. I have to consider the nature and balance of the prejudice to the two respective parties. The individual respondents may find if the application were to be permitted that they would need individual representation because their interests do not align and that may well add to the length of the proceedings and indeed the length of any proceedings in the County Court. It may be that they have no insurance that would protect them against that liability, possibly because of the timing of this application, the events in question relating back to 2017. That, it seems to me, is a significant prejudice.

70. Conversely, the claimant was able to issue the Second Claim in May 2019 and at that time it was open to her to include the individuals as joint tortfeasors or individual tortfeasors by naming them as individual respondents. She has therefore potentially lost the ability to bring a claim against the individual respondents as a consequence of her own choice and default.

71. The balance of prejudice in relation to the individual respondents therefore leads me to conclude that it would not be in the interests of justice to grant the application to amend.

72. I turn then to the two corporate respondents. The nature of the claimant's application as against those two companies is not immediately apparent in this sense. The claim simply says that they are liable for the actions of the individual employees. The basis of that liability on the claimant's application is that there was a TUPE transfer that took place as a consequence of a sale purchase in October 2020. A sale purchase is not in law the same as a transfer of an undertaking, and the respondent continues to trade albeit within the constraints of the CVA. There Second Claim does not include any claim against the corporate respondents any claim added by amendment would be significantly out of time.

73. In short, the proposed claims against the corporate respondents are out of time and I can see no basis whatsoever on which either R Capital Nominees or TRL 2019 Limited could be said to be liable for the acts of the individual respondents such that it would be appropriate to add them as respondents to these proceedings.

74. The consequence of all of those matters is that the applications in their entirety are dismissed.

<u>The disposal of the Second Claim</u>

75. The only existing claim is that the Second Claim against Archant Community Media Limited which was stayed until 21 January 2021. The stay was granted because the Supervisors objected to the claim proceedings as the respondent was subject to a CVA. The consequence therefore is that the claimant not having proved a claim within the insolvency proceedings within prescribed the time frame, it is difficult to see how the Second Claim could proceed in the Tribunal, but that is not a matter that I have to address today.

76. The parties must therefore write to the Tribunal stating what action should be taken in respect of the Second Claim by 1 March 2021.

Employment Judge Midgley
Date: 09 March 2021

Judgment and Reasons sent to the parties: 10 March 2021

FOR THE TRIBUNAL OFFICE

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.