EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107395/2020

Held by CVP on 14 May 2021

Employment Judge McManus

Mr Craig Stewart	**Claimant** **In person**
SSE Generation Limited	**Respondent** **Represented by:** **Mr Meechan,** **Solicitor**

PRELIMINARY HEARING DECISION

Decision

1. The ET1 is amended in terms of the claimant's Answers to the Order issued with Note from the Preliminary Hearing of 29 January 2021.

2. The claims of disability discrimination under the Equality Act 2010 are not timebarred.

3. The claim of victimisation under section 27 of the Equality Act 2010 is struck out as having no reasonable prospect so success.

4. The following claims proceed to a Final Hearing (unless withdrawn by the claimant):-

- Unfair dismissal
- Disability Discrimination under the Equality Act 2010 section 13
- Disability Discrimination under the Equality Act 2010 section 15
- Disability Discrimination under the Equality Act 2010 section 19
- Disability Discrimination under the Equality Act 2010 section 21
- Disability Discrimination under the Equality Act 2010 section 26

5. Any application for expenses will be considered following the conclusion of the Final Hearing.

REASONS

Background

1. There have previously been two Preliminary Hearings in this case conducted by telephone for the purposes of case management (Telephone Case Management Preliminary Hearings ('TCMPH')). These took place on 29 January 2021 and 15 March 2021. The Note issued after each TCMPH is in the Joint Bundle produced for this Hearing, at pages 58 - 65 and 85 -89 respectively.

2. At the TCMPH on 29 January 2021, the claimant was directed to answer a number of questions, set out in an Order. Those questions were put to the claimant at the respondent's representative's request. He did so in his Answers to Questions which is now at pages 66 – 79 of the Joint Bundle.

3. Following receipt of those Answers, it was the respondent's representative's position, as set out in their email of 9 March 2021 (page 80 – 83), that new claims were being brought in those Answers.

4. Following the TCMPH on 15 March 2021, this Preliminary Hearing ('PH') was arranged to determine the following preliminary issues:-

(1) whether the claimant should be permitted to amend his claim so as to incorporate the answers given by him to the questions order and make a claim of disability discrimination as set out therein,

(2) whether, if the claimant is so permitted to amend his claim, all or part of the claim should be dismissed as being time barred,

(3) whether, if the claimant is permitted to amend his claim, the claim of disability discrimination should be struck out in whole or in part on the basis that it is misconceived and/or has no reasonable prospect of success.

5. In the Note issued following the TCMPH in March 2021, the claimant was directed to section 123 of the Equality Act 2020 and reference was made to the cases of *Selkent Bus Co Ltd v Moore* and *British Coal Co Ltd v Keeble* being relevant to the issues for determination at this PH.

6. It was confirmed to the parties by email from the Tribunal dated 6 April 2021 that the only proposed amendment being considered at this PH was the claimant's answers to the questions order, now being in the Joint Bundle at 66 – 79. It was the respondent's representative's position that the ET1 form does not contain a claim in respect of harassment or victimisation.

7. In summary, it is the respondent's position that no claim for disability discrimination (or harassment or victimisation) was brought in the ET1, that the claims of disability discrimination brought in the proposed amendment (being the claimant's Answers to the Order) are time barred and lacking in specification and that amendment in those terms should not be allowed, failing which the disability discrimination claims should be struck out. It is accepted that the unfair dismissal claim was brought within the relevant time period, with regard to the extension provided by the issue of the ACAS EC Certificate.

8. In summary, it is the claimant's position that claims of disability discrimination and unfair dismissal were brought in the ET1 and that the relevant date for calculation of the time period within which the claims of disability

discrimination should be brought is 15 September, being the date of the purported last act of discrimination, being the decision from the disciplinary appeal.

9. The parties had helpfully liaised to prepare a Joint Bundle containing all documents relied upon at this PH. The numbers in brackets refer to page numbers in this Joint Bundle. This Joint Bundle was produced in digital format only (PDF). The PDF Joint Bundle was very helpfully indexed and bookmarked.

Proceedings at PH

10. The claimant is unrepresented. The respondent is professionally represented. At the outset of this PH, I explained the overriding objective of the Tribunal under Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'). I explained that the purpose of this PH was only to determine the preliminary issues, as set out above. I explained the procedure which would follow at this PH. It was agreed that evidence would be heard from the claimant relevant to the issue of timebar, followed by submissions, firstly from the respondent, with the claimant then having the opportunity to comment on the respondent's representative's submissions.

11. The respondent's representative had helpful sent his written submissions to the Tribunal and the claimant prior to this PH. The claimant confirmed that he had read these submissions. The claimant's evidence in chief was primarily given by him answering questions put by me. The claimant was also given the opportunity to state anything else he considered to be relevant to the issues. The claimant was asked questions in cross examination by the respondent's representative. The claimant was given the opportunity to give further evidence on matters arising from the cross examination. Following the claimant's evidence, the respondent's representative adopted his written submissions and made supplementary oral submissions. The claimant then made his submissions.

Findings In Fact

12. The following facts relevant to the issues for determination at this PH were admitted or were found to be proven. Where '(sic)' appears it denotes a typo from the claimant's ET1.

13. The claimant's employment with the respondent commenced on 29 September 2014 and terminated on 22 July 2020. The claimant started early conciliation 6 October 2020 (Day A) and the certificate was issued on 6 November 2020 (Day B). The ACAS EC certificate is document 1 in the bundle, page 3. The claimant presented his ET1 using the online form on 20 November 2020 (Document 2, pages 4 to 15).

14. The claimant appealed against the decision to dismiss. The letter setting out that decision is dated 15 September 2020.

15. The claimant first sought advice in respect of the matters he seeks to bring in these proceedings from CAB in April 2020, following him first being told by the respondent that a fact finding investigation would be carried out re him. The claimant obtained advice from a CAB advisor on four or five occasions between April 2020 and his dismissal in July 2020. The claimant first contacted ACAS in respect of the matters he seeks to bring in these proceedings in July 2020. The claimant was given advice about time bar from the CAB advisor and from ACAS. The claimant also obtained information from the ACAS website. His reference in his claim form to 'middle band'; 'aggravated damages'; 'victimisation' and 'Injury to feelings' were from information which he saw on the ACAS website.

16. The claimant has been diagnosed with chronic stress and anxiety. He has been on medication for his mental health conditions for around 10 years. At the time of his dismissal the claimant was prescribed an antidepressant (Sertraline 50mg).

17. In the months after the claimant was dismissed by the respondent, the claimant felt under a number of stressors, including from the effects of financial repercussions of having been dismissed, dealing with concern about

the risk of Covid – 19, having to move in with his parents, and his marriage difficulties. He felt that his life had been 'turned upside down'. His confidence was negatively affected and it was a difficult time for him. The claimant attended a number of appointments with his GP over the period from when he was dismissed until when he lodged his ET1. His Sertraline medication was increased to 100mg at some point between his dismissal and Christmas 2020. He spent time using various self help resources such as Apps on his phone to try to improve his mental health.

18. On 11 September 2020 the claimant sent an email to the respondent (120) seeking an update on his appeal. In that email he stated:- '*As you are aware this is eating into my timescale to take my case to a tribunal."*

19. After the claimant's dismissal by the respondent, the claimant began several new jobs which did not continue. The claimant completed the ET1 form himself, on his mobile phone, on 20 November, which was his first day of employment with a new employer. It took him about an hour to complete the form. He then submitted the ET1 on line on the same day.

20. The claimant ticked the box at 8 indicating that he was bringing a claim of disability discrimination because he believed that that was applicable to what he believed to be why he was dismissed. He did not tick the box indicating a claim relying on the protected characteristic of marriage and civil partnership.

21. The claimant believed that he had submitted as attachments to this on line application his grievance letter of 25 May 2020 (93 - 95) and the letter which is the respondent's decision on the appeal from his dismissal (98 - 115), dated 15 September 2020.

22. In his ET1, at section 8.1 (page 9 of the bundle), the claimant ticked boxes indicating claims of unfair dismissal, discrimination on the grounds of disability, being owed 'other payments' and another type pf claim, stating '*Financial loss, aggravated damages, victimisation and injury to feelings*'. At section 8.2 (page 10), he put:-

"*After raising safety concerns regarding covid-19 and my need to self isolate I was clearly treated differently from other staff who also raised concerns and isolated and I was witch hunted.*

Would it be possible to have an email address to send both my grievance and appeal letters to as I feel my case is very complex and these documents round everything together"

23. At box 9.1 boxes are ticked indicating that the claimant is seeking re-engagement re the unfair dismissal claim, compensation and a recommendation re discrimination.

24. At box 9.2, the claimant put:-

"Unfair dismissal
I wish to claim £32,000 (I years salary) for unfair dismissal.

Disability discrimination
I wish to claim £27,000 for disability discrimination, my reasoning behind this sum is that it falls into the 'middle band' which I believe my case is because it happened on several occasions."

Financial loss
I wish to claim £10,000 for aggravated damages and feel this is a satisfactory amount due to my employer (not medically trained) making an assumption on my condition during my appeal against my dismissal.
I did not receive any outcome of my formal grievance despite it being accepted.

Victimisation
I wish to claim £50,000 for victimisation. I was the only employee placed on a fact find due to Covid related absence, despite others being absent / self isolating due to a family member presenting symptoms.
I was placed on an (incomplete) fact find regarding my wife's whereabouts the day after I raised valid safety concerns.

Injury to feelings"

25. There appears to be some further type which does not appear on the printed ET1 document.

26. At box 12 of the ET1 form the claimant ticked the box to say that he was not disabled. The claimant did this because he thought that referred to whether he had a disability which made it difficult for him to fill out the form. The claimant was tired and felt under stress at the time of his completion of the ET1 form.

27. At box 15 the claimant put:-

"I have a witness statement from a colleague saying he heard my manager talk about how everyone's work was getting looked into but they were only interested in finding faults with mine.

I have witness statements from various colleagues confirming that Covid was poorly managed at site despite me raising concerns.

I have a doctors letter confirming that I was off sick with covert symptoms when my employer didn't believe me.

I have various emails and txt (sic) messages to my manager stating that I felt stressed leading up to my fact find's (sic) however the reason for not accepting my appeal was that 'they didn't believe stress played a part'.

I gave my employer my written permission to contact my GP regarding my absence but they never obtained the information they needed putting and (sic) unbelievable amount of pressure on me to get these during a global pandemic."

28. The ET3 response was submitted by the respondent's representative. The defence to the claim was set out in a separate paper. This set out preliminary issues under hearings of 'Specification'; 'Time Bar' and 'Disability Status'. Under the heading 'Factual Pleadings' are sub-headings 'Disciplinary Investigation (1); Invite to Disciplinary Hearing (1); Grievance; Disciplinary

Investigation (2); Invite to Disciplinary Hearing (2); Disciplinary Hearing; Grievance Outcome; Disciplinary Outcome; Disciplinary Appeal. There are further headings of 'Claimant's Allegations'; 'Legal Pleadings' (with sub-headings of Unfair Dismissal; Disability Discrimination; Victimisation and Other Payments); 'Remedy' and 'General'.

29. The respondent's response indicated that they considered the disability discrimination claims to be timebarred and insufficiently specified. They denied all claims.

30. At the stage of Initial Consideration, the claim was considered to contain a claim of discrimination. Following standard procedure for discrimination claims, a Preliminary Hearing ('PH') was fixed for case management purposes and Agenda forms were sent to parties. In advance of this PH the claimant and the respondent submitted their completed Agendas. The claimant provided some additional information in his Agenda in relation to the claims he was making.

31. The claimant confirmed in his Agenda form (in response to standard call 2.1 re details of the claim) that he was making a claim under the Equality Act 2010. In that Agenda form he did not specify any particular section of the Equality Act that he was relying on. He requested additional information from the respondent, stating:-

> "w*hen I was first made aware of the 'whistleblower' I was told that the we are willing to provide a statement, I have requested this several times with no success. My wife questioned this after receiving information following a subject access request and was told that there was no 'whistle blower' but that Scott Phillips had received a verbal account of this. After reading the employment tribunal response form, the respondent solicitor still refers to this as 'an anonymous whistleblower' I would like clarity on how this information was received and also the statement which I have been told that the 'credible source' is able to provide"*

32. At box 3.3, in relation to the claimant's calculation of what he considers to be appropriate compensation, the claimant includes the following under the heading of 'Victimisation':-

> *"I wish to claim £50,000 for victimisation. I was the only employee placed on a fact find due to the Covid related absence despite others being absent self isolating due to a family member presenting symptoms. I was placed on an (incomplete) fact find regarding my wife's whereabouts the day after I raised valid safety concerns. The Equality Act 2010 states 'A person (A) victimises another person (B) if A subjects B to a detriment because:- giving false evidence or information or making a false allegation is not a protected act if the evidence of this or information is given, or the allegation is made, in bad faith (sic)."*

33. Also at box 3.3, in relation to the claimant's calculation of what he considers to be appropriate compensation, the claimant includes the following under the heading of 'Injury to feelings':-

> *"I wish to claim £40,000 for injury to feelings I believe this to be a more serious case as there has been a length (sic) campaign of discriminatory harassment. I have had months of both physical and emotional symptoms whilst this was ongoing, as a result and on the advice of my GP my medication has been increased significantly and I will continue to be on the schools for the foreseeable future.*
>
> *The total claim I am submitting as detailed above amounts to £206025.00"*

34. The claimant gives further details of his position in respect of disability discrimination in his answers to the questions in Schedule 1 of his completed agenda form claim. In section 4 of Schedule 1, in respect of direct discrimination the claimant states:-

"B*etween March 2020 and July 2020 I received direct discrimination from Scott Phillips, David Fraser, Leo Green, Willie Caithness and Ciaran McGuire.*

I have suffered from mental illness for 10 years and in between March 2020 and July 2020 made Scott Phillips and Leo Green aware of how I was feeling due to the responsibilities of being a key worker during the coronavirus pandemic but also living with my wife and youngest daughter who have a blood condition and compromised immune system.

I raised safety concerns regarding infection control at site and noted in the email to Scott and Leo about my personal issues and how I wasn't trying to be difficult but just wanted to highlight how much of a concern was for myself and my family. I received an abrupt and unhelpful reply stating that I could take my own car to work if (sic) wasn't happy sharing a van (this wasn't an option as I use my wife's car which she relies on and isn't insured for business use).

The next day after sending my email I get a notification that I am on a fact find investigation regarding my covert 19 related absence, however Ciaran McGuire made me aware that the purpose of this investigation was also to gain information with regard to my wife's whereabouts when I followed government advice and self isolated for 14 days when she had symptoms of covid- 19.

Several other staff members and a griffon wind farm self isolated when they or their family members presented with symptoms however I was the only on (sic) who was investigated on this matter. I believe this to be discrimination.

Prior to this I was absent for three days with what I believed to be covid- 19. I presented with a temperature, shortness of breath, extreme fatigue and general malaise. I had contacted out of hours who also believed it could have been Covid 19 but after they saught (sic) advice several hours later from a specialist at the infectious diseases unit I was advised to return to work when all symptoms stopped. I had

a sickness absence meeting on my return which was satisfactory, with no concerns raised. I'd like to highlight at this point that I made management aware when I was returning to work and nobody expressed any concern.

I gave SACE written permission to contact my GP to confirm these events which they never pursued.

I was placed in a position of mistrust."

35. In response to the question in that section 4 '*Why do you consider this treatment to have been because of a protected characteristic?',* the claimant replied:-

"*My employer is aware of my struggles with my mental health condition. I raised these because it was causing me an unimaginable amount of stress and upset, there was no personal risk assessment form done, I was never given any reassurance, I was expected to carry on at work as normal during times which were very abnormal."*

36. In response to the question in section 5 of that Schedule 1 '*What is the 'provision, criterion or practice' which you say the respondent has applied to you?"* the claimant replied:-

"*After I raised safety concerns, there was an extensive audit was put in place (sic)"*

37. The claimant does not state in his Agenda when he says that alleged provision, criterion or practice ('PCP') was applied to him. At section 5(ii) of Schedule 2 of the Agenda, he relies on the PCP being applied to all technicians at Griffin Wind Farm. He states "*however I believe?',* the claimant replied:-

"Yes, because of prior unfair treatment and harassment from management leading up to this audit it was a deliberate attempt to set me up to fail."

38. At section 7 of Schedule 1 of his Agenda form, the claimant seeks to rely on harassment. His answer to the question '*Why do you consider that the conduct was related to a protected characteristic?*' is:-

> *"I believe this is related to the protected characteristic 'marriage and civil partnership' under the Equality Act 2010, on this occasion I have been treated unfairly and on reasonable (sic), other technicians at griffon wind farm self isolated due to there (sic) wife's presenting Covid 19 symptoms, however, I was the only employee asked for evidence that my wife was not in her place of work."*

39. The claimant seeks to rely on 'marriage and civil partnership' as a protected characteristic.

40. Also in that section 7, the claimant's answer to the question '*Do you say that this conduct was of a sexual nature or related to sex (as in gender)? If so why?'* is '*No'*.

41. At section 8 of Schedule 1 of his Agenda form, the claimant seeks to rely on victimisation. His answer to the question '*Which of the protected acts described in section 27(2) of the Equality Act have you carried out*?' is:-

> *"Used my safety licence to raise safety concerns."*

42. The claimant seeks to rely on raising safety concerns as a protected act in term so the Equality Act 2010.

43. In Schedule 2 of his completed Agenda form, the claimant gives some details of what he relies on in respect of disability discrimination. He said he in that form he relies on '*stress and anxiety'*. He states that he has suffered from a mental illness for around 10 years and gives information as to how that affects him and the medication he has been prescribed for that. At section D4 of that Schedule, in response to the question '*Do you say that the respondent knew or could reasonably be expected to know that you had a disability at the time you say you were discriminated against? If so why?*', The claimant stated:-

"I have suffered from this issue for years I have progressed through the sickness absence policy regarding my absences in the past due to having flareups and within these meetings I have discussed my mental health as the reason.

I was signed off in 2017 for six weeks for mental health episode.

I have had conversations with Scott Phillips and Leo Green in the past and after a period of absence is is he advised me to use the employment assistance program Nuffield health and I was seen by a therapist during work time in December 2019.

During the Covid 19 pandemic I have sent emails to Scott and Leo regarding my stress levels being high lack of Covid 19 precautions on site at the start of lockdown placed me in a high level of stress, I raised my concerns about the effect it could have on my family the response from scorched and Leo was to investigate myself and to find faults with me placing me in a state of alarm, I couldn't stop work of (sic) fear of repercussions so I had to carry on with work to the best of my ability. During first fact find under Covid 19 when the news of the whistleblower struck me out of the blue I was expected to carry on with my work and as a result of feeling the pressure inflicted on me by management I made mistakes.

SSE used my admin mistakes and unfairly dismissed me. I have been open and honest all throughout my time with SSE and yes I have made mistakes but staff at SSE must take responsibility for there (sic) part to play in my unfair dismissal.

I have no doubt that Scott, Leo and Ciaran knew of my previous issues with stress and anxiety and I believe anyone placed in the position I was in would have made mistakes too."

44. At section D5 of that Schedule, the claimant indicates that he is complaining discrimination arising from disability (section 15). He sets out:-

"*My poor mental health was ignored despite several attempts to make both Scott Phillips and Leo Green aware of how I was feeling during*

this time there are reasonable adjustment (sic) which could easily have been put in place to both reassure me and stop my conditioning (sic) from worsening, I believe had they done this, I wouldn't have made mistakes as a result of feeling under pressure and in turn would not have lost my job."

45. At section D6 of that Schedule, the claimant indicates that he is complaining about a provision criterion or practice having been applied by or on behalf of the respondent, placing him in a substantial disadvantage in comparison with people who are not disabled (section 19). He sets out:-

"*I believe that the first fact find investigation when the 'whistle blower' was mentioned was a deliberate and unfair act to scare myself and heighten my already high stress levels. When I was first notified about this I contacted Scott to ask for information with regards to why I was to attend a fact find, I explained to him that I was feeling stressed and worried at this time, the response I got via phone call was that "you've nothing to worry about if your (sic) telling the truth.*

Scott, Leo and Ciaran deliberately contributed to the decline in my mental health and the result of this was the uncharacteristic mistakes I made."

46. Also at that Section D6, the claimant replied to the standard questions (ii) (re whether he relied on any physical feature) and (iii) (re whether he relied on failure to provide an axillary aid) with *'n/a'.*

47. At section D7 of that Schedule, where asked 'W*hat is the substantial disadvantage at which you see you were placed?',* the claimant stated:-

"With previous issues with stress and anxiety I feel there has been no attempt to aid me and my concerns when working as a key worker and living with family who suffer from underlying health conditions even when I said I was stressed and having issues with Covid 19, SSE deliberately placed me in an impossible situation to obtain a doctors

letter and wife's whereabouts that added to my stress causing me to make uncharacteristic admin mistakes."

48. At section D8 of that Schedule, in respect of the respondent's knowledge of the claimant being likely to be placed at the substantial disadvantage, the claimant stated:-

"Yes. Witness (Findlay Kirk) had a conversation with Scott Phillips as witnessed by Witness (Lewis Harper)."

49. At section D9 of that Schedule, where asked 'W*hat are the steps which you say it would have been reasonable for the respondent to take?',* the claimant stated:-

"1. I believe Scott Leo and Ciaran where (sic) to think about real life situations and understand that during Covid 19 GP surgery's (sic) where working to a limited capacity (sic), understandably printing a doctors note was not a priority to them. As I advised at the time there is a process to full for an employer to gain this information from my GP but they never did, I was tainted as a liar.

2. I believe it to be unreasonable for Scott, Leo and Ciaran to base a disciplinary procedure on factually incorrect gossip, my wife's whereabouts has nothing to do with SSE. Her personal information is hers and I do not have permission to disclose this with anyone. To peruse (sic) this to a disciplinary is unreasonable in my opinion.

3. SSE continued to keep me leading a team of technicians while placing me under this amount of stress, awaiting me to make a mistake, in hind site (sic) Scott could of (sic) removed my responsibility of team lead relieving me of some stress during this time.

4. Refer me to Nuffield Health. A phone number was provided by Scott Phillips by email all

50. At section D10 of that Schedule, the claimant seeks to answer the question *'In what way would those steps have prevented the substantial disadvantage at which you believe has arisen?'.*

51. The respondent in their Agenda indicated that they still required a clear statement of precisely what claims were being made. They attached a draft order for additional information and documents.

52. The preliminary hearing for the purposes of case management took place by telephone ('TCMPH') in January 2021. At that TCMPH EJ McFatridge agreed that it was necessary for the claimant to provide further specification. An Order was issued in terms of the respondent's request. This was issued on the basis that '*If the claimant answers this fully then this will assist the Tribunal in ascertaining precisely what claims were being made*.' (para 3 of PH Note from January 2020 (pages 58 - 65).

53. At paragraph 5 of the PH Note from January 2021 it is stated:-

> *"In his Agenda the claimant makes reference to a claim based on discrimination arising from marriage and/or civil partnership. The claimant confirmed that he was not intending to make a separate claim under this head. His only discrimination claim relies on the protected characteristic of disability."*

54. At paragraph 6 of the PH Note from January 2020 it is stated:-

> *"With regard to the claim for other payments the claimant confirmed that he had misunderstood the form and under this heading he had simply set out the heads of compensation which he considered he was due in terms of his unfair dismissal and discrimination claims.*"

55. At paragraph 6 of the PH Note from January 2020 it is stated:-

> *Once the particulars have been lodged a further preliminary hearing will take place for case management purposes. I explained to the claimant that at that hearing the Tribunal will decide how to proceed*

with the case. It may be that a final hearing shall be fixed. It may be that one or more preliminary hearings will be fixed in order to decide preliminary issues. At present there are two preliminary issues which have been highlighted by the respondent. One is the issue of whether or not the claimant is disabled. The other issue is whether or not all or some of the discrimination claims are time barred. Further procedure will be discussed at the next preliminary hearing."

56. The terms of the Order were as requested by the respondent's representative and are as follows:-

(1) DISABILITY STATUS (S.6 EQUALITY ACT 2010)

(1) The claimant refers to stress and anxiety, and separately mental illness. What is the medical condition that the claimant has been diagnosed with?

(2) When was the claimant diagnosed with this condition?

(3) In what way does the condition have a substantial adverse affect on the claimant's ability to carry out normal day-to-day activities? Please provide examples.

(4) In the claimant's agenda he refers to being prescribed 50mg sertraline. When was this prescription made? Please provide medical evidence.

(5) In the claimant's agenda, he refers to the sertraline dose being increased to 100mg. When was this? Please provide medical evidence.

(6) How would the medical condition affect his ability to carry out normal day-to-day activities if he did not receive this medication?

(7) The claimant should produce any medical evidence or records to support the above information and his alleged disability status.

(2) DIRECT DISABILITY DISCRIMINATION (S.13 EQUALITY ACT 2010)

(1) With reference to s.4(i) of the claimant's agenda, is the less favourable treatment relied on the decision to investigate the claimant's conduct?

(2) If so, does the claimant accept that this decision was taken sometime in April 2020?

(3) Why does the claimant say the treatment was because of his disability (namely the medical condition relied in the Disability Status section above)?

(4) Who does the claimant rely on as a comparator(s), or does the claimant rely on a hypothetical comparator?

(3) DISCRIMINATION ARISING FROM (S.15 EQUALITY ACT 2010)

(1) What is the alleged unfavourable treatment relied on?

(2) On what date was the claimant subjected to the unfavourable treatment and by whom?

(3) What is the "something arising in consequence of disability"?

(4) What is the causal link between the unfavourable treatment at (1) and the something arising in consequence of disability at (3)?

(4) INDIRECT DISABILITY DISCRIMINATION (S.19 EQUALITY ACT 2010)

(1) In the claimant's agenda, he says he relies on the following provision, criterion or practice (PCP): "after I raised safety concerns, there was an extensive audit was put in place."

i. Is the claimant saying that there is a general practice of safety audits; or

ii. Does he rely on a particular audit?

(2) When does the claimant say the respondent applied the PCP above?

(3) In what way does the PCP put people with the claimant's disability at a particular disadvantage, when compared with persons who do not share the claimant's disability?

i. The claimant says in his agenda that "everyone's work was being checked, mines was the only one that was pursued" but this does not explain why the alleged PCP puts people with the claimant's disability at a particular disadvantage to persons who do not share the claimant's disability.

(4) In what way did it put the claimant at that disadvantage?

(5) When did it put the claimant at that disadvantage?

(5) REASONABLE ADJUSTMENTS (SS. 20/21 EQUALITY ACT 2010)

(1) It is not clear from the claimant's agenda at section D.6 what PCP is relied on. Please confirm which of the following it is:

i. The first fact find investigation that was concluded on 14 May 2020 and/or the mention of a whistleblower during that investigation;

1. If so, does the claimant accept that neither are PCPs, but are instead one off acts that were applied in the claimant's case?

ii. The requirement to obtain a doctor's letter in relation to the absence which led to the fact find investigation which concluded on 14 May 2020;

1. If so, does the claimant accept that this is not a PCP, but is instead one off act that were applied in the claimant's case;

iii. The requirement to confirm his wife's whereabouts which led to the fact find investigation which concluded on 14 May 2020

1. If so, does the claimant accept that this is not a PCP, but is instead one off act that were applied in the claimant's case?

(2) In relation to the PCP relied on, the claimant is called upon to confirm in what way it put him at a substantial disadvantage compared to those who aren't disabled.

(3) The claimant says (section D.8 of this agenda) that the respondent ought to have known that the claimant was likely to be placed at the substantial disadvantage because Findlay Kirk had a conversation with Scott Philips as witnessed by Lewis Harper.

i. When was this conversation?

ii. What substantial disadvantage was Scott Philips told that the claimant was likely to be placed at and why?

(4) The claimant lists nine steps that he says would have been reasonable for the respondent to take.

i. *In relation to each listed step, when does he say it should have been taken?*

ii. *In relation to each step, did he request to the respondent during his employment that the step should be taken; and if so, to whom and when?*

(6) HARASSSMENT (S.26 EQUALITY ACT 2010)

(1) It is understood that the claimant relies on the protected characteristic of marriage and civil partnership for his harassment claim (section s.7 of the claimant's agenda).

(2) There is no mention of marriage and civil partnership harassment in the ET1 and so this claim cannot be introduced without a fully particularised written amendment application. In any event, marriage and civil partnership is not a relevant protected characteristic for the purpose of section 26 claims.

(7) VICTIMISATION (S.27 EQUALITY ACT 2010)

(1) Does the claimant accept that "using my safety licence to raise safety concerns" is not a protected act in section 27(2) of the Equality Act 2010?

(2) The claimant's victimisation claim seems to have been misunderstood by the claimant; and should be dismissed.

(8) UNFAIR DISMISSAL

(1) What section of the Employment Rights Act 1996 does the claimant rely on for his unfair dismissal claim?

(2) Why does he say his dismissal was unfair?

(9) OTHER CLAIMS

(1) Does the claimant rely on any other claims other than those outlined above?

(2) If so, please provide full details, including the section of legislation the claim is brought under and the facts from the ET1 relied on.

(10) REMEDY

(1) Please provide details of all jobs applied for since the claimant's employment was terminated by the respondent.

(2) Please provide full details of employment secured by the claimant from the date employment with the respondent terminated, to include:

i. the name and address of the employer;

ii. the start date of employment;

iii. the number of hours per week the claimant has worked in the employment; and

iv. full details of salary received (gross and net); and benefits.

(3) Please provide any documentation showing the terms of employment in relation to the alternative employment secured.

(4) Please also provide copies of all wage slips or other documentation showing the gross and net salary or earnings from the date of termination of employment with the respondent to date.

(5) Provide details of all state benefits (if any) claimed and received by the claimant since employment with the respondent terminated.

(6) Provide details of any other steps taken to mitigate the claimant's losses.

(7) Provide evidence and full medical records to support the assertion that any injury to feelings or other non-financial loss was caused solely by the actions of the respondent.

57. That Order request is detailed and makes reference to the position stated by the claimant in his ET1 and in his completed Agenda form. It calls for further particulars of the claims.

58. The claimant responded to that Order in his Answers ('the Answers') submitted on 11 February 2021. The Answers are in the Joint Bundle (pages 66 – 84). In the Answers, the claimant states that he relies on having been diagnosed with Chronic anxiety and Depression on 21 June 2016.

59. The respondent's representatives emailed the Tribunal (copied to the claimant) on 9 March 2021 (page 80 – 83). A further TCMPH took place on 15 March 2021, again before EJ McFatridge. The position was summarised in the Note (page 86 – 89) issued following that TCMP (at paras 2 & 3) as follows:-

"(2) On 9 March the respondent's representative sent an email to the Tribunal, copied to the claimant. In that e-mail dated 9 March 2021 the respondent's representatives had set out their position with regard to the response to questions lodged by the claimant. It was their position that the claimant's ET1 had set out a claim of unfair dismissal and that whilst it referred to a claim of disability discrimination this claim was not further spelt out in any way. The respondent's position was that the answers given by the claimant to the various questions asked would tend to indicate that the claimant was now seeking to amend his claim so as to include claims which were not in the initial ET1. He was referring to a disability which was not mentioned in his ET1. The respondent also questioned whether the claimant had provided sufficient detail of his claim of unfair dismissal. This had not been particularised in the ET1 but in the further particulars the claimant had indicated that he was in fact making a claim of automatic unfair dismissal in terms of section 100. It was their position that he had not set out in detail any of the specific points which required to be pled in order to make such a claim.

(3) I enquired of the claimant whether he was indeed making a specific claim only under section 100(1)(e) of the Employment Rights Act 1996 or whether in fact he was making a claim of ordinary unfair dismissal in terms of section 98. It appeared to me that although the claimant's position was that his dismissal was unlawful in terms of section 100(1)(e) he was also making a more generalised claim of ordinary unfair dismissal. The claimant confirmed that this was indeed the case. The claimant's claim is a claim of ordinary unfair dismissal in terms of section 98."

60. At that TCMPH in March 2021, EJ Mcfatridge decided that there should be a PH for determination of the following issues:-

- whether the claimant should be permitted to amend his claim so as to incorporate the answers given by him to the questions order and make a claim of disability discrimination as set out therein,

- whether, if the claimant is so permitted to amend his claim, all or part of the claim should be dismissed as being time barred,
- whether, if the claimant is permitted to amend his claim, the claim of disability discrimination should be struck out in whole or in part on the basis that it is misconceived and/or has no reasonable prospect of success.

61. There was correspondence between the parties and the Tribunal between 21 March and 5 April 2021 (90-92). The respondent's position was set out as being that the claim did not include one of harassment or victimisation. It was confirmed to parties that the only amendment to be considered at this PH was was the claimant's response to the FP (i.e. the Answers to the Order).

62. On 6 April 2021 parties were sent an email from the Tribunal Office confirming that the only amendment to be considered at this PH was the claimant's response to the FP.

Relevant Law

63. Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules'), being:-

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*
> *Dealing with a case fairly and justly includes, so far as practicable -*
> *(a) ensuring that the parties are on an equal footing;*
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
> *(e) saving expense.*
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The*

parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

64. The duty to deal with cases fairly and justly is a duty of the Tribunal towards all parties before it.

65. The relevant law in respect of time periods for presenting a claim under the Equality Act 2010 is in section 123 of the Equality Act 2010. For employment cases, this is (a) *the period of 3 months starting with the date of the act to which the complaint relates,* or (b) *such other period as the employment tribunal thinks just and equitable.* Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it. (section 123(3)(b)). Section 123(4) provides that in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) When P does an act inconsistent with doing it, or

(b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

66. Lady Smith summarised the relevant law in respect of amendment applications (at paragraphs 20 – 26) in *Margarot Forrest Case Management V Miss FS Kennedy* UKEATS/0023/10/BI. That decision was made with reference to the 2004 Tribunal Procedure Rules, but remains relevant, as follows:-

"*20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Rules 10(2)(q) and 27(7)). Thus, if a claimant's representative seeks permission to alter, add to or subtract from what is written in the claimant's form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim."*

67. In *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06MT, the EAT helpfully set out the normal procedure which should be followed by a Tribunal when considering an amendment to an ET1. In that case it had become apparent to the Employment Tribunal in the course of a hearing that the claimant was seeking to pursue a line of evidence that had not been foreshadowed in the form ET1. The line of evidence had been objected to but the Tribunal had allowed the questioning to continue. The issues raised on appeal gave rise to consideration of the procedure that an Employment Tribunal ought to follow when, at a hearing, it appears that a party is seeking to present a case that differs from that of which notice has been given in the form ET1. That was set out from paragraph 30 of the EAT's decision, as follows:-

> *"30 We are persuaded that this appeal is well founded. The Tribunal seems, unfortunately, to have jumped too far too fast. What, in our view, it required to recognise before making its decision was as follows:*
>
> *31 Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross examination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.*
>
> *32 Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.*
>
> *33 Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms*

of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend, as discussed above. Further, unless it does so, the fair notice obligations referred to in the quotation from Ali, above, will not be complied with.

34 Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.

35 Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.

36 Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.

37 Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.

38 Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."

68. That case made reference to Ali *v Office of National Statistics [2005] IRLR 201,* where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

"*39…….. …a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An*

originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states."

69. The position set out in paragraph 20 of *Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT*, is also relevant to the issues in this PH:-

"20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether 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 they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661."

70. The leading authority in respect of amendment applications is *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661,* [1996] ICR 836. There the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, and set out the factors to be considered as including:-

(ii) The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or

substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;

(iii) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;

(iv) The timing and manner of the application.

71. In *Selkent*, Mummery J, as he then was, set out at paragraph 26:

"…an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application."

72. The relevant law in respect of time bar re discrimination claims is in the Equality Act 2010 section 123:-

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it."

73. In *Hendricks v Metropolitan Police Commissioner [*2002] EWCA 1686, at paragraph 48, Mummery LJ set out well known dictum re an act extending over a period (within the meaning of the time limit provisions of the relevant 1975 and 1976 Acts, which precede the Equality Act 2010).

74. In *British Coal Corporation v Keeble 1997 IRLR 336*, the Court of Appeal set out the factors to be taken into consideration when considering whether it would be just and equitable to extend the three month time limit, being in particular:-

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;
- The extent to which the party sued has co-operated with any requests for information;
- The promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action;
- The steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

75. Rule 37(1) (contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013):

> *"A tribunal may strike out at any stage of the proceedings, either on its own initiative, or following the application of a party, all or part of a claim or response on any of the following grounds –*
>
> (a) *that it is scandalous or vexatious or has no reasonable prospects of success;*
>
> (b) *the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent, as the case may be, has been scandalous unreasonable or vexatious;*
>
> (c) *for non-compliance with any of these Rules or with an order of the Tribunal;*
>
> (d) *that it has not been actively pursued;*

(e) *the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).”*

76. Following *Hasan v Tesco Stores Ltd UKEAT/0098/16*, when considering whether to strike out, a Tribunal must consider whether any of the grounds set out in Rule 37 have been established, then go on to decide whether to exercise its discretion to strike out, given the permissive nature of the rule.

77. Guidance was given by the Court of Appeal in Ezsias *v North Glamorgan NHS Trust [2007] EWCA Civ 330,* in particular at para 29

> *“It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute.”*

78. The EAT provided guidance in *Mechkarov v Citibank* [2016] ICR 1121, at para 14:

- *Only in the clearest of cases should a discrimination claim be struck out*
- *Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence*
- *The claimant’s case must ordinarily be taken at its highest*
- *If the claimant’s case is “conclusively disproved by” or is “totally and inexplicably inconsistent” with undisputed contemporaneous documents, it may be struck out*
- *A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*

79. Nevertheless, there is authority for discrimination and other claims being struck out.

80. In *Croke v Leeds City Council UKEAT/0512/07/LA,* Mr Croke, a litigant in person, presented discrimination claims against the Council, which applied to have them struck out. After requiring Mr Croke to provide full particulars of

his claim, at a PHR an employment judge held that his claims were for victimisation. However, as there was no material from which the necessary causal link between a protected act and the Council's alleged conduct could be identified, the judge struck out the claims as having no reasonable prospect of success. Upholding the employment judge's decision, the EAT held that where, on the available material, the employment judge considered that a case was "not, in any ordinary sense of the term, fact-sensitive", it could be struck out without evidence being formally heard.

81. In *Ahir v British Airways plc 2017 EWCA Civ 1392*, CA, the Court of Appeal asserted that Tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an Employment Judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. The Court concluded that the Employment Judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success. There was a well-documented and innocent explanation for the appellant's dismissal, and his dishonest conduct was considered in light of his airside clearance. It was held that cases could not be allowed to proceed simply on the basis of assertions.

82. In *Shestak v Royal College of Nursing EAT 0270/08* it was held that undisputed documentary evidence — in the form of emails which could not, taken at their highest, support the claimant's interpretation of events — justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage.

83. In *E v X, L & Z* UKEAT/0079/20/RN(V) & UKEAT/0080/20/RN(V), the EAT gave a useful summary of relevant case law and the set out the principles to be applied when dealing with issues of time bar, amendment and strike out. The key principles were set out from para 50, as follows:-

> *"50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:*
>
> *1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: **Sougrin;***
>
> *2) It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: **Robinson**;*
>
> *3) Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: **Sridhar**;*
>
> *4) It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue: **Caterham**;*
>
> *5) When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which*

*connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: **Lyfar**;*

6) *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: **Aziz**; **Sridhar**;*

7) *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: **Aziz**;*

8) *In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading: **Caterham** (as qualified at paragraph 47 above);*

9) *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: **Robinson** and paragraph 47 above;*

10) *If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: **Caterham**;*

11) *Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which*

*would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: **Caterham**;*

*12) Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: **Caterham**;*

*13) If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: **Caterham**.*

Respondent's Submissions

84. The Tribunal was invited by the respondent's representative to refuse the amendment application to include the claims of disability discrimination, failing which the claims should be dismissed as time barred and/or struck out

for lack of reasonable prospects of success and that the claim of unfair dismissal only should proceed to a Final Hearing.

85. The respondent's representative's position before me was that the only claim set out in the ET1 was a claim for unfair dismissal. It was the respondent's position that in the answers to further particulars the claimant brings entirely new heads of claim, on new factual basis. It was submitted that the proposed amendment is both significant and substantial.

86. Reliance was placed on the principles set out in *Selkent Bus Company Ltd v Moore* [1996] ICR 836. With regard to those principles, it was the respondent's position that: (a) the nature of the amendment was that of a substantial alteration pleading a new cause of action (b) the new claims of disability discrimination were timebarred (c) the timing and manner of the application was such that the respondent would be prejudiced should the amendment be allowed.

87. Reliance was placed on the decision of the ET in *Chandok v Tirkey* [2015] IRLR 195, in particular at paras. 16 – 18. It was the respondent's representative's submission that that case was authority for the position that parties are not at liberty simply to raise whatever issue they wish to raise at any time.

88. It was the respondent's representative's position that the proposed amendment seeks to introduce a new factual basis for the claim and introduces entirely new heads of claim and causes of action, namely direct disability discrimination, indirect disability discrimination, discrimination arising in consequence of disability and a failure to make reasonable adjustments. His submission was that it is clear that these claims were not included in the original claim. It was submitted that it was a significant and substantial amendment to the claim of unfair dismissal.

89. It was submitted that the proposed amendment had been submitted outwith the requisite time limits and that any claim could and should have been raised within the relevant time limits. Reliance was placed on the claimant's

evidence that he first spoke to a CAB advisor in April 2020 and to ACAS in July 2020. Reliance was placed on the claimant's acceptance under cross examination that he could have raised the claim sooner.

90. The respondent's representative's reliance on timebar was based on the last act of discrimination being the date of dismissal (22 July 2020). His submission was that the appeal decision was not an act of discrimination and that that is not set out in terms in the proposed amendment. Reliance was placed on the respondent being entitled to be made aware of the claimant's case in writing and in clear terms. It was submitted that the disability discrimination claim set out in the proposed amendment does not rely on continuing acts up to the appeal outcome.

91. It was the respondent's position that there were no attachments to the ET1 and that he had checked that with the ET office as he wished to ensure that there was no additional part of the apparently incomplete remedies section of the ET1. It was submitted that if the claimant's grievance from May 2020 (page 93 – 95) and the Appeal (Page 116 – 118) were attached to the ET1, that would be evidence rather than further particulars of the claim.

92. The respondent's representative's position was that no disability discrimination claim was made until the answers to questions and that any claim for disability discrimination is timebarred. He did not accept that any claim for disability discrimination was brought within the ET1 on 20 November 2020. He accepted that the box for disability discrimination was ticked but relied on no disability discrimination claim being pled. His position was that if it was considered that a disability discrimination claim had been brought within the ET1 on 20 November 2020, then that claim required further particulars and the claims brought in those further particulars were timebarred, based on the date of dismissal being 22 July 2020. His submission was that it was difficult to understand from the proposed amendment when each act relied upon occurred, but that the proposed amendment came more than 3 months after the last act, being the dismissal on 22 July 2020.

93. It was submitted that the respondent would suffer considerable prejudice if the claimant's claim is amended to allow the disability discrimination claims out of time. Reliance was placed on the length of the Hearing then being extended to cover the new heads of claim and additional witnesses being required to address the constituent elements of the new heads of claim. It was submitted that memories will have faded and witnesses may have left the respondent's employment. Reliance was placed on this being particularly detrimental to the respondent, given that inferences may be drawn in discrimination proceedings from incomplete recollections. Reliance was placed on there being increased costs for the respondent, which would not be recoverable. It was submitted that the hardship to the claimant would be less, as he would still be able to proceed with the claim of unfair dismissal and if successful, would be able to argue that he should receive compensation as a result.

94. It was conceded on behalf of the respondent that the claimant had disability status at the material times (with regard to chronic anxiety and depression) The respondent's knowledge of the claimants disability status is denied. It is the respondent's position that reliance would be made on medical reports obtained during the course of the claimant's employment stating that the claimant should not be considered to have disability status.

95. Reliance was placed on additional witnesses and time being required at the Final Hearing to address the issue of the respondent's knowledge of the claimant's disability status. In his written submissions, the respondent's representative critised the lack of specification provided by the claimant in his answers to the Order. In respect of the specification provided on direct discrimination, it was submitted that that claim would be timebarred as it appears that the claimant is relying on events pre April 2020.

96. In the written submissions, comments were also made in respect of the merits of the disability discrimination claim. In respect of direct discrimination, reliance was placed on the claimant having stated in his response to the Order that the reasons for the allegedly less favourable treatment was (1) the

fact he had raised concerns to management about supervision and safety and (2) previous stress related absence. It was submitted that (1) is a reason not because of his disability and that the stress related absence was not for the conditions relied upon in respect of disability status.

97. In his written submissions, the respondent's representative also critised the lack of specification re discrimination arising in consequence of disability (section 15 Equality Act 2010). Reliance was placed on the claimant not having answered the questions: "what is the 'something arising in consequence of disability'" and "what is the causal link between the unfavourable treatment and something arising in consequence of disability". It was submitted that any claim under section 15 continues to lack in specification and is time barred.

98. In the written submissions, criticism was also made of the merits of the claimant's stated position re indirect disability discrimination (section 19 Equality Act 2010). Reliance was placed on the claimant's position in the Order response that he does not rely on a general practice of audits, but a particular audit that was applied to him (pages 71 and 72). It was submitted that that undermines his indirect discrimination claim. Reliance was placed on the claimant's position in the Order response re when he says the PCP was applied to him being "1st fact find to disciplinary appeal outcome" (page 72) and also relying on the investigation into "issues with his work", which it was submitted was concluded by Justin Boyle on 11 June 2020. It was also noted that the claimant's position is that he was put at the disadvantage when he returned to work after the first absence (i.e. on 13 March 2020). It was submitted that whether time runs from when the PCP was applied to him or when he was put at the disadvantage, this claim is also time barred. It was further submitted that particular audit the claimant refers to does not amount to a PCP, and the respondent did not apply a PCP which put, or would put, the claimant and persons with his disability at a particular disadvantage. It was submitted that that claim is misconceived and lacking in the necessary specification to ensure the respondent knows the case it must answer.

99. With regard to the claimant's position on a claim for reasonable adjustments (section 20 Equality Act 2010), it was submitted that what the claimant relies on is not a PCP. That position was on the basis that the claimant relies on reference to a whistleblower; requesting he obtain a doctor's note; and asking about his wife's whereabouts, all on 14 May 2020, as the relevant PCP(s). Reliance was placed on the claimant's position that that was not applied to anyone else and was preserved for him, which, it was submitted, undermines completely his assertion that this amounts to a PCP. The respondent accepts referring to a whistleblower, requesting a doctor's note and asking about his wife, but denies that any or all of this amounted to a PCP within the meaning of the Equality Act.

100. Reliance was placed on the claimant's position in response to the Order that the substantial disadvantage he was placed at because of the PCP was "Scott was pursuing to sack me". When asked when he says the respondent should have made each of the nine listed adjustments, he does not provide any specific dates. It was submitted that the answers provided do not amount to a claim for failure to make reasonable adjustments in terms of the Equality Act 2010. Further, there is no reference to reasonable adjustments (explicitly or impliedly) in the ET1. It was submitted that this claim is lacking in specification and/or misconceived. Reliance was placed on it also relating to one off acts, relied on as PCPs, which were applied to the claimant on or around 14 May 2020, and so this claim too was said to be time barred.

101. With regard to the applicability of time limits, it was the respondent's position that the disability discrimination claims should have been raised within three months of the incident(s) complained of. As set out in the ET3, to the extent that a claim relates to issues raised in the claimant's grievance, it was noted that the grievance was raised on 25 May 2020, almost six months before the presentation of the ET1. It was submitted that the claimant could and should have acted sooner.

102. With regard to the timing and the manner of the amendment application, it was submitted that, as a result of the claimant's approach to these

proceedings, particularly not setting out the disability discrimination claims in the ET1 and not providing the answers which now form the basis of this amendment application until 11 February 2021, there has been three preliminary hearings, causing delay and expense for all involved (including the Tribunal). Reliance was placed on the particulars of the proposed amendment being provided around three months after the presentation of the claim. It was submitted that almost six months after the presentation of the claim, the respondent has not yet been able to properly understand the issues for determination at the final hearing. Reliance was placed on the particulars of the proposed amendment continuing to lack specification.

103. It was submitted that the claimant has been put on sufficient notice of the respondent's position that the claims lack specification, from as early as the ET3 response and at various points thereafter in these proceedings, including the email of 9 March 2021. Reliance was placed on the claims continuing to lack the necessary specification to enable the respondent to properly understand and defend the purported claims of disability discrimination against it. It was submitted that amendments must be properly formulated and sufficiently particularised for permission to amend to be granted and that if these claims are allowed to proceed to a final hearing, it will likely lead to further delay and additional cost for the Respondent. Once properly formulated, it will also be necessary for the respondent to apply to amend its ET3 response (as at the time of lodging the ET3 response it was not possible to meaningfully respond to the disability discrimination claim), which will result in further delay and expense. Reliance was placed on the respondent being entitled to know the case it is being asked to respond to, in clear pleadings from the claimant. It was submitted that the paramount considerations of the relative injustice and hardship involved are weighted against the Respondent and the application to amend should not be allowed.

104. With regard specifically to time bar, it was submitted by the respondent's representative that the claim of disability discrimination was submitted outwith the applicable statutory time limit in section 123(1) of the Equality Act 2010. Reliance was placed on *Humphries v Chevler Packaging Limited*

UKEAT/0024/06, para 33 and the onus being on the claimant to persuade the Tribunal that time should be extended to such other period as is just and equitable. Reliance was placed on *Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576.* In respect of there being no presumption a Tribunal should extend the period and extension being the exception rather than the rule. Reliance was placed in particular on the position at para 25 of the Court of Appeal's decision in *Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576,* at paragraph 25, being:-

> "*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*"

105. It was submitted that there is no general principle that an extension of time will be granted where the delay is caused by an internal grievance or appeal hearing. Reliance was placed on the Court of Appeal's decision in *Apelogun-Gabriels v London Borough of Lambeth [2002] IRLR 116 CA*, in particular Lord Justice Gibson's position at paragraph 16:

> *"It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal. The very fact that there have been suggestions made by eminent judges in 1973 and in 1982 that the statutory provisions should be amended demonstrates that, without such amendment, time would ordinarily run whether or not the internal procedure was being followed. For my part therefore….that the fact, if it be so, that the employee had deferred commencing proceedings in the tribunal while*

awaiting the outcome of domestic proceedings is only one factor to be taken into account."

106. Reliance was placed on the factors set out in *British Coal Corporation v Keeble 1997 IRLR 336*.

107. It was submitted, with reliance on *Lupetti v Wrens Old House Ltd [1984] ICR 348, EAT t*hat the merits of the claim can be taken into account when determining whether it is just and equitable to extend time.

108. Submissions were made on the basis of what were said to be relevant dates (although it is now noted that the was no evidence on these dates, other than as set out in the It is difficult to assess when time begins to run in relation to each of the disability discrimination claims due to the issues of specification. However, on the basis that the claimant raised a grievance about the allegations he now relies on as claims of disability discrimination, then as set out in the ET3, to the extent that a claim relates to issues raised in the claimant's grievance, it is noted that the grievance was raised on 25 May 2020, almost six months before the presentation of the ET1; and as such is time barred. The respondent's position is that he could and should have raised the disability discrimination claims sooner.

109. With regard to direct disability discrimination (section 13), it was submitted that, on the basis of what the claimant states in in response to call (2)(2) of the Order (page 68), what is alleged to have been an act of direct discrimination (the decision taken by management) was taken in March 2020, therefore time begins to run sometime in March or at the latest on 31 March 2020.

110. With regard to indirect disability discrimination (section 19), it was submitted that, that claim is timebarred on the basis of what the claimant states in in response to call (4)(1)(ii) of the Order (page 72), given what is alleged to be the PCP relied (said to be a particular audit). Reliance was placed on the claimant's response to being asked when he says the PCP was applied to him being "1st fact find to disciplinary appeal outcome." Reliance was placed

on the claimant also stating that the audit process was used to highlight issues with his work. It was submitted (although it is now noted that no evidence was heard on this) that the investigation into "issues with his work", or the claimant's unsafe working practices, was concluded by Justin Boyle on 11 June 2020.

111. Reliance was placed on the claimant's position in his response to the Order being that he was put at the disadvantage when he returned to work after the first absence. It was submitted that that was on 13 March 2020 (although it is now noted that no evidence was heard to support that submission). It was submitted that whether time runs from when the PCP was applied to him, or when he was put at the disadvantage, more than three months passed before the claimant presented his ET1.

112. With regard to alleged failure to make reasonable adjustments (section 20), it was submitted that, that claim without merit and is timebarred on the basis of what the claimant states in in response to the Order, given that the PCPs relied on for the purpose of the reasonable adjustments claim all took place on 14 May 2020 and were one off events. It was submitted that the respondent does not have a practice of doing any of these things. Reliance was placed on the claimant's position in response to the Order that no one else was treated in the same way. It was submitted that that is an acceptance by the claimant that these are not PCPs. It was submitted that although the claimant in his response to the Order does not provide specific dates in response to being asked when the alleged reasonable adjustments ought to have been made, time should run from or around the 14 May 2020, when the alleged PCPs were applied to the claimant. It is now noted that no evidence was heard to support that submission. It was submitted that the claim under section 20, is time barred, and could and should have been raised before the date on which the ET1 was presented (20 November 2020) and/or before the date on which the answers to the questions were provided (11 February 2021).

113. It was submitted that the latest date of expiry of the 3 month time limit would have been 10 September 2020 (i.e. three months from 11 June 2020). Reliance was placed on the claimant having not initiated Early Conciliation until 6 October 2020.

114. It was submitted that the claimant has not provided sufficient evidence and/or submissions to justify an extension of time.

115. With regard to *Keeble,* reliance was placed on the length of the delay. Reliance was placed on the ET1 being submitted on 20 November 2020, two weeks after the issue of the ACAS certificate. It was submitted that weeks and/or months had passed since the expiry of the ordinary time limits. Reliance was placed on the claimant having contacted ACAS and being aware of time limits. It was submitted that the reason for the delay was because internal procedures were ongoing. Reliance was placed on evidence heard in respect of the claimant referring to an awareness of time limits in an email to the respondent on 11 September 2020 (page 120).

116. It was submitted that with regard to the issue of cogency of evidence, the delay is particularly relevant to acts relied on for the purposes of the disability discrimination claim which pre-date the dismissal. Reliance was placed on the respondent having fully cooperated with the Tribunal and the claimant in these proceedings. It was submitted that the claimant did not act promptly and that he could and should have raised the claim sooner. It was submitted that if he knew of the facts giving rise to the claim when raising a grievance on 25 May 2020, he should not have delayed until 20 November 2020 to raise his claim (almost six months). Reliance was placed on some of the acts now complained of having taken place as early as March 2020.

117. It was submitted that, for the reasons outlined in the respondent's representative's email dated 9 March 2021 (p 80 – 83), and in his submissions, the respondent's position is that the disability discrimination claims have no prospects of success and that this should be taken into account by the Tribunal in determining whether to extend time. It was

submitted that in the circumstances it would not be just and equitable for the Tribunal to extend time.

118. It was further submitted that the claims of disability discrimination, if allowed, should be struck out under Rule 37(1)(a) of the ET Rules, on the basis of having no reasonable prospects of success. It was accepted that the threshold for striking out a claim for having no reasonable prospects of success is high. Nevertheless, the Tribunal was reminded that it does have the discretion to do so, and is invited to do so in this case (to the extent that the amendment is permitted and not dismissed because of time bar).

119. Reliance was made on the claimant having been given ample opportunity to properly specify his disability discrimination claims. It was submitted that the claims, as currently specified, are misconceived and/or lack any reasonable prospects of success and should accordingly be dismissed, even when the claims are taken at their highest.

120. In respect of the section 13 claim (direct discrimination), it was submitted that, taken at its highest and assuming that the claimant will be able to prove each answer/element, a direct disability discrimination claim will not be made out/will not have reasonable prospects of success. Reliance was placed on the claimant's response to being asked why he says the less favourable treatment was because of his disability being that there were two reasons: (1) the fact he had raised concerns to management about supervision and safety (so not because of his disability) and (2) previous stress related absence (but, it was submitted, he relies on depression and anxiety as a disability, not stress, and if the reason was the absence then the reason was not the disability).

121. In respect of the section 15 claim (discrimination arising in consequence of disability), it was submitted that the claimant has not answered all of the questions required to make out a successful claim under section 15 of the Equality Act (despite ample opportunity to do so). It was submitted that, when read as a whole and taken at its highest, the claim lacks reasonable prospects

of success (not least because the pleadings do not contain a statable claim of discrimination arising in consequence).

122. In respect of the section 19 claim (indirect disability discrimination) reliance was placed on the claimant's position in his answers to the Order, confirmed that he does not rely on the respondent's general practice of carrying out safety audits, but rather a particular audit that was carried out in relation to the claimant only. It was submitted that that is not therefore a PCP. It was submitted that, when asked to provide information into the alleged group disadvantage, the claimant does not do so, but does seem to suggest that he was treated differently than others, which undermines a claim of indirect discrimination. It was submitted that, taking this claim at its highest, it lacks reasonable prospects of success. It was submitted that even if the claimant successfully proves each of his answers to these questions, his claim will not be successful because he will not prove what he has to prove legally to succeed in a section 19 claim.

123. In respect of the section 20 claim (failure to make reasonable adjustments) reliance was placed on the position in the claimant's answers to the Order being reliance on reference to a whistleblower; requesting he obtain a doctor's note; and asking about his wife's whereabouts, all on 14 May 2020, as a PCP for the purpose of his reasonable adjustments claim. It was submitted that as the claimant goes on in his response to state this was not applied to anyone else, and was preserved for him, that undermines completely his assertion that this amounts to a PCP. It was denied that referring to a whistleblower, requesting a doctor's note and asking about the claimant's wife amounted to a PCP within the meaning of the Equality Act. It was submitted that as the claimant states in his answers to the Order that the substantial disadvantage he was placed at because of the PCP was "Scott was pursuing to sack me", that would be the substantial disadvantage causing the PCP and not the other way around. Reliance was placed on the claimant in his answers to the Order not specifying any dates when he says the each of the nine listed adjustments should have been done by. Reliance was also made on the claimant not being clear in his answers to the Order in

what way each adjustment would remove the alleged disadvantage. It was submitted that his claim is clearly misconceived, and should be struck out as lacking in reasonable prospects.

124. It was submitted that in the claimant's answers to the Order, when referring to each of the disability discrimination elements of the claims, he focused heavily on the health and safety aspects and his dismissal which followed thereafter. It was submitted that the answers to the Order appear to provide specification in relation to why the claimant says his dismissal was unfair, rather than providing the necessary specification of any disability discrimination claim.

125. It is the respondent's position that it is this unfair dismissal claim, connected to his alleged health and safety concerns, which should proceed to a final hearing, not the alleged disability discrimination claims, which, it was submitted, are not contained within the ET1, are lacking in specification, time barred and/or misconceived.

126. It was submitted that it would be in accordance with the overriding objective, particularly to ensure fair notice and save unnecessary time and cost (for the respondent and the Tribunal), for the disability discrimination claims to stop and for the unfair dismissal claim only to now proceed to a Final Hearing.

127. In conclusion, the Tribunal was invited by the respondent's representative to refuse the amendment application to include the claims of disability discrimination, failing which the claims should be dismissed as time barred and/or struck out for lack of reasonable prospects of success and that the claim of unfair dismissal only should proceed to a Final Hearing.

Claimant's Submissions

128. The claimant commented on the respondent's representative's submissions. He confirmed that he had read the written submissions.

129. The claimant relied on his position given in evidence at the PH. His position was that he had raised claims of unfair dismissal and disability discrimination

in his ET1 and the attachments which he believed had been made to that ET1 form. The claimant's position was that he had been reasonable and fair in giving the respondent grace to deal with his appeal, on the basis that that may resolve matters.

130. The claimant's position was that he was aware of the three month time limit and understood that the time limit would run from the last act of discrimination. His position was that there was a 'cumulation of events'. His position was that in April 2020 he had been placed on a fact finding investigation which had exacerbated his mental health conditions, that as a result of that extra stress he had made mistakes, that he was subjected to an audit which showed that he made mistakes, that he had then been dismissed for gross misconduct based on those mistakes, and that in making the decision to dismiss and in deciding not to uphold his appeal, the respondent had failed to take into account his mental health conditions and in particular the effect of the additional stress caused by the fact finding investigation in April 2020. The claimant also relied on having raised a grievance about that fact finding investigation in April 2020 and specifically relying on his mental health conditions in that grievance letter. His position was that he had not yet received the outcome of that grievance. The claimant's position was that his claim was lodged in time, having been presented less than three months after the last act complained of, being the decision from the appeal, which is in letter dated 15 September 2021.

131. His position was that it had been an extremely difficult time for hm. He said that his 'life had been turned upside down' by his dismissal. His medication had been increased by his GP.

Comments on the Evidence

132. There were some inconsistencies in the claimant's evidence. The claimant's position in his email to the respondent of 11 September 2020, where he referenced 'eating into time limits' is inconsistent with his position that he believed that the relevant date for calculation of time bar was the date of the appeal decision letter (15 September 2020). His position in evidence was

that he was still waiting on the grievance outcome and that '*If I waited for that it would be timebarred'*.

133. The respondent led no evidence and the claimant's evidence was not contested. The respondent's submissions were based on legal analysis of accepted facts and dates.

Equal Treatment Bench Book

134. When considering the issues in this case I took into account the guidance in the Equal Treatment Bench Book. I took into account both that the claimant is unrepresented (a 'Litigant in Person' or 'LIP') and that his is regarded as disabled with regard to mental health conditions (Chronic anxiety and Depression). The Equal Treatment Bench Book is an online publication available to the Judiciary and to the public.

135. In particular, I took into account the guidance on the difficulties which that LIPs may have in presenting their case (Chapter 1 'Litigants in Person and Lay Representatives' para 15) and the factors which have an adverse effect on the presentation of their case (Chapter 1, para 16). I took into account Chapter 1 at para 22 *"Difficulties faced by disabled witnesses are likely to be exacerbated where the individual is representing him or herself".*

136. I also took into account the content of Chapter 4 re mental disability.

Decision

Time bar

137. I did not accept the respondent's representative's position that no claim for disability discrimination had been brought in the ET1. The box for claiming disability discrimination is ticked. As set out in the findings in fact, there is wording in the ET1 which would not be relevant to an unfair dismissal claim only. It is not unusual for an ET1 to only make a bold claim of discrimination on the grounds of a particular protected characteristic (e.g. disability) and for further particulars of the claims being made being required. The standard

procedure followed by the Employment Tribunal provides for that. In claims where it appears from the ET1 that a discrimination claim is being made, parties are sent standard form Agendas for completion prior to a Preliminary Hearing for the purpose of case management. That is what occurred in these proceedings. At Initial Consideration it was recognised that there were claims of disability and unfair dismissal brought. For that reason, the case proceeded to a Preliminary Hearing for the purpose of case management and standard Agenda forms were issued to parties. The wording of the questions of these standard Agenda forms specifically provides for further details of the discrimination claim being given at that stage. In his completed Agenda form, by answering the standard questions, the claimant confirmed that he intended to being a claim under the Equality Act 2010. He provided some further information about the basis of his claims under the Equality Act 2010. That information prompted the respondent's representative's drafting of the detailed questions in respect of which an Order was then sought and issued, and it is the Answers which are before me as an amendment application.

138. The ET3 clearly responds to a claim of disability discrimination having been brought in the ET1. As set out in the findings in fact, there are a number of headings in the ET3 which relate to a claim of disability discrimination having been brought in the ET1. The ET3 defends a claim of disability discrimination, argues that it would be timebarred and seeks speciation, which the respondent is entitled to do.

139. It seems to me that a disability discrimination claim is derived from a sensible reading of the ET1. For these reasons, I accept that the ET1 brought claims of disability discrimination i.e. claims under the Equality Act 2010 reliant on the protected characteristic of disability, as well as a claim for unfair dismissal under the Employment Rights Act 1996.

140. With regard to the significance of the manner and timing of the amendment application, I considered it to be significant that what is now being regarded as a proposed amendment (the Answers) came from an Order for information and documents, which was made in detailed terms requested by the

respondent's representative. The respondent was entitled to be provided with further particulars of the disability discrimination claim. The Order issued by EJ Mcfatridge in March 2021 sought to obtain what appeared to be relevant information, based on the claimant's stated position in his ET1 and completed Agenda form. I took into account that there is no suggestion that the claimant has not complied with the Order for documents and information. The claimant's Answers do not seek to bring new heads of claim. The Answers give further particulars of the claims in the ET1 of unfair dismissal and disability discrimination, as was the intention of the Order.

141. I took into account the claimant's uncontested evidence that he believed he had put attachments with the ET1. The letters which he believed to have been attached would have given further details of the basis if the claim. I did not accept the respondent's position that these would just be evidence. The grievance letter would be a statement of the claimant's position at the time of writing.

142. The respondent's initial position on timebar was that events pre April 2020 occurred more than three months before the claim was lodged. Taken at its highest, the claimant's position is that in the decision to dismiss (and the appeal decision) the respondent failed to take into account the impact on the claimant's mental health of being put under investigation. The claimant relied on the same matters (only in respect of the April fact finding) in his grievance. I am satisfied that, on the face of what is presented in the ET1, the completed Agenda forms and the proposed amendment (the Answers) the claimant has set out what he believes is a continuing course of events. On that basis, I do not accept the respondent's position that part of the claim of disability discrimination relates only to matters which occurred in April 2020 and are therefore timebarred. I am satisfied that the terms of the dismissal letter make clear reference to the claimant's mental health condition and the decision. I am satisfied that, taken at its highest, there may be a link between what the claimant sets out as being the acts of discrimination and the reasoning set out by the respondent in the appeal decision.

143. The ET1, which brought a claim of disability discrimination was presented within the period of three months starting from the last act in what is purported to be conduct over a period. Without making any conclusion as to the prospects of success of the claims, or whether there is in fact a continuing course of events, I am satisfied that., taking the claimant's case at its' highest, the claimant alleges a continuing course of acts of discrimination ending with the appeal decision letter. On that basis, the claim of disability discrimination was brought within the relevant time period as provided for in section 123 of the Equality Act 2010. The claimant contends that last act to have been on 15 September 2020 and the ET1 was submitted on 20 November 2020, following the issue of the ACAS ECC on 6 October 2020.

144. Taking the claimant's case at its highest, and with regard to the provisions of section 123 of the Equality Act, I am satisfied that the claimant alleges conduct extending over a period, up to and including the date of the decision on his appeal of his dismissal, being on 15 September 2020. I take into account that the ET1 makes specific reference to '*length (sic) campaign of discriminatory harassment'*. The ET1 bringing claims of disability discrimination and unfair dismissal, was presented within three months of that date. The claim of disability discrimination (and of unfair dismissal) is not timebarred.

145. I take into account that ongoing internal proceedings are a factor (per Court of Appeal in *Apelogun – Gabriels*).

146. In coming to my decision I took into account, as an example with similarities to the present case, the position in *Hale*, as referred to from para 44 in *E v X,* as follows:-

> *"44. In* Hale, *Choudhury P considered an appeal (so far as material for current purposes) from the tribunal's finding that an NHS trust's decision to instigate the MHPS procedure should be treated as a one-off act of discrimination, rather than as part of an act extending over a period. Having cited the dictum of Balcombe LJ, in* Sougrin v Haringey Health Authority *[1992] ICR 650, CA,*

by which he held that "in order to see what is "the acts complained of" within the meaning of section INSERT it is necessary to look at the originating application", Choudhury P held (at paragraph 38) that the issue as formulated complained of being subjected to disciplinary procedures and ultimately being dismissed. That formulation suggested that the complaint was about a continuing act commencing with a decision to instigate the process and ending with a dismissal." At paragraph 42, he continued:

> *'By taking the decision to instigate disciplinary procedures, it seems to me that the respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the basic process is initiated, the respondent would subject the claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts" as per the decision in* Hendricks*, paragraph 52.'*

He concluded that the tribunal had erred in treating the first stage of the process as a one-off act. In the end, Hale *stands as no more than an example of the application of the applicable principles and I did not understand Ms Criddle to suggest otherwise."*

147. In coming to my decision I took into account Mummery LJ's s dictum in *Hendricks v Metropolitan Police Commissioner [2002] EWCA 1686 (*referred to in *E v X) .* Although that was with regard to the preceeding legislation, I considered that, similarly, in this case, the claimant is entitled to prove his claim beyond this preliminary stage on the basis that the burden of proof is on him to prove, either by direct evidence or by inference from primary facts, that the alleged incidents of discrimination and / or detriment are linked to one another and that they are evidence of continuing conduct extending

over a period, and in terms of the Equality Act 2010 section 123 is to be treated as done at the end of the period. On that analysis, I am satisfied that the end of that period is the end of the disciplinary process. The ET1 was submitted within 3 months of the end of the disciplinary process. Claims of disability discrimination (and victimisation) are referred to in the ET1 and are not time barred."

148. Even if the last act of discrimination is taken to be the date of dismissal (22 July 2020) the claim of disability discrimination was lodged within the relevant time period of three months of the effective date of termination of employment (on the application of the extension caused by the ACAS Conciliation process). The respondent does not dispute that the claim of unfair dismissal was brought within the relevant period.

149. I did not accept that the failure to specify which provisions of the Equality Act were being relied on leads to the claims being timebarred. A claim of disability discrimination was brought within the relevant period, as set out above. The respondent is entitled to fair notice of the claimant's claim and steps were taken to provide this by way of the Agenda questionnaire procedure and the Answers to the questions set out by the respondent's representative and issued as an Order.

150. Had I concluded that the ET1 did not contain a claim of disability discrimination, I would have considered it just and equitable to extend the period and allow the claim, taking into consideration the claimant's mental state.

151. The relevant protected characteristics are set out in section 4 of the Equality Act 2010. These are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity; race; religion or belief; sex; sexual orientation.

152. I am satisfied that the ET1 does not bring a claim based on the protected characteristic of marriage and civil partnership. There is no indication in that ET1 that a claim is being brought relying on that protected characteristic. The

box for that is not ticked. The first mention of that was in the claimant's Agenda response. There is no mention of a claim based on that protected characteristic in the Answers.

Amendment Application

153. It is not helpful that the terms of the proposed amendment are set out in the Answers, rather than in terms of a specific amendment application. I take into account that the claimant is unrepresented (an LIP), that it is accepted by the respondent that the claimant has disability status with regard to Chronic anxiety and depression and that the claimant was not asked to set out his position in terms of a proposed amendment application. With regard to the principles in Selkent, I am satisfied that the terms of the Answers are the terms of the proposed amendment.

154. Also with regard to the Selkent principles, I take into account the nature of the amendment, being Answers in response to an Order issued in terms of questions posed by the respondent's representative following receipt of the claimant's completed Agenda. I consider it to be relevant that those questions as drafted by the respondent's representative are detailed and make specific reference to matters which are relied upon by the claimant.

155. I took into account *Martin v Microgen Wealth Management Systems Ltd EAT 0505/06* where the EAT stressed that the overriding objective requires, among other things, that cases are dealt with expeditiously and in a way which saves expense.

156. The claimant's position in his completed Agenda forms and the proposed amendment (the Answers) gives further detail and puts labels on the disability discrimination claim which was brought in the ET1. They give more information for facts already pled, rather than the making of entirely new factual allegations which change the basis of the existing claim.

157. In all the circumstances, I am satisfied that the proposed amendment (the Answers) are the addition of factual details to the existing allegation of

disability discrimination and the addition of labels, with reference to particular sections of the Equality Act 2010.

158. I am not satisfied that the respondent's position re cogency of evidence has basis or leads to undue prejudice to the respondent. It was not the respondent's position that relevant and necessary witnesses had in fact left their employment. It was not suggested that the fact finding, audit, disciplinary, appeal and grievance process had not been properly documented, or that such documentary evidence could not be recovered. If documents such as minutes and emails documenting the processes followed can be recovered (and there is no suggestion that they cannot), those documents can be relied upon in the Tribunal proceedings and are then likely to assist witnesses 'recollection of events. It does not appear that the respondent would not be in a position to properly prepare their defence of the disability discrimination claim brought by the claimant. The ET3 indicates a substantive defence being made and the respondent's knowledge of events. In all the circumstances, the injustice and hardship to the claimant of refusing the amendment is disproportionate to any injustice and hardship to the respondent of allowing the amendment. Although the claimant may continue with his claim of unfair dismissal there are separate considerations in respect of the disability discrimination claim and either one may be separately successful or unsuccessful on the facts.

159. In weighing up the balance of justice and the hardship in allowing or refusing the amendment, I do not take the claimant's quantification of his claim as set out in his ET1 as being appropriate. I note that the sums sought by the claimant as set out in his ET1 and Agenda do not appear to rely on any particular medial evidence, nor relate to the claimant's actual wage loss and any issues re mitigation of loss, contribution and / or reflection of the claimant's position that he had been in a number of different jobs since his dismissal.

160. In weighing up the balance of justice and the hardship in allowing or refusing the amendment I take into account that the respondent has already set out a

substantive defence to the claim and that there is no indication that they will not be able to recover documentary evidence which they may rely on in their defence.

161. It is recognised that additional expense has been incurred by the respondent as a result of these preliminary proceedings in respect of the claimant's proposed amendment. If the respondent wishes to seek expenses in respect of these preliminary proceedings, such application will be dealt with following conclusion of the Final Hearing.

162. In all the circumstances I allow the ET1 to be amended in terms of the Answers. The respondent is given the opportunity to amend the ET3 in response.

Strike Out

163. I do not accept the respondent's representative's position that the section 13 claim must fail because but the claimant relies on depression and anxiety as a disability, not stress, and the reason for the absence was not related to the claimant's disability. There was no medical evidence before me with regard to the reason for the claimant's absence and whether that related to the conditions relied upon by the claimant in respect of his disability status. On the face of it, there is at least the possibility of a link between an absence stated to be because of stress and a chronic condition of stress and depression. That is a matter for the Tribunal at the Final Hearing, once relevant evidence has been heard.

164. I take into account that the decision was made my managers in March 2020 and the claimant's position that it was part of a continuing course of events, although the claimant has not particularized that.

165. I take into account that the test for strike out no longer refers to 'misconceived'.

166. In considering all the issues before me in this case, I applied the key principles set out in *E v X, L & Z* UKEAT/0079/20/RN(V) & UKEAT/0080/20/RN(V) from

paragraph 50. I identified the substance of the acts of which complaint is made by looking at the claim form. (*Sougrin).* That claim form clearly set out an intention to bring claims of discrimination on the grounds of disability. With regard to whether the ET1 set out a link (*Robinson*), I took into account that at box 15 of the ET1 there is reference to both the initial fact finding and the outcome of the appeal. These are the start and end points of what the claimant now relies on as being a continuing course of events. I noted that it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated in the claim form *(Sridhar).* I noted that the purpose of the PH was substantively to determine the limitation issue, and not to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated *(Caterham).* The test which I applied was whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. I have found in this case that it will be a question for the Final Hearing whether what the claimant relies on is in fact a continuing course of conduct. The issue of time bar is then live for the Final Hearing to that extent. It will be a finding of fact for the tribunal at the Final Hearing as to whether one act leads to another (*Lyfar).* The claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs (*Aziz; Sridhar).*

167. I took into account the respondent's reliance on separate individuals having made decisions which the claimant relies on as being a continuing course of conduct. I took into account that the fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor (*Aziz).*

168. I took the approach to strike out the claim under section 27 of the Equality Act 2010 (victimisation) because on the facts relied on by the claimant in that claim that claim has no prospects of success because what the claimant relies on is not a protected act in the sense required in that legislation.

169. In considering the strike out application, I took into account the claimant's case, at its highest, including considering whether any aspect of that case is innately implausible for any reason. I did not find any aspect of the claim to be innately implausible *(Robinson).*

170. I have decided to strike out the section 27 victimisation claim only on the basis that even if all the facts are found to be as pleaded, that complaint would have no reasonable prospect of success on its merits because the claim does not rely on a protected act and that is required. That cannot be said for the other claims brought by the claimant under the Equality Act 2010 relying on the protected characteristic of disability.

171. I do not consider that there is no reasonable prospect of the claimant establishing at a Final Hearing that what he relies on was a course of conduct extending over a period, so having the effect that the disability discrimination claim is not timebarred, with regard to the provisions of section 123(3). That will be for determination by the Tribunal at the Final Hearing.

172. I take into account the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of the issue of time bar, given the reliance on there being a continuing course of conduct.

173. In all the circumstances, the issue of whether or not the disability discrimination claims have been brought within the terms time limits set out in section 123 of the Equality Act 2010 will be for determination by the Tribunal at the Final Hearing in this case.

174. I accept the respondent's position that it is not clear what the claimant relies on as having arisen as a result of his disability (section 15 Equality Act). With regard to the Equal Treatment Benchbook guidance, I now direct that if the claimant wishes to purse a claim under section 15 of the Equality Act in addition to his other claims, (which he may chose not to do) he should**, by 5 July 2021 answer the following questions:-**

(1) What does the claimant say arose in consequence of his disability, which caused the respondent to treat him unfavourably?

(2) What does the claimant say the unfavourable treatment which he relies on in his claim under section 15 of the Equality Act 2010?

175. If the claimant does not intend to proceed with his claim under section 15 of the Equality Act 2010, he should confirm that position to the Employment Tribunal and to the respondent **by 5 July 2021.**

176. I accept the respondent's position that, the section 19 claim (indirect discrimination) as currently set out appears to be misconceived because what the claimant relies on (referencing the 'whistleblower', the requirement to obtain a doctor's note, asking about his wife's whereabouts) does not appear to be a PCP i.e a provision, criterion or practice which is applied by the respondent to all or a particular category of its employees. I take into account the claimant's answer to S5 of his Agenda that what he claims was indirect discrimination occurred 'after I raised safety concerns'. I take into account that it has been confirmed that no claim is made under section 100 of the ERA. It appears that the claimant relies on the audit in his section 19 claim.

177. With regard to the Equal Treatment Benchbook guidance, I now direct that if the claimant wishes to purse a claim under section 19 of the Equality Act in addition to his other claims, (which he may chose not to do) he should**, by 5 July 2021 answer the following questions:-**

(1) What provision, criterion or practice ('PCP') does the claimant say was applied by the respondent and is discriminatory in relation to the claimant's disability?

(2) In what way does the claimant say he was disadvantaged by the application of that PCP, compared with others who were not disabled would not have been?

178. If the claimant does not intend to proceed with his claim under section 19 of the Equality Act 2010, he should confirm that position to the Employment Tribunal and to the respondent **by 5 July 2021.**

179. The claim under section 20 / 21 Equality Act is specified in the amendment which is allowed, is not timebarred, on the basis that the amendment puts labels and gives further factual detail of the claim of disability discrimination which is bought in the ET1. Taken at its highest, it can no be said that that claim has no prospects of success.

180. The ET1 brings a claim under section 26 Equality Act 2010 based on the protected characteristic of disability.

181. The claim of victimisation as set out in the ET1 is not based on a protected act in terms of the Equality Act 2010 section 26. The legal definition of 'victimisation' is not the same as the common use of that word. In terms of the Equality Act 2010 'victimisation' is, in general terms, treatment because a person has done a 'protected act'. That means, generally, that they have complained about discrimination or harassment. That is not what the claimant relies upon here. For that reason I strike out the claim of victimisation as having no prospects of success.

Further Procedure

182. In coming to my decision on further procedure I have taken into account the respondent's position in their submissions that the unfair dismissal case should proceed to a Final Hearing. I have taken into account that the claimant is accepted by the respondent as having disability status in terms of the Equality Act 2010

183. The case will be scheduled for a Final Hearing, in respect of disability discrimination and unfair dismissal.

184. A further TCMH will be arranged for the purposes of case management. The matters to be discussed will include:-

- Whether any claim is withdrawn by the claimant and should be dismissed.
- Whether the Final Hearing should be in person or via CVP
- Whether witness statements should be used
- The issues to be determined by the Tribunal at the Final Hearing
- Witnesses (being necessary and relevant to the issues for determination)
- Fixing dates for the Final Hearing
- Issue of any Case Management orders to ensure preparation for the Final Hearing, including re exchange of documents and preparing and lodging the Joint Bundle for use at the Final Hearing
- Whether both parties are willing to engage in Judicial Mediation as an alternative means of dispute resolution.

185. Date listing letters will be sent to parties to seek information on their availability for the Final Hearing and their position as to whether or not this case is suitable to be heard via CVP.

Employment Judge: **C McManus**
Date of Judgment: **09 June 2021**
Date sent to parties: **10 June 2021**