EMPLOYMENT TRIBUNALS

Claimant: **Mr S Ali**

Respondent: **Royal Mail Group Ltd**

Before: **Employment Judge R Harfield**

Reserved Judgment on preliminary issues

Background

1. The claimant presented his claim form on 24 September 2021 complaining of disability discrimination. He wrote in box 8.2 (with paragraph numbers inserted by me for ease of reference):

(1) In 2015 Royal Mail reluctantly re-adjusted my duty under the EQACT2010, I was given in writing an adjusted work pattern. this work pattern contained times and different jobs through my working day at the end of the work paper is a statement stating "this new duty set will not attract any TBR or shift allowance.

(2) I was re-delivered this same paperwork around the 24th June by Abigail Maunder (current shift manager). who was following on from what Andrew Colclough left her with. it is here again the EQACT2010 was breached.

(3) On 01/07/21 6.6 years later after raising the complaint with Abigail's maunder, it transpired through agreements that i was always entitled to the TBR (15 mins per day) then by 05/07/21 Royal Mail reinstated my TBR officially into my duty and working day. if I didn't raise this, this would have carried on for many more years. Royal mail are ignoring the revocation period and my claim of discrimination.

(4) this has caused me immense injury to feelings.

(5) this Direct Discrimination under section 13 of EQACT2010 is because of my disability. if I never had this disability then I would have never lost out on my TBR for 6.6 years and be subjected to this long-term disadvantage, detriments and unequal treatment compared to others. i was treated less than what i deserve. i was made to pay for a reasonable adjustment by means of my TBR (15 mins per day).

(6) i was treated less/unfavourably as nobody else has this type of rota on the late shift. i was put at a clear disadvantage for 6.6 years because of this written letter. nobody had the authority to write such a statement against me.

(7) it was unfair treatment a discriminatory practice/criterion applied onto my re-adjusted duty under the EQACT2010. my employer was more than palpably aware i was disabled they have been since 2011 as per my medical notes state. this revocation was not applied to anybody else on the late shift, they kept ignoring their own medical evidence.

(8) i was victimised because I was going to bring forth a complaint officially under the EQACT2010 in around 2014. my employer was considering to IHR me without my knowledge more than once as i understand it from my employer's medical records. whilst I was undergoing medical intervention and getting better. it my belief that because this did not transpire he punished me and victimised me in another form in 2015 when readjusting my duty he was still vexatious about previous"

2. The respondent filed grounds of resistance defending the claim. It acknowledges that in or around 2012/2013 the respondent considered whether the claimant qualified for ill health retirement and obtained advice from occupational health in this regard but concluded the claimant did not qualify. The respondent asserts that as the claimant had a change of duty in 2015 he no longer qualified for Time Bonus Relief (TBR) or Late Shift Allowance (LSA) and that a letter was sent to the claimant confirming this on 3 December 2014. The respondent says that in 2021 the claimant asserted he was entitled to TBR and his manager contacted his previous manager, who advised the new manager to commence payments of TBR as the amount involved did not justify the management time that would be spend dealing with a dispute. The respondent says in their ET3 that the claimant then lodged a grievance asserting he was entitled to backdating of the TBR. The grievance was not upheld. The respondent denies direct disability discrimination relating to the non payment of TBR. The respondent denied victimisation, and asserts that the protected act and the detriment relied upon were not clear, but they denied knowing the claimant was intending to bring an Equality Act complaint in 2014. The respondent asserted that the claimant's complaints lack specification but that it appears that some of the claims were time barred.

3. EJ Sharp directed the claimant to provide further particulars of the victimisation claim. The claimant did so on 25 January 2022. In short form they read as the claimant saying that:

   (1) in November 2014 he complained to his manager about a lack of reasonable adjustments, saying if occupational health advice was not going to be followed he would seek legal advice. The claimant asserts that in December 2014 his manager then revoked his time bonus and threatened to remove his shift allowance;

   (2) after he submitted his ET1 in these proceedings, the grievance stage 2 manager Mr Walker, in September 2021, in breach of process, did not share investigation summary notes with the claimant, or share witness or interview notes and threatened to revoke the time bonus again;

   (3) after he submitted his ET1 in these proceedings, the grievance stage 2 appeal meeting manager Mr Singh, on 23 November 2021, asked the claimant pre-loaded questions about a "fraudulent and fictitious document" that was within the claimant's medical file in the room. The claimant says Mr Singh was trying to cover up discrimination and make the claimant out to be dishonest;

   (4) after his submitted his ET1 in these proceedings, Mr Singh at a further meeting on 2 December 2021, was "manipulating the facts surrounding the fictitious document, to the point of denying its existence." The claimant says the meeting was held to gaslight him and detract from the fraudulent document and he believes that Mr Singh was being fed questions from the respondent's legal team during the meeting. The claimant says due to the way the meeting was conducted he ultimately had to leave the meeting.

4. The case came before EJ Ryan on 9 February 2022. EJ Ryan noted at paragraph 3.4.1 of the case management order that the claimant was complaining of direct disability discrimination, where the alleged less favourable treatment was the loss of entitlement to TBR in 2015 and continuously until it was re-instated on 5 July 2021. EJ Ryan noted the claimant was saying he had sought reasonable adjustments in November 2014 for his wrist condition, and alleged that the respondent had discriminated against him, and as an adjustment the claimant was put on the late shift but one consequence was loss of TBR. At paragraph 3.4.2 EJ Ryan noted a complaint of victimisation, with the protected act said to be seeking adjustments in November 2014 and the detriment being the revocation of TBR until 2021.

5. EJ Ryan discussed the claimant's further particulars which he noted incorporated an amendment application, with possibly another to be

added. He made directions for the claimant to set out in writing the amendments to the victimisation claim the claimant was seeking. The respondent was to set out their position on the amendment application, and indicate if they were applying for any preliminary issue to be considered at a preliminary hearing, and a judge would decide what issue should be dealt with at a public preliminary hearing, or at least list the case for further case management.

6. On 16 March the claimant provided his application to amend. He sought to rely on 8 incidents:

(1) Incident 1: said to be direct disability discrimination, it being alleged that in 2012/2013 his manager, Mr Colclough, sought ill health retirement on the claimant's behaviour without consulting with or consent from the claimant, and without considering making reasonable adjustments;

(2) Incident 2: said to be victimisation, it being alleged that in or around November 2014 the claimant complained to Mr Colcough about not receiving reasonable adjustments, and as a result Mr Colclough threatened to remove the claimant's shift allowance and TBR;

(3) Incident 3: said to be direct disability discrimination, it being alleged that on 3 December 2014 Mr Colclough then proceeded to remove the claimant's TBR. The claimant asserts that "*This act of discrimination has been continuing for the last 6.6 years (continuing act).*"

(4) Incident 4: said to be direct disability discrimination, it being alleged that in May 2021 Ms Maunder was given the opportunity to correct the situation in a realignment meeting when the claimant highlighted the direct discrimination, but her response was to refer to Mr Colclough's document that revoked the TBR and asserted the claimant had no entitlement to TBR. The claimant says that Ms Maunder continued the direct discrimination course of conduct of her predecessor by the continuing act of revoking TBR during the realignment exercise. (The claimant acknowledges that Ms Maunder later reinstated his TBR but says that Ms Maunders' initial decision had continued the discrimination against him for a further 2 weeks);

(5) Incident 5: said to be victimisation, it being alleged that in August 2021 the claimant submitted a grievance about direct disability discrimination, and he was victimised by (a) Mr Walker being a lower grade manager than the manager he was investigating, (b) not being given the notes of meeting to correct/comment upon, (c) Mr Walker not sharing witness statements or evidence used to make his decision with the claimant, (d) not informing the claimant of his right of appeal, (e) exceeding the 28 days (68 days) provided for under policy to conclude the grievance without

explanation for the delay until the claimant contacted HR and (f) Mr Walker concluding an error had been made in reinstating the claimant's TBR and threatening to revoke it;

(6) Incident 6: said to be victimisation, it being alleged that after he submitted his grievance and ET1, Mr Singh in the meeting on 23 November asked the claimant pre-loaded questions about the alleged fraudulent and fictitious document, to cover up discrimination and to make the claimant out to be dishonest;

(7) Incident 7: said to be victimisation, in the second meeting with Mr Singh on 2 December where it is said Mr Singh manipulated the facts around the "fictitious and fraudulent document" and gaslit the claimant;

(8) Incident 8: said to be victimisation, in Mr Singh not upholding the claimant's grievance and saying the revocation of TBR was the correct decision and that the "fraudulent and fictitious" document was not relevant

7. On 29 March 2022 the respondent commented on the claimant's amendment application, largely objecting to the amendments sought. The respondent applied for the time issues, in both the ET1 and the amendment application to be considered at a preliminary hearing. EJ Sharp responded on 13 April 2022 stating that the claimant would have to explain the delay in not bringing the claims earlier, and it may require determination about whether to extend time or leave it to the final hearing. EJ Sharp highlighted that evidence may be required from the claimant and the parties were directed to comment whether there would be sufficient time at the preliminary hearing to deal with the issues. The claimant wished for all matters to be dealt with at full merits hearing. The respondent submitted a preliminary hearing should proceed. EJ Moore directed that the preliminary hearing was to go ahead to determine the time limit issues set out in the notice of hearing, the amendment application, and to make case management orders. EJ Moore directed the claimant to explain the delay, in support of his amendment application. She said it was not proportionate to leave matters to a final hearing.

8. The notice of hearing said that the time limit issues to be determined in the discrimination and victimisation claims were:

"*Was any complaint presented outside the time limits in sections 123(1)(a) & (b) of the Equality Act 2010 and if so should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it? Further, or alternatively, because of those time limits (and not for any other reason), should any complaint be struck out under rule 37 on the basis that it has no reasonable prospect of success and/or should one or more deposit orders be made under rule 39 on the basis of little reasonable prospect of*

success? Dealing with these issues may involve consideration of subsidiary issues including: whether there was "conduct extending over a period"' whether it would be "just and equitable" for the tribunal to permit proceedings on an otherwise out of time complaint to be brought: when the treatment complained about occurred."

9. On 11 May 2022 the claimant provided an email to address the matter of why his claims were brought so late to the Employment Tribunal. He said that the 2013 introduction of tribunal fees was a clear obstacle for him to obtain access to justice. He said there were many other reasons financial and otherwise that also prevented him, but the tribunal fees were the primary reason why he could not afford to bring his claim sooner. He said the advice from his union at the time was that he would have to pay £300 to submit his claim and up to £2000 hearing fees for a discrimination claim plus more for hearing dates. He said he did not have the money and he was at the time still suffering with severe mental health issues and trauma from the car accident (in which he injured his wrist) and two theft allegations levelled against him by the respondent previously. He said he only learned from his union in or around August 2021, when they were helping him with his grievance, that fees had been abolished. The claimant also said again that there was a continuing act of discrimination over the whole 6 years.

10. EJ Brace directed the claimant to further explain why his amendment application was not made earlier. The claimant said he thought he had already complied to the best of his ability. The claimant, in an email of 25 May, commented he thought the hearing was to decide the amendment and for case management. At my direction on 26 May he was sent an email to again confirm that the hearing had also been listed to decide time limit issues. The email set out that the claimant would need to give evidence about matters relating to his application to amend and time limits and set out the type of topics the claimant would have to give evidence about. The claimant was also referred to the Presidential Guidance about amendment applications.

11. The public preliminary hearing proceeded before me on a hybrid basis, with the claimant attending in person and Mr Harte, for the respondent, attending by video. I had a bundle prepared by Mr Harte before me which the claimant also had a copy of. The claimant gave evidence under oath, where I asked some questions, Mr Harte some questions and the claimant had the opportunity say what else he wanted to say. The claimant objected to the fact he was the only one giving evidence under oath and Mr Harte was questioning his assertions in evidence. I explained it was necessary for the claimant to give evidence on oath, and indeed was in his best interests to do so, because what he said then had the status of being witness evidence. I also explained given the potential time limit difficulties

identified when listing the case for hearing, the claimant had to give evidence because he had to set out his case why his claims are in time, and also give his evidence about why, if relevant, time should be extended on a just and equitable basis. The parties also provided further oral submissions. Mr Harte provided his first so that the claimant, as a litigant in person, could understand how the respondent set out their position. I have not set out their submissions here but they are incorporated by reference below.

12. By the conclusion of the preliminary hearing matters had moved forward in that the respondent was objecting to incidents 1 and 2 above on the basis they required amendment and were out of time. They accepted that incident 3 does not require permission to amend, but they argued it is out of time. Incident 4 they accepted was within the claim form, and they did not seek to argue it was, in itself, out of time (but argued it did not bring other earlier matters within time). The respondent did not oppose the amendment application to add incidents 5, 6, 7 and 8 and I granted permission. Not set out in the claimant's list of incidents in his amendment application is also the victimisation claim set out at paragraph 3.4.2 of EJ Ryan's case management order. The respondent here asserted that the complaint is out of time.

The legal principles relating to amendment applications

13. In Selkent Bus Co Ltd v Moore [1996] guidance was given by the Employment Appeal Tribunal as to the approach that Tribunals should take to amendment applications.

14. The guidance says the Tribunal should take account of all the circumstances, balancing any injustice and/or hardship to both parties when deciding whether to allow or to refuse the amendment. The guidance makes it clear that there are far too many circumstances for any judgment to delineate what amounts to the relevant circumstances, but that the following categories are part of that relevancy process.

15. The first is the nature of the amendment sought. The guidance indicating that applications are of many different kinds ranging from the minor correction of typing errors through to the addition of factual details on existing allegations. The addition and substitution of other labels for facts already pleaded to and the making of entirely new factual allegations which change the basis of an existing claim. On the far end of this spectrum is the substantial alteration pleading a new cause of action.

16. The guidance provides that the applicability of time limits is important when a new cause of action forms the proposed amendment; the hardship

to a party may be greater if the new cause of action would be out of time if brought in a separate claim.

17. The guidance then makes it clear that the timing and manner of the application should be taken account of by the Tribunal although it is clear that an amendment should not be refused solely because there is a delay in making it.

18. Each of the above along with any other relevant circumstances are to be take account of as a part of the discretionary balancing exercise. The tribunal should discover why the amendment was not sought earlier. I should take any factors into account which affect that, but I am to consider that relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, adjournments, and any additional costs to a party, particularly if that party is unlikely to recover those costs are also part of that process.

19. In the more recent decision of Vaughan v Modality Partnership the Employment Appeal Tribunal emphasised that the Selkent factors are not a checklist but are some of the factors a Tribunal may need to take account of when undertaking the fundamental exercise of balancing relative injustice and hardship. The Tribunal has to consider their relative and cumulative significance in the overall balance of justice. The Employment Appeal Tribunal encouraged Employment Tribunals, when deciding amendment applications, to focus on what are the real practical consequences of allowing or refusing the amendment.

20. The case law also states that the merits/viability of a proposed new amendment can be a relevant consideration. When weighing up whether to allow the amendment, the Tribunal is entitled to consider whether the proposed claim has reasonable prospects of success/ does not appear good. However, where there is a pessimistic view on merits that falls short of "no reasonable prospects of success" it may be more difficult to refuse the amendment when the application to amend is within time (bearing in mind it would be open to a claimant who is in time to instead issue a fresh claim): Gillett v Bridge 86 Ltd. In DeCosta v British Gas it was also more recently emphasised that the Tribunal, when considering an amendment application of an "in time" amendment application, should still consider the claim's viability.

Application to amend – allegation of direct disability discrimination that in 2012/2013 the claimant's manager sought ill health retirement on the claimant's behalf without consulting or informing the claimant or considering reasonable adjustments

21. The claimant's primary position is that permission to amend is not required as this complaint is already in his claim form as presented at paragraph (8) in box 8.2. Factually it does feature at paragraph (8) of the claim form. However, the natural reading of what the claimant has written there is that it is a victimisation complaint. I do not consider that the complaint is there as a direct discrimination complaint, and the claimant does require permission to amend.

22. Turning to that amendment application, the bringing of the complaint as a direct discrimination complaint is not a simple relabelling. Amongst other things the questions before the Tribunal are different as to the "reason why" it is said the detrimental treatment happened when considering a direct discrimination claim compared to a victimisation claim. But I do accept that the factual background is there. It is therefore not the most substantial of amendments compared to what was written on the ET1 claim form. However, Acas early conciliation took place between 24 August 2021 and 13 September 2021 and the claim form was presented on 24 September 2021 some 8 or 9 years after the events in question.

23. The claimant said in evidence that he did not bring this complaint earlier because he did not know about it (he did not mention that in his previous email to the employment tribunal). He said that his manager's enquiries about ill health retirement were made without his knowledge at the time, and he only found out about them when he later accessed a copy of his occupational health records in August or September 2021. The claimant submitted it would therefore be just and equitable to extend time to allow the complaint to be brought. The claimant does not argue that the incident is part of an ongoing continuing act. The claimant says there should be no prejudice in allowing the complaint to proceed on the basis the evidence is available because the occupational health records still exist and show the questions his line manager asked of occupational health.

24. For the purposes of determining this application, I accept the claimant's evidence that he did not know about the consideration for ill health retirement at the time and that he raised the matter within his claim form fairly promptly after it came to his attention (albeit on the face of it as a victimisation complaint not a direct discrimination complaint. Although in fact he does not ultimately pursue it as a victimisation complaint, presumably because it transpires the action predates the claimant's first protected act and the complaint is therefore not temporally sustainable). However, a lack of knowledge on the claimant's part does not necessarily mean the amendment should be granted. It is something to be weighed into the equation. I do *not* consider that the overall balance of prejudice and hardship remains in favour of granting the amendment to allow this complaint to proceed, or that it would be just and equitable to allow it to proceed from a time limit perspective.

25. The complaint is a standalone complaint, that is incredibly stale, having happened 8 or 9 years ago. I consider there is likely to be very real evidential prejudice to the respondent if the complaint were allowed to proceed. Mr Colclough would be required to give evidence as to why he acted in the way he did, and filled in the occupational health forms in the way he did, 8 or 9 years ago (or indeed longer by the time of the final hearing). I accept these are standard management referral forms where it is likely to be very difficult after such a period of time to remember exactly what was in an individual's mind at the time. The claimant's assertion that the occupational health records themselves are enough is incorrect. The complaint he seeks to make is one of direct disability discrimination. It is not a test of whether "but for" the claimant being disabled the detrimental treatment alleged would not have happened. The Tribunal has to determine the reason why the treatment happened, in the sense of looking at the mental processes of the individual in question and whether that was materially influenced by disability. Mr Colclough would have to give evidence about what was going on in his mind at the time he filled in the forms. I am satisfied there is a very real prospect of serious evidential prejudice to the respondent.

26. I take into account the claimant will suffer some prejudice in not being able to pursue the complaint, and in circumstances where he did not know about the conduct at the time to be able to challenge it at the time. However, the claimant is not left without a claim to pursue at all; other parts of his claim continue and this is not the main part of the complaints that he seeks to bring.

27. The amendment is not permitted. I would add that even if the complaint was in the claim form when presented, I would have in any event concluded the Tribunal does not have jurisdiction to hear it on the basis it was presented out of time and it would not be just and equitable to extend time. I therefore would not have permitted it to proceed in any event.

Legal principles relating to deciding time limit issues at a preliminary hearing

Section 123 of the Equality Act

28. Section 123 of the Equality Act says:

> *"(1) Subject to sections 140A and 140B 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.*
>
> *(4) 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."*

Conduct extending over a period

29. In Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, it was said by the Court of Appeal:

> **"***51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see Owusu v London Fire & Civil Defence Authority [1995] IRLR 574 at paragraphs 21-23; Rovenska v General Medical Council [1998] ICR 85 at p.96; Cast v Croydon College [1998] ICR 500 at p.509 (cf the approach of the Appeal Tribunal in* Derby Specialist Fabrication Ltd v Burton *[2001] ICR 833 at p.841 where there was an 'accumulation of events over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the employers to prevent racial abuse and discrimination and as amounting to 'other detriment' within section 4(2)(c) of the 1976 Act).*

> *52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

30. As stated, they are but examples of situations where an act was, or was not, considered to extend over a period. But it remains helpful to consider the type of cases that were referred to in Hendricks.

31. Barclays Bank v Kapur [1991] 2AC 355, was concerned with bank workers who had less favourable pension arrangements, in terms of recognising years of service, than employees of European origin. Lord Griffiths, in the House of Lords, referred to two earlier cases of Amies and Calder and said they illustrated the difference between, on the one hand, a deliberate omission as a one off decision, and on the other hand a continuing state of affairs. Lord Griffiths said it was right to classify in Kapur the pension provisions as a continuing act lasting throughout the period of employment. He said it would the same as a situation where an employer knowingly paid lower wages to black employees compared to white employees.

32. An example, of a case falling the other side of the line is Sougrin v Haringey Health Authority [1992] ICR 650. There the claimant complained about a regrading she was given compared to a white colleague. It was held that the act complained of was that the respondent had refused to upgrade the applicant while upgrading her comparator, not that it operated a policy or rule never to upgrade black nurses. The discriminatory act was a once-for-all event (occurring at the latest on the dismissal of her internal appeal), and the payment of a lower salary to her than that paid to her comparator was therefore not an "act extending over a period" but the continuing consequence of that event. An argument that the court was bound by Kapur to find in her favour was rejected. It was said:

> "*In the present case it has never been suggested that the local health authority had any such policy [not to pay the same wages to black and white employees]. Its policy was quite clearly to pay the same wages to every employee in the same grade regardless of*

racial distinctions The applicant's complaint was quite different, namely that she had been refused an F-regrading for racially discriminatory reasons."

33. The difference was explained in Rovenska v General Medical Council [1998] ICR 85:

"….[T]he courts have held that, if an employer adopts a policy which means that a black employee or a female employee is inevitably barred from access to valuable benefits, this is a continuing act of discrimination against employees who fall into these categories until the offending policy is abrogated"

34. In Owusu v London Fire & Civil Defence Authority, 1995] IRLR 574 it was said**:**

" The position is that an act does not extend over a period simply because the doing of the act has continuing consequences. A specific decision not to upgrade may be a specific act with continuing consequences. The continuing consequences do not make it a continuing act. On the other hand, an act does extend over a period of time if it takes the form of some policy, rule or practice, in accordance with which decisions are taken from time to time. What is continuing is alleged in this case to be a practice which results in consistent decisions discriminatory of Mr Owusu.

It would be a matter of evidence for the tribunal as to whether such a practice ... in fact exists. It may be that, when explanations are given by the respondents, it will be shown that there is no link between one instance and another, no linking practice but a matter of one-off decisions with different explanations which cannot constitute a practice."

35. In Cast v Croydon College [1998] ICR 500, complaint was made of a series of decisions refusing an application to job share or work part-time, which was alleged to be the result of a sexually discriminatory policy. Here observations were made about the distinction between a later decision merely referring back to an earlier decision and a fresh decision. It was stated that where decision makers make clear in responding to further requests that they have reconsidered the matter, then time begins to run again. If they have not, and they merely refer the complainant to their previous decision, no new period of limitation will arise. However, where the successive acts are such as to indicate and/or are pursuant to a discriminatory policy or regime, different considerations arise. It was accepted that on the Tribunal's findings of fact in that particular case, the claimant was complaining that the decisions were indicating the existence of a discriminatory policy, which was an acting extending over a period

36. His Honour Judge McMullen QC said in Coutts & Co Plc and Anr v Cure & Anr [2005] ICR 1098, at paragraph 28:

> "*The factual circumstances in which discrimination occurs have been illustrated in the authorities as falling into one of the following categories.*
> *(1) A one-off act of discrimination, such as a refusal to promote, which has continuing consequences for the disappointed candidate.*
> *(2) An act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time.*
> *(3) A series of discriminatory acts, whether or not set against a background of a discriminatory policy.*
> *A complaint in respect of category (1) must be made within three months of the act or, where specific statutory provision is made for a deliberate omission to act, within three months from the date when the relevant less favourable treatment was 'decided on'. Time runs for a category (2) complaint when the discriminatory rule is abrogated; and it will also run in the case of the specific application of the rule to any given employee, eg in refusing promotion, from the date of that application. Time runs in a category (3) complaint where there is specific statutory provision for this, from the last in the series of acts."*

37. In Parr v MSR Partners LLP & Ors [2022] EWCA Civ24 the Court of Appeal held that circumstances amounting to demotion, in an age discrimination claim, should be treated no differently to a dismissal. It was a one off act with continuing consequences rather than conduct extending over a period. It was said:

> "*The case law does draw a distinction, at any rate when analysing whether the conduct complained of is an "act extending over a period", between a rule, policy or practice which inevitably leads to the rejection of the claimant and one which involves (in practice and not just on paper) the exercise of a discretion…*

Just and equitable extensions of time

38. As to the approach to take to applications for an extension of time on a just and equitable basis, it was said in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194:

> "*18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to*

which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras 30-32, 43, 48; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para 75.

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).”

The approach to take at preliminary hearings concerning time limits

39. The Notice of Hearing in this case empowers me to decide, substantively, whether the claim is out of time or not, and whether time should be extended under section 123, or instead (or as well), to consider whether to strike out the claim as having no reasonable prospect of success relating to time limits or alternatively to make a deposit order on the basis the claim, on time limit points, has little reasonable prospects of success.

40. The power to make a deposit order is provided by rule 39 of the ET Rules, as follows:

“(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

41. The test for the ordering of a deposit is therefore that the party has little reasonable prospect success. It was said by the Employment Appeal Tribunal in Hemdan v Ishmail [2017] IRLR 228 that the purpose of a deposit order is " *To identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs, ultimately, if the claim fails"* and it is*" emphatically not…to make it difficult to access justice or effect a strike out through the back door*." A deposit order should be capable of being complied with and a party should not be ordered to pay a sum which he or she is unlikely to be able to raise.

42. As for the approach the Tribunal should take, in Wright v Nipponkoa Insurance [2014] UKEAT/0113/14 Van Rensburg v Royal Borough of Kingston-Upon-Thames and others [2007] UKEAT/0095/07 it was said when determining whether to make a deposit order, a Tribunal is not restricted to a consideration of purely legal issues; it is entitled to have regard to the likelihood of the party being able to establish the facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. That said there is a

balance to be struck as to how far such an analysis can go. It was also made clear in Hemdan that a mini-trial of the facts is to be avoided. If there is a core factual conflict it should properly be resolved at a full merits hearing where evidence is heard and tested.

43. Under Rule 37 a claim or part of a claim can be struck out in grounds that include it has no reasonable prospect of success. A claim cannot be struck out unless the party has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

44. In E v X & Anor UKEAT 20_0079_20_1012 the Employment Appeal Tribunal reviewed the case law relating to preliminary hearings on matters relating to time limits. The principles were summarised as follows:

(a) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form;

(b) It is appropriate to consider the way in which a claimant his 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) 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;

(i) 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;

(j) 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;

(k) 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:

(l) 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;

(m) 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.

Time limit issues (1) direct disability discrimination re: loss of entitlement to TBR in 2015 (paragraph 3.4.1 of order of EJ Ryan and incident 3 in the claimant's application to amend & (2) victimisation re:revocation of TBR (paragraph 3.4.2 of order of EJ Ryan

Conduct extending over a period?

45. The Notice of Hearing gives me a discretion as to whether to approach this issue on the basis of making a substantive final decision on the time limit issues, or whether I should alternatively (or in addition) consider it on the basis of a strike out application under rule 37 (or a deposit order application).

46. I consider it more appropriate to consider the issues from a rule 37 perspective, as I only heard evidence from the claimant. I therefore have to examine the issues taking the claimant's case at its highest. I have to consider whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be a continuing acts.

47. It is important to set these pleaded allegations within the wider context of the case. In particular, of relevance is incident 4 in the claimant's amendment application (which in fact is now accepted as being part of the claimant's pleaded case from the start and which is in time (see paragraph [2] of the original grounds of claim)). This is the complaint that on 24 June 2021 the claimant's then shift manager, Ms Maunder redelivered the paperwork saying that he was not entitled to any TBR which it is said amounts to direct disability discrimination. It is also important to note that the claimant says his loss of entitlement to TBR was continuous until it was reinstated by Ms Maunder on 5 July 2021. A part of the claimant's other complaints, under a permitted amendment, is that subsequently the respondent in the grievance process has threatened to remove it again, on the basis that it was incorrectly reinstated, and the claimant should not have had TBR throughout.

48. The claimant's case is that the removal of his TBR in late 2014 or early 2015 was a continuing act for a period of 6.6 years. He said that in 2014/2015 Mr Colclough made a decision to remove his TBR. At page [109] of the preliminary hearing is Mr Colclough's letter dated 3 December 2015 with a manuscript amendment to 2014. It is addressed to the claimant's union representative and says "*As discussed to reach a resolution which will be beneficial to all parties I can now confirm that I am in a position to align Mr Ali to the correct workload at the correct times in*

line with his OH Assist Referral. See below the new pattern to commence from Monday 4th January 2015 and will be a permanent role." The letter then sets out a shift pattern and states at the end of the letter "*Please [note] that as a new duty set this will not attract time Bonus Relief or Late Shift Allowance."*

49. The claimant said his was discontented with this aspect of the outcome. His position is that it was unfair, and discriminatory because he ended up, in effect, funding his own reasonable adjustments. He said he discussed challenging it with his trade union but they advised him that it would be pointless as it would not get anywhere. He did not pursue a grievance or an employment tribunal claim at the time, and the situation went unchallenged for some 6 years. However, during that time he was without TBR.

50. The claimant said that the issue was raised by him, and by his union on his behalf, with Ms Maunder in 2021 as part of a realignment meeting. The respondent was making some business changes and Ms Maunder was meeting employees with adjusted roles to see where their hours could fit and align to workload requirements. It gave the claimant the opportunity to raise the question of his entitlement. He said that Ms Maunder told him he was not entitled to TBR and she then on 24 June 2021 gave the claimant the same letter that Mr Colclough gave him but with the date updated and with her name on it. He said that the discriminatory action on the part of Ms Maunder that amounted to less favourable treatment because of disability was her letter of 24 June 2021 saying he had no right to TBR. It was put to the claimant in cross examination that Mr Colclough and Ms Maunder made two separate decisions 6 years apart, with Mr Colclough deciding the claimant was no longer entitled to TBR and removing it, and Ms Maunder, deciding the claimant was not entitled to TBR and declining to reinstate it. The claimant did not agree, saying that it was exactly the same act, the same premise, and the same issue. He said that Ms Maunder had made a fresh decision. He said that it was a continuing act, a continuing state of affairs. The claimant said that Ms Maunder continued the same act and that she, like Mr Colclough, took the claimant's TBR away as she did not reinstate it immediately. He said that the removal of his TBR extended over a very long period of time and the link between the events was clear as Ms Maunder revoking his entitlement to TBR was exactly the same as Mr Colclough had done.

51. The link that the claimant was relying upon was the continuation of the removal of TBR after Mr Colclough's decision until the TBR was reinstated and also the link between Mr Colclough's decision and Ms Maunder's decision. It was on that basis the claimant was saying the complaints were in time. He did not present his case on the basis that the other more

recent events, where permission to amend was given, are also part of this one continuing discriminatory act extending over a period.

52. The respondent argues that Mr Colclough's decision was a one off act, albeit one with continuing consequences in terms of loss of TBR. The respondent argues that this was a move to new duties or changed duties, or adjusted duties (as the claimant describes it), which resulted in the removal of TBR. The respondent says this was not a discriminatory rule or regime or practice but a one off decision. The respondent asserts this is not a case where the claimant argues there was a policy that TBR was removed for disabled employees. They say it is that the claimant is complaining about Mr Colclough making a decision to remove it which is said to have been because the claimant was a disabled person or as an act of victimisation because of the claimant's earlier complaint. The respondent submitted it was akin to Sougrin. The respondent argues that when Ms Maunder looked at it in 2021 she did not take the claimant's TBR away as he did not have it at that point in time. She was addressing the claimant's claim at that point in time that he was entitled to it, she said he was not, and that her decision was separate to the original decision.

53. All of the case law is clear that I have to look at the substance, in the pleaded case, of what the claimant is complaining about, not the labels that anyone selects.

54. The claimant is not complaining about there being an act extending over a period of time, in the sense of there being a rule or a policy by reference to which decisions are made from time to time. He has not set out his case, for example, as being that the respondent had a rule or policy in place that disabled individuals or disabled individuals on adjusted duties did not qualify for TBR in general. Or that he fell foul of such a rule or policy when applied to him by Mr Colclough and Ms Maunders (compared with for example the discriminatory policy in place in Kapur.) The categories set out in Coutts are simply a helpful tool rather than a rigid statement of the law. But to adopt that language, the claimant has not advanced his case as a category (2) case of "an act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time." The most he said along those lines is the statement in his claim form that "*it was unfair treatment a discriminatory practice/criterion applied onto my readjusted duty under the EQACT2010, my employer was more than palpably aware I was disabled they have been since 2011 as per my medical notes state, tis revocation was not applied to anybody else on the late shift, they kept ignoring their own medical evidence."* But this is in substance a complaint about the individual decision that the claimant would not be entitled to TBR. Like in Sougrin, what the claimant is complaining about is the individualised decision to remove TBR, or that he did not qualify for TBR, which he says

was less favourable treatment of him because of his disability, or the personal act of victimisation against him because of a protected act. He is not advancing a case, on what he has put forward, that the respondent was operating a policy or rule never to give TBR to disabled employees or disabled employees on adjusted duties. He is saying, in effect, that Mr Colclough and Ms Maunder had a discretion they could have exercised to give him TBR, and that in making a decision not to exercise their discretion in his favour he was discriminated against, with Mr Colclough and Ms Maunder being materially influenced to do so (in the sense of their conscious or subconscious minds) because of his disability or because (for Mr Colcough) he had previously complained about a failure to make adjustments. The claimant has therefore not shown that the complaints are capable of being an act extending over a period on that particular basis.

55. The claimant has also not set out his claim on the basis of, for example, saying that the decisions about TBR were part of an accumulation of events over a period of time related to his disability, in the sense of, for example, him facing an ongoing climate of abuse in work related to disability, or there being a continuing state of affairs in the respondent in a wider sense in which disabled employees were treated less favourably. Instead, he focuses on the handling of his TBR by Mr Colclough, with that then continuing, and with, he says, Ms Maunder repeating the same discriminatory action in June 2021.

56. I therefore look next at the question of whether the claimant has set out a prima face case that these complaints are in time because they are a series of discriminatory acts, whether or not set against a background of a discriminatory policy (category 3 in Coutts). Adopting the language in Hendricks this involves considering whether the claimant has shown was happened with his TBR was an ongoing discriminatory state of affairs rather than a succession of unconnected or isolated specific acts, where time would begin to run from the date when each specific act was committed.

57. In substance the claimant is saying Mr Colclough made an individualised decision to remove the claimant's TBR. Taking the claimant's case at its highest in that regard, but applying the case law in the area, that would be, by itself, a one off decision, from which time would run, albeit it was a one off decision with ongoing consequences in terms of the ongoing loss of TBR. The fact that the claimant therefore suffered an ongoing loss of TBR would not serve to bring the claim in time.

58. In substance, the claimant is then saying that Ms Maunder made an individualised decision not to reinstate his TBR. The question then becomes whether there is sufficient linkage between those alleged

individual discriminatory acts of Mr Colclough and Ms Maunder such that it is capable of amounting to conduct extending over a period.

59. There is obviously a connection between the actions of Mr Colclough and Ms Maunder. It is the same topic and Ms Maunder, on the claimant's case, sent the claimant, in effect, the same decision letter. However, they are decisions made by different people, made 6 years apart with nothing in between. They are different decisions in the sense that Mr Colclough decided the claimant would no longer qualify for TBR whereas Ms Maunder, when the issue was brought to her by the claimant after a 6 year gap in time, decided the claimant did not qualify for its reinstatement. The case as advanced by the claimant is not that Mr Colclough and Ms Maunder made their decisions set against a background or in implementation of a discriminatory policy.

60. Overall, bearing in mind in particular the substantial gap in time between the conduct of Mr Colclough and Ms Maunder, who on the claimant's own account were making their own individual decisions, with nothing happening in between, I consider that the claimant has no reasonable prospect of success in establishing that the complaints in question are an act extending over a period. He has not sufficiently established a reasonably arguable basis for the contention that the acts of Mr Colclough and Ms Maunder are so linked as to be continuing acts or to constitute an ongoing state of affairs. Subject to considerations of whether I should grant a just and equitable extension of time, I find that the parts of the claimant's claim that the respondent, through Mr Colclough, directly discriminated against the claimant in removing his TBR and/or victimised him in doing so should be struck out as having no reasonable prospect of success. The complaint about Ms Maunder's decision remains within time.

61. If the analysis above is incorrect, I would have alternatively found that the claimant's claim of a continuing act had little reasonable prospect of success such that I would have been minded to order the claimant to pay a deposit on condition of being allowed to continue to bring his complaints about Mr Colclough's decision making.

Just and equitable extension of time?

62. The claimant argued that alternatively time should be extended on a just and equitable basis. He said in evidence he did not take action at the time because the union said it would be pointless and the claimant would not get anywhere with it. He accepted that he knew at the time it was possible to take a complaint to the employment tribunal. He said he did not pursue a tribunal claim on his own accord because his union told him of the fees and that deterred him. He said his understanding was he would have to

pay the fees, and there was no suggestion of any financial assistance from the union.

63. I asked the claimant if he looked at other sources of advice. He said that he was glad to get the adjustments in work, that his wrist was bad at the time, he was suffering mental anguish from the car accident and the disciplinary cases brought against him in work, and he had a young family at the time. The claimant said he had to weigh it up and he accepted what he had at the time and carried on working. He said his union did not tell him about the time limits at the time and he did not look at the issue of time limits for himself at the time in 2014.

64. The claimant said he did not raise a grievance at the time because he was advised to accept the state of affairs. He said he raised it with the union, but it was a long time ago, and they said they would speak to management but he did not think they got back to him. He said his perception was the union and management were very close at the time. He said he was told there were fees to pay and it was pointless and he accepted the state of affairs at the time. He said the union said an appeal would be pointless. When asked if the union knew he was considering a tribunal claim, he said that it was a long time ago and he could not say what they were thinking. He said he was taking his legal advice from the union and was saying he did not think it was right and they said he was not going to get anywhere with it. He was asked again if the union were aware in 2015 the claimant was looking to bring a tribunal claim and he said again he could not remember as it was a long time ago. He then also said it may have been discussed at the time, and, if so, the union would have been aware. The claimant said if there had not been fees he would have got advice from the union as to how to pursue it but he could not afford the money at the time.

65. The claimant said the TBR issue came back to life as it arose as a question with Ms Maunder and that he sought the advice of the union again when he was told there were now no tribunal fees involved. The claimant said his union the CWU mentioned the 3 month time limit when he went into the branch to submit his ET1 on their PC. He said he did not know about it until then and that his CWU rep told him that his claim was in time.

66. The delay in bringing an employment tribunal claim about the decision of Mr Colclough is substantial. It is over 6 years. In terms of the reason for the delay, I do not accept that this rests solely with the claimant being put off by there being employment tribunal fees to pay. Based on what the claimant said in evidence, I consider and find, that the claimant reached a considered decision at the time not to take matters further at all. Importantly that included deciding not to pursue an internal grievance or

appeal, which would have incurred no fees. I find he decided not to pursue the matter because the practical advice from the union was that it would not get anywhere, because the claimant whilst disappointed with the loss of TBR was relieved that his adjusted duties were finally sorted, and because he had various other things going on in his life at the time including his wrist pain, and the other stresses he identified. In short, he considered his options, weighed things up and decided on balance not to proceed. I accept that one of the factors that weighed in his mind against pursuing a tribunal claim further at the time was because the union told him of the likely fees. But I do not accept that fees aside the claimant would have otherwise pursued a tribunal claim at that time. As I have said, he did not pursue an internal appeal or a grievance which involved no fees. I would add that the union must have known the claimant was contemplating an employment tribunal claim for them to have had a conversation about fees in the first place.

67. I accept that the claimant may not have known about the 3 month time limit for bringing an employment tribunal claim at the time. But I do not consider that if the claimant had been aware it would have made a difference; he decided not to take action at that point in time.

68. Turning to issues of prejudice and hardship, I am satisfied that the delay in the claimant bringing his claim has prejudiced the respondent. It was not investigated whilst matters were fresh. Mr Colclough would be being asked to turn his mind back and give evidence about (a) what the claimant said at the time in respect of the alleged protected act, (b) and why he made the decision he did about the claimant's TBR. I accept as a management decision it is not something that is likely to stand out in his memory. By way of analogy the claimant himself when giving evidence struggled to remember the sequence of events with Ms Maunder, which was only a year ago, not, as would be expected of Mr Colclough, 6 years ago. I do not accept, as the claimant asserts, that it is all ok because Mr Colclough's letter is available. That does not, of itself, set out what was operating in Mr Colclough's mind at the time. I also accept it is likely that the passage of time will mean that other ancillary documents may no longer be available. The fact that the claimant did not complain about it internally at the time also means that there will not be, for example, grievance paperwork available that may shine some light on the decision making at the time.

69. I have taken into account the fact that the initial removal of the TBR may well feature as background evidence in the complaints that are not time barred and can go forward. However, I accept the respondent's submission that this does not remove the prejudice the respondent would suffer if the complaints are permitted to proceed as specific allegations of discrimination. I accept there is a difference between the prejudice that

might be caused to a respondent who is having difficulties dealing with a stale allegation that is a matter of background, is different to the prejudice the respondent would face with the allegation being a substantive one of discrimination.

70. I accept that if an extension of time is not granted the claimant will suffer some prejudice. He will not be able to pursue his complaint about the initial removal of the TBR. It is, however, as I have found, a decision that the claimant made at the time not to proceed. Furthermore, the claimant has other complaints that he can still pursue, including Ms Maunder's decision, and the challenges he makes to the grievance process and decision that is also in part about TBR.

71. Weighing it all up I do not find that it would be just and equitable to grant an extension of time to the claimant.

72. The consequence is that under Rule 37 I strike out the claimant's complaints of direct disability discrimination and victimisation in respect of Mr Colclough's removal of his TBR in late 2014/early 2015 on the basis that they have no reasonable prospect of success.

Application to amend – allegation of victimisation in that in November 2014 the claimant complained about not receiving reasonable adjustments (protected act) and because of this Mr Colclough *threatened* to remove his shift allowance and revoke his TBR when presenting the claimant with reasonable adjustments

73. To be clear this complaint is about an alleged *threat* to remove the claimant's shift allowance and TBR not the actual subsequent removal.

74. The claimant says this complaint is in his claim form at paragraph (1) where he says "*In 2015 Royal Mail reluctantly re-adjusted my duty under the EQACT2010, I was given in writing an adjusted work pattern. this work pattern contained times and different jobs through my working day at the end of the work paper is a statement stating "this new duty set will not attract any TBR or shift allowance."* I do not accept that a natural reading of the claim form includes a complaint about Mr Colclough allegedly *threatening* to remove the claimants shift allowance and TBR. Instead it reads as a complaint about the actual removal because it talks about the claimant being given an adjusted work pattern, and then talks about Ms Maunder re-presenting that decision to him again down the line. To pursue the complaint therefore requires permission to amend.

75. I have dealt with this application to amend after making a decision on time limits about Mr Colclough's decision making about the actual removal of TBR. This is because if the particular amendment is allowed it will not

improve the claimant's position on time limits (because it pre-dates the events which I have already found to be out of time). However, if I had reached a decision not to strike out those complaints, the claimant would then potentially have had the benefit of arguing this application to amend does not have as significant time difficulties as would otherwise appear, because of the link with the other decisions made by Mr Colclough.

76. As it happens, I have decided to strike out the other complaints made about Mr Colclough's decision in late 2014/early 2015. Set within that context I do not grant permission for the claimant to amend his claim to bring a complaint about Mr Colclough earlier threatening to remove his TBR. The amendment in one sense could be said to be minor, in that there is a clear link between Mr Colclough allegedly threatening to remove the claimant's TBR and then removing it. However, it is in fact ultimately a more substantial amendment because the other complaints against Mr Colclough have been struck out. The issue of time limits is important, because again it is being added long out of time and in circumstances, in which I have made a finding of fact (above) that the claimant made a considered decision not to pursue his complaints about Mr Colclough's decision making at the time. The evidential prejudice to the respondent, again discussed above, would also apply here too. Again there is some prejudice to the claimant, in not being able to pursue this particular complaint. But again, he has the other parts of his claim, that are more recent, that he is able to pursue. On balance, the balance of prejudice and hardship lies in favour of not granting the amendment.

77. I have issued a separate case management order. Within that I set out a draft list of issues in respect of the remainder of the claimant's complaints (including the other permitted amendments) which will proceed to a hearing. But to be clear that does not include, as allegations of discrimination, (a) the allegation about Mr Colclough referring the claimant for consideration of ill health retirement in 2014, (b) the allegation that Mr Colclough threatened to remove the claimant's TBR and shift allowance and (c) the allegation that Mr Colclough did then remove the claimant's TBR whether as direct discrimination on victimisation.

Employment Judge R Harfield
Dated: 23 June 2022

JUDGMENT SENT TO THE PARTIES ON 24 June 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
Mr N Roche