EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr M Alexander	**AND**	Imperial College Healthcare NHS Trust

Heard at: London Central **On**: 28 September 2022

Before: Employment Judge Adkin

Representation

For the Claimant: In person, accompanied by his mother

For the Respondent: Ms K Hoskyns, of Counsel

JUDGMENT

1. The Claimant's application to amend is:

    a. Granted in respect of the following paragraphs of the 15 page list of issues produced on 9 September 2022: 4b, 4e, 7a, 7b, 7c, 11a, 11d (short summary only), 12b(i)-(vi) inclusive, 12d, 12e (summarised), 13b, c, d (summarised), 14a (summarised), 16, 19e

    b. Refused in respect of 4f, 7d, 11a, 11b, 11c, 12a, 12b(vii)-(viii), 12c, 13a, 14b, c, d, e, 15, 19a, 19b, 19c, 19d, 19f, 19g, entire claim of indirect discrimination, entire breach of contract claim

2. The Respondent's application to strike out the claims or alternatively make a deposit order on the basis that there is no/little reasonable prospect of the claims being found to be in time is refused.

WRITTEN REASONS

Procedural History

1. This case has already been case managed by a number of judges.

Documentation

2. In preparation for this hearing I received, a fairly excessive number of documents. The Respondent produced a bundle of 1,027 pages.

3. The Claimant produced a separate bundle of 201 pages. In addition to that I have received the following documents:

   3.1. A document entitled: Claimant's submissions regarding Respondent's objections to strike out its claim dated 28 June 2022 which is signed on 12 July 2022

   3.2. Another document: Claimant's guidance of evidence to all parties for the preliminary hearing on 28 September 2022

   3.3. Application to amend.

Background

4. The Claimant was employed by the Respondent as a trainee doctor from 7 August 2019 to 6 April 2020. A grievance process in which he was involved concluded on 23 August 2021.

5. He presented a claim to the Employment Tribunal on 20 September 2021 having also submitted an ACAS certificate on the very same day.

6. On 2 March 2022 Employment Judge Norris at a case management hearing listed a further case management hearing on 3 May 2022 to consider disability status and time points.

7. Disability was conceded by the Respondent on 21 April 2022.

8. At a hearing on 3 May 2022 Employment Judge Gordon Walker recorded the acceptance of disability by virtue of the mental impairment of "recurrent

depressive disorder and anxiety". She listed a further case management order for 19 July 2022 to consider the application to amend further applications and case management orders.

9. That came before Employment Judge Khan on 19 July 2022 who ordered that the Respondent should identify which parts of on the legal issues were said to be new, to particularise the justification defences, and also to send a copy of an agreed list of issues to the Tribunal and to the Claimant. He listed a further hearing on 28 September 2022 to consider the application to amend brought by the Claimant and an application for strike out or in the alternative a deposit order by the Respondent.

APPLICATION TO AMEND

Original claim

10. In the claim form ET1 submitted on 20 September 2021 the Claimant ticked the box to indicate that he was bringing a disability discrimination claim. He also ticked the box saying he was bringing another type of claim which was injury to health (which would simply be a possible remedy outcome of a disability discrimination claim).

11. The Claimant also purported to bring a claim of breach of the Data Protection Act 2018 regarding documentation of his training process. The Tribunal does not have jurisdiction to deal with that sort of claim.

12. In box 8.2 there is a narrative which reads as follows:

> Injury to my mental health in June 2020 after a competency panel report based on the behaviour of supervisor Dr Fertleman to actively try and terminate my career from his April 2020 report. His report was based on "concerns" which were either untruthful or misrepresentative of the facts.
>
> Disability discrimination August 2019 to May 2020 in the hands of supervisors Dr Colin Mitchell, Dr Michael Fertleman and Dr Susanna Long treating me differently to my peers by unjustly making me supernumerary for a whole year, not allowing me to do on calls, not following training guidelines written by HEE, not following disability training guidelines written by the GMC and not following reasonable adjustments recommended by occupational health reports. Occupational health had written asking to wean me off a supernumerary position, be given guidance on this and start a substantive post and do on calls and thus be able to learn more effectively. The disability training guidances written by GMC describe how occupational health have jurisdiction in training matters, and where reasonable adjustments are recommended by occupational health, it is unlawful not to consider them. There was active secrecy, out of keeping with the training guidances by HEE for transparency, by Dr Long, Dr Mitchell and Dr Fertleman about

> the unfair opinions of Dr Fertleman on my progress which put my career in jeopardy and led to the consideration of unfair dismissal in June 2020,
>
> Breach of Data Protection Act 2018 regarding accurate documentation on my training progress in Dr Fertleman's rotation from December 2019 to April 2020 by not acknowledging the progress I made in the ward rounds that I led, shown by my ward round entries.
>
> Discrimination in a biased grievance investigation relating to the above which was concluded on 24/8/2021 and denied my right to a fair grievance as an appeal has been refused. The investigator failed to grasp the meaning of the points I was making regarding regulations and misrepresented the facts with the evidence I had submitted.
>
> Given that employment finished with Imperial on 6/4/21 I ask for permission to lodge a hearing out of time based on exceptional circumstances given that I had lodged a grievance with Imperial on 6/4/21, I had misplaced my faith in the Imperial justice system and was misled into thinking that the Grievance will conclude fairly at the end of May 2021 but had an unfair conclusion on 24/8/21 prohibiting me from appealing to tribunal.

13. It is noted that this referred to not following reasonable adjustments recommended by Occupational Health reports and ultimately consideration of unfair dismissal in 2022. As to the reasons for delay in submitting this claim the Claimant has dealt with this at the bottom of this extract, in essence that he was following the internal grievance process.

Evolutions of the original claim

14. The Claimant has attempted to particularise his claim in a series of stages:

    14.1. A response to the Respondents agenda for the preliminary hearing on 24 January 2022 provide on 15 March 2022

    14.2. A requested additional issues document provided on 15 March 2022

    14.3. A “list of issues amended by Claimant as per ET directions” document provided on 23 March 2022

    14.4. A response to the Respondents email dated 24 March 2022, provided on 28 March 2022

    14.5. A modified witness statement dated 22 April 2022

    14.6. An annotated version of the Respondents new draft list of issues provided on 31 May 2022

14.7. Additional information for the list of issues provided on 31 May 2022

15. Subsequently there have been edits to a list of issues which was created by the Respondent on 10 May 2022 and amended on 7 June 2022, further amended on 27 June 2022 and additions made by the Claimant on 9 August 2022

16. Shortly before the matter came before me there was a significant amount of to and fro about the correct format of a draft list of issues, as at 10 September 2022 a document entitled amended list of issues of some 15 pages was provided, this was at the request of the Respondent. The document that we used to consider the applications to amend.

17. Because of the evolution in this matter, it is slightly difficult to identify exactly when each element of the proposed amended claim arose. I have done my best to understand it.

Respondent's stance

18. The Respondent in this hearing as communicated by Ms Hoskyns has taken a commendably pragmatic and realistic approach, making appropriate concessions in the interest of moving this litigation forward.

19. The approach has been to in many cases not object to a proposed amendment where there is documentary evidence that these matters were raised in the grievance, i.e. reasons to believe that the Respondent had already dealt with this matter and then would not suffer significant hardship in trying to deal with a matter that was being brought a long time after the event.

20. The Claimant made some sensible concessions of his own.

21. I understand there has been quite voluminous correspondence in the litigation to date. I would encourage the parties to keep such correspondence to minimum and keep some "momentum" going with the concessionary and collaborative approach that arose during the course of this hearing.

LAW

Law on Amendment

22. I have considered this application to amend applying the tests set out in *Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore* [1996] IRLR 661 and the guidance in *Galilee v Commissioner of Police of the Metropolis* [2018] ICR 634 as well as the Presidential Guidance on General Case Management (2018) Guidance Note 1: Amendment of the Claim and Response.

23. When considering an application to amend, a tribunal must take into all the circumstances and should balance the injustice and hardship of allowing the

amendment against the injustice and hardship of refusing it. The relevant circumstances include:

23.1. The nature of amendment;

23.2. The applicability of time limits;

23.3. The timing and manner of the application.

24. In *Vaughan v Modality Partnership* [2021] IRLR 97 HHJ James Tayler suggested that a relevant question is "what will be the real practical consequences of allowing or refusing the amendment": [paragraph 21].

Law on time limits

25. The Equality Act 2010 contains the following provision:

> 123 Time limits
>
> (1) Subject to section 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.

26. The leading case of whether an act is 'continuing' for the purposes of discrimination is *Hendricks v Commissioner of the Police for the Metropolis* [2003] IRLR 96, CA *per* Mummery LJ at paragraphs 48-49 & 52:

> **48**… the burden is on [the Claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism', 'a prevailing way of life', a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.
>
> **49**… [the Claimant] may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination.
>
> **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'… 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 on-going 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.

27. In *Robertson v Bexley Community Centre t/a Leisure Link* 2003 IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, '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 the discretion is the exception rather than the rule.'

28. In *Abertawe Bro Morgannwg University Local Health Board v Morgan* 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

> "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 s 33 of the Limitation Act 1980, s 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 s 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 [2003] EWCA Civ 15, [2003] IRLR 220, 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 s 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 All ER 381, para [75].

> 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)."

29. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

> "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking."

Law on strike out

30. Discrimination cases should not be struck out except in the very clearest circumstances. In *Anyanwu v South Bank Students' Union* [2001] IRLR 305, HL, a race discrimination case in Lord Steyn stated (at [24]):

> "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high pub-lic interest."

31. At [39] Lord Hope of Craighead noted that '[t]he time and resources of the employment tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail, he also stated (at para 37):

> " … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injus-tice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an op-portunity to lead evidence."

32. The EAT in *Jaffrey v Department of the Environment, Transport and the Regions* [2002] IRLR 688 at [41], EAT confirmed that this did not amount to a fetter on the Tribunal's discretion. There is no blanket ban on strike out

applications succeeding in discrimination claims (see Langstaff J in *Chandhok v Tirkey* UKEAT/0190/14, [2015] ICR 527 at [20]). The learned editors of Harvey suggest that the power to strike out in discrimination cases should be exercised with greater caution than in other, less fact-sensitive, types of case.

33. I was referred by the Respondent to the decision of the Court of Appeal in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548.

34. In *E v X & ors; L v X & ors* (UKEAT/0079/20/RN, UKEAT/0080/20/RN) Ellenbogen J reviewed the authorities governing the situation in which a tribunal considers strike out on the basis of time grounds. In order for a Tribunal to have jurisdiction either the claimant needs to establish that the act of discrimination amount to a continuing act extending into the primary limitation period, or the Tribunal must be satisfied that it is just and equitable to grant the required extension of time (para 4).

35. Following a review of the authorities Ellenbogen J distilled the following principles at paragraph 50:

> 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;
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> 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;
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> 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;
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> 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 para 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 para 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.

CONCLUSIONS

Application to amend

Direct Disability Discrimination

36. The Respondent does not object to the allegation brought at **4b** of the amended list of issues i.e. Dr Suzanna Long and Dr Megan Griffith on the ARCP panel passing all of the F1 Doctors in the Claimants cohort in May/June 2020 but not the Claimant. Allowed.

37. A modified form of the allegation at **4e** is allowed, is not disputed by the Respondent and I grant permission for it in this form:

> "Dr Anna Wetherall had unjustly precluded me in fulfilling the 20 curriculum points by only allowing me to document on ward rounds, only seeing the medical fit for discharge patients and only writing up discharge summaries."

38. As to allegation **4f** which is opposed by the Respondent the position of the Respondent is that this is a new allegation not contained in the ET1 and requires leave to amend. The Respondent submitted that the substance of this allegation was not in the grievance it refers to individuals not mentioned in the grievance and it relates to events that took place more than two years before the claim was submitted. The Claimant confirmed during submissions that in fact people mentioned here did not still work for the Respondent.

39. I accept the Respondent's position that they would be genuinely prejudiced in trying to deal with this allegation given this and that it is brought significantly out of time. I do not grant permission for this allegation. Refused.

Harassment relating to disability

40. Although the Respondent submits generally that this is a new allegation not contained in the ET1 I take the view that there is not a clear box to tick to indicate harassment and harassment does come under the umbrella of disability discrimination, in this case the allegation is harassment relating to disability.

41. Pragmatically the Respondent does not object to **7a** which relates to an email on 17 December 2019. Allowed.

42. The Respondent does however object to 7b which relates to comments said to have been made in December 2019. I take the view that the substance of

allegation **7b** is very similar to 7a in 7b the allegation is that comments were made in line with the content of the email at 7a in those circumstances it is difficult for me to see the prejudice to the Respondent. In any event I would not expect the Respondent to call as a witness every single person alleged to have been present in that allegation, accordingly I allow **7b**.

43. **7c** refers to an allegation which is particularised under the section 15 claim at paragraph 12b of the list of issues. I am content to allow that amendment on the basis suggested and agreed by Counsel for that allegation at 12b i.e a truncated version of the form that appeared in the list of issues. Allowed.

44. **7d** is opposed by the Respondent on the ground that this is an allegation of concealment rather than an allegation of harassment. I do not accept that concealment could not be unwanted conduct. But it seems very difficult to see how concealment would be relating to a disability and I take account of the fact that this is something involving two different witnesses to the main body of the harassment allegation. I do not allow this element 7d.

Indirect Discrimination

45. This is said to be based on the PCPs set out in the failure to make reasonable adjustments claim. The PCPs set out in the reasonable adjustment claim are unsatisfactory as I discussed with the parties at the hearing.

46. Considering as I am required to do under the Vaughan v Modality case the practical affect of the application on the parties, my view is the indirect discrimination will add complexity to the hearing and at present is completely inchoate i.e. I cannot see a proper claim. Adding the claim would prejudice to the Respondent, and no particular advantage to the Claimant, since I do not see that there is a coherent claim.

47. This application is refused.

Discrimination arising from disability (section 15 of the Equality Act)

48. The parties agree and I am happy to adopt a suggestion that allegation **11a** is framed in substantially identical terms to 4e for which permission is granted.

49. Moving to **11b** this allegation is not in the grievance the Respondent says that they are prejudiced, and, in any event, this adds little to an allegation already being pursued about the 20 foundation curriculum points. The Claimant says that this only came to his attention as a result of a subject access request. Similar considerations apply to point **11c**. On balance, and because this was not covered in the internal grievance process as I understand it I will not allow this allegation to proceed. These parts of the application are refused.

50. As to allegation **11d** as presently framed in the list of issues there is something of a mish mash of different points, multiple points in one which is difficult to make sense of and includes reference to reasonable adjustments. The Respondent has proposed a short summary version of this:

"Dr Mitchell failed to adequately act as a Clinical Supervisor"

51. On the basis that the Claimant could use the points below it on the draft list of issues to substantiate this allegation pragmatically this seems to be a sensible approach and I allow the amendment on that basis.

52. Paragraph **12a** of the section 15 claim was apparently not raised as part of the grievance and is brought significantly out of time, for these reasons I do not allow this.

53. Allegation **12b** it is suggested by the Respondent that this is framed by using the headline "did Dr Fertleman undermine the Claimant's clinical capabilities in front of other educational supervisors by sending the following" and then the first six dates given which are:

    53.1. 17 December emailing Dr Mitchell and Dr Long

    53.2. 12 February 2020 emailing Dr Mitchell and Dr Long

    53.3. 13 February replying to Dr Daneshmend

    53.4. February 2020 an email sent to Dr Mitchell and Dr Long about the Claimant being aggressive to staff

    53.5. 23 April 2020 emailing Dr Mitchell and Dr Long

    53.6. 24 July 2020 emailing Mr Kinross and Dr Koizia

54. I have not allowed **12(b) vii or viii** since these are and have been appropriately identified by the Respondent as being consequences rather than illegal acts.

55. **12(c)** is substantially background and is refused.

56. **12(d)** is opposed by the Respondent on the basis that this is no more than an element of 12(e). Having heard submissions from the Claimant this is a separate allegation, which is that the Dr Fertleman failed to raise with the Claimant his concerns about the Claimant's clinical competence, time management and prioritisation issues in the period December 2019 to January 2020, it is my view that this should stand alone and should proceed as an allegation, so I allow this 12(d).

57. **12(e)** should proceed as "Did Dr Michael Fertleman prepare a damaging and unsubstantiated Clinical Supervisor report in April 2022", the remainder of the matters added by the Claimant in the list of issues under this subparagraph are simply commentary and background and substanting evidence and should be removed from the list of issues but might form part of the Claimant's witness evidence in due course. The Respondent of course has notice of them. Allowed.

58. Paragraph **13** it is suggested by the Respondent that this does not make sense as an allegation, I agree that it seems to be blending together of a section 15 and a reasonable adjustment claim. It does not make sense of the face of it and I will not allow this to proceed. Refused.

59. Pragmatically the Respondent does not object to **13(b), (c) and (d)** and in each case suggests that the issue be framed by reference to the first phrase used in the narrative I agree with that approach and the Claimant can use the references to evidence in other matters as commentary and part of his witness statements as appropriate. Allowed.

60. **14a** for similar reasons is allowed.

61. The remaining allegations **14(b), (c), (d) and (e)** are related matters or background and are not allowed through as separate allegations. The object of this exercise is to identify clear headline allegations not a confusing mass of different but similar allegations. Refused.

62. Paragraph **15** of the list of issues should come out since this is the reference to evidence.

63. The Respondent has no objection to paragraph **16** which is a description of the matters that were said to be something arising. I am content to allow this but remove the words "such as" and replace them with "specifically" since this needs to be a definitive list.

Failure to make reasonable adjustments

64. I note that the words reasonable adjustments were used in the claim form and to some extent this is an exercise in providing further particulars rather than bringing a new head of claim.

65. The difficulty identified is that many of the said provisions criteria or practices ("PCPs") do not in my view amount to cogent PCPs. In particular many seem to be matters that arose in the Claimant's own case but not provisions criteria or practices that the Respondent more widely.

66. The only matter which is clearly a PCP of general application is **19(e)** not allowing trainees to move to another firm, this is the only allegation that I will allow to proceed.

67. The Claimant needs to identify what the effect of not being able to move to another consultant's team and why that was said to be a substantial disadvantage and that needs to be reflected in in an amended paragraph 20 much of which can fall away. Claimant to update in list of issues.

68. It follows that paragraph 21 should be amended to say that the adjustment would be to allow the Claimant as a trainee to move to another firm (team led by another consultant).

Breach of Contract

69. This claim was not intimated or mentioned in the claim form at all. It is highly complicated taking up three pages of close type, the objection of the Respondent is that it is unclear whether there was any loss arising from a breach of contract at all.

70. The Claimant counters that he lost money as a result of achieving promotion late. It seems to me that this might be a remedy in the other claims which are proceeding, if any of the allegations of discrimination are successful. I share the scepticism of the Respondent as to whether this is a proper breach of contract claimant all.

71. This claim of breach of contract has been brought late. It is not a case of "relabeling" another allegation it seems to relate to a mass of other factual matters. Considering the practical affect on the parties (Modality) this will cause hardship to the Respondent who will have to deal with another new and complex claim. I do not consider it is in the interest of justice to allow this completely new claim and I refuse this application.

STRIKE OUT

Respondents' application for Strike Out

72. The Respondent makes an application to strike out by letter of 28 June 2022 that is pursued principally on the basis that the Claimant has no reasonable prospect of showing a continuing act so as to bring claims that are out of time in time.

73. In particular the Respondent contends that there was "clear blue water" [this may have been my paraphrase] i.e. a time during which there was no ongoing discriminatory act or events between **July 2020** and the start of the grievance on **6 April 2021**.

74. The claim was presented on **20 September 2021**. The ACAS certificate was issued the same day. The Respondent makes the point that events which occurred wholly or before 20 June 2021 are on the face of it out of time.

75. It is submitted that the Claimant has provided no explanation at all for delays between August 2019 and April 2021 and that the explanation for delays between April and September 2021 is inadequate.

Claimant's position

76. The Claimant contends in summary that there were ongoing discriminatory matters, that he only discovered certain matters in May 2021, he references the unusual pressures of the Covid-19 pandemic and opposes the application for a strike out or a deposit order.

77. I have examined the way that the Claimant's has articulated his claim in various documents to analyse the Respondent's "clear blue water" submission.

Claim form

78. I have considered the narrative in the claim form, in particular at box 8.2.

79. The claim form complains about the report of Dr Fertleman dated April 2020 and the resulting competency panel report in June 2020 at which consideration was given to his dismissal he says. He describes disability discrimination in the period August 2019 – May 2020 at the hands of supervisors Dr Colin Mitchell, Dr Michael Fertleman and Dr Susanna Long, whom he says unjustly made him supernumerary for a whole year. This was the year ending 6 April 2021.

80. The Claimant's employment with the Respondent finished on 6 April 2021. He lodged a grievance on this day and it concluded on 24 August 2021. He contends that this date had the effect of "prohibiting me from appealing to tribunal". The claim form on its face expressly acknowledges that the claimant being presented out of time based on exceptional circumstances.

81. It is unclear based on the Claimant's claim form what ongoing discriminatory conduct was said to be in the period May 2020 – 6 April 2021.

Claimant's modified witness statement

82. I considered a 10 page document which appeared at page 61 in the bundle for the hearing, which is a entitled "Claimant's modified witness statement" assigned and dated 22 April 2022. This is directed to the question of time limits. The second paragraph refers to "a chained events of discrimination", which I take to be an allusion to a continuing act of discrimination or continuing discriminatory state of affairs, which, if the Claimant can establish it may have the effect of bringing events which are on the face of it out of time in time.

83. He also refers to reasons why it would be just and equitable to extend the deadline.

84. In this document the Claimant contends that had he not suffered personal injury and injury to feelings in June 2020 and that he would have been promoted to foundation Year 2 on 2 August 2020. He says that he suffered from May 2021 from low mood after discovery of the level of harassment and discrimination.

85. As to earlier events in August 2019 – May 2020 the Claimant says that he was misled until May 2020. The Claimant says [68] at paragraph 10(b) of this document that an email disclosure on 20 May 2021 was highly significant. I understand that he received emails from the Respondent on this day, following a Data Subject Access Request. He says that fully understood the level of discrimination at this stage and that a misguided report from his immediate superior a Senior House Officer Dr Anna Weatherall was the reason for the restrictive approach allowed to his development.

86. The Claimant says that between April – August 2021 he was in a very busy job working 3 – 4 hours overtime with increased responsibilities and had little time outside of work to pursue the stresses of legal action. He also relies on the Covid-19 pandemic as being a reason why it would have been "unsuitable and unfair" to have taken legal action sooner.

Claimant's submissions regarding respondent's objections to strike out its claim dated 28/6/22

87. I considered this 24 page submission document from the Claimant, signed and dated by him on 12 July 2022. In it, the Claimant submits that *Lyfar v Brighton* is not applicable given what he describes as the "intertwined and continued conduct" regarding the act of Dr Mitchell, Dr Fertleman and Dr long.

88. As to prospects of success that he submits that the was strong evidence of differential treatment in being made supernumerary for a whole year and been prohibited from doing on calls up to May 2020. That alleged concerns about clinical incompetence were unsubstantiated.

Further submissions invitation

89. Following on from the hearing I invited further submissions from the parties in writing as follows:

89.1. Do the parties agree that Employment Judge Adkin should be considering whether it is just and equitable to extend time? (This appears to be addressed in the Respondent's letter of 28 June 2022 and the Claimant's modified witness statement dated 22 April 2022.)

89.2. If so, is the assessment of just and equitable part of the likelihood test (i.e. no reasonable prospect of success or alternatively little reasonable prospect of success) being applied as part of the strike out/deposit order, or is it a separate and distinct exercise that the Tribunal is carrying out?

89.3. Can the Claimant identify particular documents in the bundles which were discovered by him on 20 May 2021 which he says revealed to him new matters relating to discrimination. He should clearly identify whether these are references to the larger Respondent bundle or alternatively his bundle.

89.4. Does the Respondent accept that the Claimant discovered facts on 20 May 2021 as a result of a subject access request which were previously unknown to him and are the basis of the allegations that he now pursues of discrimination and harassment? (This is described in the Claimant's modified witness statement dated 22 April 2022). If so it is accepted that this is an argument in favour of extending time?

89.5. Is it open to the Tribunal at this preliminary stage to conclude that the "just and equitable" extension should be dealt with by a full panel at a final hearing?

90. I provided the opportunity for the parties to reply to one another's written submissions. I did not receive any replies to those primary submissions from either party.

Respondent's written submission

91. In a written submission dated 16 October 2022 the Respondent submitted that the exercise of considering likelihood for the strike out/deposit order should include consideration of the likelihood of the just and equitable extension being exercised in the Claimant's favour. It was submitted that the "new" material discovered by the Claimant in May 2021 as a result of his DSAR application did not constitute matters of which the Claimant was wholly unaware. In essence the Claimant knew the actions that Dr Fertleman had taken, and the new material was no more than supporting evidence.

Claimant's written submission

92. In a written submission dated 18 October 2022, the Claimant explained that documents pages 299 – 321 of the Respondent's bundle for the hearing on 28 September 2022 were the documents which he says showed to him new matters relating to discrimination harassment and breach of contract. He characterised them as correspondence indicating hostile intentions and a coordinated attempt to dismiss the Claimant. He says that had he seen the sooner he would have taken legal action sooner.

93. Furthermore, the Claimant stated that at the hearing on 28 September he is concerned that there was not sufficient time to deal with the "just and equitable" extension to extend time in the alternative. He requested that this be dealt with at a further hearing rather than on paper.

Conclusion on Strike Out

94. I have, with the assistance of the parties, carried out the exercise in clarifying the list of issues before I have gone on to deal with strike out or in the alternative deposit order.

95. I did not hear oral evidence. Neither party suggested to me that I should do. Indeed, given the amount of time that have been taken up with refining the list of issues and dealing with the application to amend, it seems to me that it was doubtful that there would have been sufficient time to dealt with this without listing a further day to complete this hearing. In any event I have the Claimant's position set out in various documents as detailed above.

96. I have considered carefully the nature of the exercise that I have been asked to do. Employment Judge Khan on 19 July 2022 (there is a typographic error in the date of the order suggesting it was 2021) set this hearing to "Determine the respondent's application for strike out/a deposit order dated 28 June 2022". The Respondent's letter deals in part with the application to amend, dealt with above and then goes on to put forward arguments for strike out or in the alternative a deposit order.

97. At paragraph 30 of that letter it states that time should not be extended for two reasons. First the explanation given by the Claimant for delay is said to be inadequate. Second, the delays have significantly affected the Respondent's ability to investigate the allegations. It is said that that is particularly significant where the matters complained of occurred during the most acute phase of the Covid-19 pandemic from March 2020.

Out of time

98. The claim, presented on 20 September 2021 was presented in time in respect of the alleged unfair conclusion of a grievance on 24 August 2021. That grievance was the conclusion to a process initiated by the claimant on 6 April 2021. It would certainly be open to the Claimant to argue that that grievance process was a continuing act, such as to bring matters in time

99. The claim was certainly presented out of time in respect of alleged discrimination in the earlier period August 2019 – May or June 2020. The Claimant can only succeed in respect of claims in relation to this period if either he can show a continuing act of discrimination (sometimes called continuing discriminatory state of affairs), or a Tribunal finds that it is just and equitable to extend time.

Continuing act

100. As to the Respondent's argument that there was no ongoing discriminatory act or events between July 2020 and the start of the grievance on 6 April 2021, it seems to me that there probably is no reasonable prospect of success of the Claimant showing that there was an ongoing act of discrimination during this period.

101. The decision to make him act as a supernumerary had already been taken. The period where he was working as a supernumerary was simply the consequence of that decision it was not discrimination in itself.

102. Having considered continuing act, I go on to consider just and equitable extension.

Just & equitable extension

103. There are two factors in this case which persuaded me that I cannot conclude that there is either no reasonable prospect of success or little reasonable prospect of success. First is that the material time between June 2020 and the start of the grievance in April 2021, and also in the period between April 2021 and the submission of the claim in September 2021 were an extraordinarily pressurised times in hospitals because of the Covid-19 pandemic. The Claimant relies upon this. Second, the Claimant plainly did discover documents as a result of the DSAR exercise which he received on 20 May 2021 that caused him to re-evaluate events. While I have been referred to these pages, which plainly might have a relevance for his claim, I have not gone through each of these in detail page by page, nor is it clear to me slightly what the Claimant took from these. It is difficult for me without the assistance of the

parties to appreciate how much of this was genuinely new and how much of this must reasonably have been understood by the Claimant at the time.

104. It is difficult for me to say in the exercise of a mere likelihood test that there is little reasonable prospect or no reasonable prospect of a Tribunal (or a judge sitting alone) concluding that that these were two reasons making it just and equitable to extend time. Both the pandemic and the DSAR exercise are both potentially matters which a Tribunal might consider were basis to exercise the discretion. To be absolutely clear in this strike out/deposit order I am not seeking exercise the discretion as part of this exercise.

105. It follows that I refuse the Respondent's application to strike out or alternatively make a deposit order.

Next steps

Preliminary Hearing

106. A further Preliminary Hearing has been listed in this matter on **13 December 2022** with a time estimate of 1 day.

107. The Claimant has, in his written submission requested that the question of a 'just and equitable' extension be dealt with at a further hearing rather than on paper. It seems to me that there may be significant benefits to both parties to have this issue decided on a preliminary basis, since it might potentially simplify the claim significantly. The Claimant has already submitted a witness statement dated 22 April 2022. There is already a bundle of documents.

108. It seems to me that it would be a good use of time for the "just and equitable" test to be taken as a preliminary point at the Preliminary Hearing, before dealing with outstanding case management matters. I will direct that an amended Notice of Hearing is sent to the parties.

109. Either party may, if it objects to this course of action, apply for this hearing to be converted back to a simple case management hearing, provided it does so by **21 November 2022**.

110. The parties should exchange any updating evidence (witness statement or documentary) on which they rely specifically for the "just and equitable" extension by **2 December 2022**.

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Employment Judge Adkin

Dated: 14.11.22

Judgment and Reasons sent to the parties on:

14/11/2022

For the Tribunal Office