

Amending a claim within the limitation period

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What is the approach to be taken when a claimant seeks to amend their claim while still within the primary limitation period for the events which the amendment concerns?

This was the question considered by HHJ Auerbach in [Barbosa Dethling v The Metropolitan Police Service \[2025\] EAT 58](#), when Ms Dethling sought to amend her claim to add allegations of post-dismissal victimisation.

At first instance, Ms Dethling's application had been refused on the basis of concerns about its merits which meant that the EJ had considered that the balance of prejudice lay in favour of the respondent, rather than her.

The EAT reminded itself that the merits may be properly weighed into the balance in determining the balance of prejudice (although this must be with "care and caution", per *Kumari v Greater Manchester Mental Health NHS Foundation Trust*). But that was a case where the amendment concerned allegations that would be out of time if brought as a fresh claim.

Considering the position where such an amendment, unlike in *Kumari*, was made in time, HHJ Auerbach declined to follow the invitation of counsel for the appellant in this case that it would *never* be appropriate to have regard to the merits of a claim, short of it having no reasonable prospects, where the amendment is brought in time.

While noting the unattractiveness of potentially requiring a fresh claim to be brought, and the possibility (some Tribunal users would say inevitability) that such an application would not be dealt with in time for the claimant to then do so, HHJ Auerbach ultimately concluded that "this is one of those instances where the appellate court's stance should be, "Never say never"."

Having concluded that it was potentially open to the EJ in this case to take into account the merits even where this fell short of them having no reasonable prospect, he then went on to

find that the EJ's assessment of those merits was deficient: "in weighing the merits of that issue the tribunal was required to use as its yardstick a correct underlying approach to the law".

The EJ had placed too much weight on the Respondent's justification for its treatment and not whether the Claimant's response to it was reasonably perceived by her as to her detriment (as per *Shamoon*). They also appear to have considered the wrong test in assessing merits in relation to causation.

This is a useful judgment making clear that, even when the amendment concerns a claim brought in time, merits can at least potentially be "added to the mix" – even if the claim would not be liable to being struck out.

As a note of caution, however, whenever merits are taken into account in such applications, given the summary nature of many such judgments: the broad discretion allowed to employment judges in determining amendment applications themselves does not translate into a similarly broad discretion in determining what the merits of the underlying claim are, and the correct legal tests still need to remain firmly in mind.

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