EMPLOYMENT TRIBUNALS

Claimant
Mr Philip Dent

Respondents
Ms Abigail Baxter (R1)
Mr Ian Richardson (R2)
Ms Angela Allon (R3)
HSBC Bank plc ("HSBC")

PUBLIC PRELIMINARY HEARING

Heard at Middlesbrough **On 21st February 2018**

Before Employment Judge Garnon

Appearances
For the Claimant Mr A Finlay of Counsel (acting pro bono)
For all Respondents Mr D Maxwell of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal was presented outside the time limit prescribed for doing so in circumstances where it was reasonably practicable for it to be presented within time . It cannot be considered and is dismissed .

2. The claims of subjection of the claimant to detriment during his employment because of sexual orientation and victimisation were presented more than three months after the date of the acts complained of but in circumstances where it is just and equitable to consider them. They will be considered on the basis of the issues set out in paragraph 5.8. of the reasons below.

3. The claim of harassment was presented more than three months after the date of the acts complained of in circumstances where it is not just and equitable to consider it. It is therefore dismissed.

4. I refuse the respondents' application for a costs order.

REASONS (bold print is my emphasis unless otherwise stated)

1. Introduction and Issues

1.1. On 31st August 2017 at a private preliminary hearing (PH) I ordered a public PH before me to decide (a) the claimant's application made by e-mail on 30th August 2017 to " revive" certain claims, which it was said by Mr Andrew Dean , his lay representative, at a private PH on 21st July 2017 would not be pursued and (b)

whether any such claims should not be allowed to proceed because they are "out of time" and (c) the respondents' costs application.

1.2. The public PH was fixed for 13th October but postponed due to the claimant being ill. It was agreed case management would be deferred until the public PH. As I had to reserve this judgment , such orders will now be made at a telephone private PH to be listed for 1 hour at the first available date.

1.3.In R (on the application of Unison) v Lord Chancellor [2017] UKSC 51 (" Unison") on 26th July 2017, the Supreme Court held the fee regime for employment tribunals put people off making or continuing claims, even those likely to succeed , were unlawful and so struck down the legislation that introduced them. From the time the decision was given, it was anticipated by lawyers Tribunals would be asked to permit claims issued out of time to be heard based on the argument the unlawful fees made it not reasonably practicable to issue within the time limit and/or it was just and equitable to consider claims under the Equality Act 2010 (EqA) .This claim, presented on 22nd March 2017, was of various acts of direct discrimination, harassment, victimisation, all contrary to the EqA, unfair dismissal alleging procedural and substantive unfairness; and, possibly, wrongful dismissal. I shall return to the last point later. Although the claim form lacked detail, such was largely supplied in an e-mail dated 2nd April which said the **principal** claim was **post termination** subjection to detriment as direct discrimination and victimisation. This was the only part of the claim clearly in time.

1.4. On 21st July 2017 I recorded a summary of what appeared to be the facts alleged. On 31st August I added some detail gleaned from responses to earlier orders. I now condense them to set out only what is relevant today. I also have to record certain matters, which were a distraction to the real issues for today, but need to be set out as they may be relevant to any future applications before or at the hearing , or, possibly in one respect, in another legal forum.

2. Summary of the Alleged Facts and Record of Incidental Matters

2.1. The claimant, who is homosexual , started work for HSBC on 15th March 2013. He was based at Stockton branch. His employment ended by dismissal for gross misconduct on a date in September 2016. He alleges homophobic acts before June 2016 mainly by R1 and R3 which could have been what I had earlier called "free standing" harassment. He alleges he raised informal complaints about them to R2 who at best did nothing to prevent such acts, and at worst participated.

2.2. As to the free standing claim , on 31st August I wrote "*He still, as far as I can see, has given no detail of who said or did what and when ..If I am to be persuaded to allow these allegations to proceed , by whatever procedural route, they must be set out concisely but with precision in the witness statement the claimant prepares for the next hearing on 13th October*". These details are still is not there. In a section headed "Concluding Remarks" his statement, first sent in September 2017, says . **"***Further and better particulars in respect of this witness statement and/or related disclosure material can be provided in due course. However, this is not possible at this time as I am in the process of moving home and helpful diarised notes from 2016*

have been packed away amongst a pile of boxes for some time. Moreover, my mental health is presently in decline as a result of this case and a related case. I have been prescribed medication for depression".

Even 5 months later, there are still no specific dates or details. The best attempt I can see is "*In early May R2 and for the umpteenth time referred to faggots etc. in a derogatory and upsetting manner and he knew full well from our 121's that this caused me significant upset, violated my dignity, embarrassed me and injured my feelings."* From his replies today, I believe the claimant is saying there were so many instances he cannot specify each as they all merges into one in his mind.

2.3. In May 2016 the claimant was accused by R1 (possibly R3) of dishonesty. On 24th May she told her line manager, Isabella Judd . An investigation ensued done by R2, during which, on or about 14th June, the claimant alleged he had been "set up", especially by R1 and R3, who disliked the fact he was gay, and had been victimised because he had earlier made complaints about homophobic acts by R1 and R3. He lodged a grievance orally that day. On 31st August I wrote "*He still, as far as I can see, has given no detail of when and how earlier complaints were raised and what I said in paragraph 4 above applies to this too. HSBC's case is that this was the first time he had raised sexual orientation discrimination and he did so to shield himself from the allegations against him. R1 R2 R3 and Ms Judd denied setting him up*."

2.4. The claimant now has done somewhat better. His statement includes *" At Stockton on Tees branch, the core senior staff – with the exception of R1 - had worked together for decades. I was seen as being an outsider principally due to my sexual orientation and was advised so on several occasions. Prior to late May 2016 I had raised several informal grievances with the respondents re inter alia my sexual orientation, but these were repeatedly and disrespectfully ignored…. Examples include, but are most certainly not limited to i) raising complaints in repeated monthly face to face 121 meetings with R2; ii) raising concerns re use of inappropriate language and behaviour during "pride" conference call with HSBC staff in late April 2016 … and iii) grievances raised directly with R1 and R3 who retaliated prior to the 23 May incident - see more below - by calling me " a f ...ing .. faggot". Independent witness evidence by an HSBC customer et al can affirm" .* These "examples" are those to which the claimant's evidence will be confined. As I have stated in the past "springing" evidence at the full merits hearing will not be permitted.

2.5. The statement then digresses into matters which have nothing to do with sexual orientation "*in or around May 2016 at least two further informal complaints were raised by me, all of which given the circumstances were reasonable and legitimate. For example, one was even a non sexual orientation related matter; I merely pointed out to R1 that she was not doing some of her work tasks correctly. … On another occasion I complained that R5 kept referring to me as in effect being a "fatty" – an insulting comment towards gay people who take pride in their appearance. I was treated less favourably by R5 as she never made reference to another R4 staff member at my branch – Hannah S who was also overweight – as eating too many sandwiches or too much food at lunch etc."*

2.6. I reject the notion homosexual people are more body image conscious than heterosexual people. However, he then gives a glimpse of his main argument saying: " *As referenced earlier there were also reprisals by a number of the respondents in person in or around early May 2016* ***which culminated into an accusation of theft on 24 May 2016****. On June 15 2016 written evidence affirms that I asked that my previously stated grievance(s) re victimisation, harassment, direct discrimination etc due to my sexual orientation be "formalised" - that said nothing was done about this for some two months or so.* The essence of his case is that he had for months and years verbally raised complaints about homophobic abuse and been subjected by R1 R2 R3 and at least one other former staff member to detriments ***which*** **culminated** in a false accusation and **resulted in** a dismissal .

2.7. Mr Maxwell put to the claimant , and submitted, this witness statement was not his own work. The claimant said it was but did not deny he was helped . Mr Maxwell said he was making no allegation against Mr Finlay, and rightly so. The clear implication was the real author was Mr Dean who was not present today. I find the statement contains what the claimant genuinely believes and wants to put as his case, but also argument and additions, probably in the words of Mr Dean. Mr Dean is a civil engineer with a law degree, and I have no doubt he passionately believes the claimant has been done a great wrong and is determined to help him right it . HSBC's solicitors are fighting their clients' case vigorously using professional means but which come across to Mr Dean, as litigation tactics taking advantage of superior legal knowledge. Mr Dean retaliates, sometimes in outspoken language (an example will be seen when I deal with the costs application) saying things an experienced advocate would not say without careful consideration and his client's express instructions . The relevance of these observations, will be apparent when I deal with what I later label the " withdrawal point" .From here to the end of paragraph 2.14., I cease recording alleged facts to deal with the "incidental matters".

2.8.1. What follows is an example of what Mr Maxwell said is causing delay and expense in this case , ie continued attempts to expand it: " *In any event by late July 2016 I had lost any semblance of trust and confidence in my employer and it was untenable for me to continue. Therefore, I resigned in early August 2016 and gave one month contractual notice. As a layperson I had no clue what the term "****constructive dismissal****" meant and I did not use such words to R4 as my reason for leaving (I had no formal legal help or professional advice at that stage).* ***I just wanted to free myself of false accusations of malpractice, to stop the ridicule and the significant injury to my feelings caused by discriminatory acts in relation to my sexual orientation contrary to the Act.*** This appeared to be, or at least to foreshadow, an application to amend to add "constructive dismissal" .

2.8.2. There is an application to add a respondent, Ms Isabella Judd (R5) put thus."*R5 is named because I now have reasonable reason to believe that she and at least one other respondent concocted a plan to use a slight of hand on 23 May 2016 to obstruct and confiscate the so called missing 2x £10 notes. Further evidence thereof is being gathered and we reserve the right to report said allegation to the*

authorities along with certain alleged hate crimes." There is at present no evidence of her concocting a plan and the only allegation is that she referred to his being fat.

2.9. The leading authority on amendment is Selkent Bus Co –v-Moore .There is also the Court of Appeal judgment in Abercrombie v Aga Range Master Limited [2013] IRLR 953. I would probably have refused applications to amend to add (a) constructive unfair dismissal (b) Ms Isabella Judd as a respondent. Mr Finlay confirmed neither application was pursued. This was very wise, but to suggest either step would have created additional work for all without any discernible potential benefit for the claimant . Mr Maxwell said today he is instructed to concede nothing because of the way the claimant's case has been run, not by Mr Finlay today whose running of it has been impeccable, but by Mr Dean. .

2.10. When we were discussing at the outset today's issues, Mr Maxwell submitted wrongful dismissal was not pleaded. The claim form ticks the box for unfair dismissal but, despite the content of the particulars, does not tick the box " notice pay" which practitioners, and Tribunal staff, view as a claim of breach of contract by wrongful dismissal . On the ET1 form many people, including some lawyers, tick the box for unfair dismissal but not the box for "notice pay" thinking the former incorporates the latter, but it does not. The main differences between unfair and wrongful dismissal are that in the latter a Tribunal may substitute its view for the employer's and take into account matters the employer did not know about at the time (Boston Deep Sea Fishing Co –v-Ansell). Unless the respondent shows on balance of probability gross misconduct has occurred, dismissal is wrongful and damages are net pay for the notice period. Such a claim does require the respondent to bring evidence it would not in answer to only an unfair dismissal claim. In the latter one calls evidence from the investigating and dismissing officers to satisfy the "Burchell" test, whereas in wrongful dismissal one calls the witnesses to the misconduct alleged. Two of three times every month, I address in case management hearings instances where a claimant dismissed without notice is plainly saying he has not done what he is accused of, whether he is bringing both claims or not. The choice is the claimant's, and a missing tick in a box should not prevent him bringing a wrongful dismissal claim, but the respondent and Tribunal must know in advance.

2.11. On 31st August , I wrote

However, I remind the parties the overriding objective of dealing with cases fairly and justly includes dealing with a case in ways which are in proportionate to the complexity or importance of the issues, avoiding unnecessary formality and seeking flexibility in the proceedings, avoiding delay and saving expense. The parties and their representatives must assist the Tribunal to further the overriding objective and in particular co-operate generally with each other and with the Tribunal. The real issue is which claims, other than post termination discrimination or victimisation, the claimant (a) wants to and (b) should now be allowed to, pursue. There is nothing to prevent him bringing a wrongful dismissal claim in the County Court but that would mean two sets of proceedings where one would do. I see no reason why the mechanism by which he could bring that claim in the Tribunal cannot be ***agreed by sensible discussion between the parties.***

2.12. As for the unfair dismissal, I wrote "*Based on what Mr Dean said today, it appears the claimant's wish now is to have a judicial determination of whether he was* (guilty) *or not,* ***which is why he seeks to "revive" the unfair dismissal claim".*** I added "*In an unfair dismissal claim , the binding authority , … is Orr-v-Milton Keynes Council . As the claimant did not attend the disciplinary hearing, winning an unfair dismissal claim will be an uphill struggle, but* ***if I interpret his aims correctly, it may be the wrongful dismissal claim he wishes to "revive".***

2.13. The main issue for today is time limits. The same test applies to unfair and wrongful dismissal claims. Mr Maxwell was clear he would argue that if both were brought, both are out of time. He would also argue if the claim was held originally to contain wrongful as well as unfair dismissal both were "withdrawn" by Mr Dean on 21st July 2017 and that could not be re-visited so as to permit either to be heard in the Tribunal under this claim. On hearing that, Mr Finlay elected to agree with Mr Maxwell the claim form did not expressly include wrongful dismissal and he would not attempt to have such a claim heard here, but may bring it in the County Court . He said he had taken a careful note in case HSBC tried to argue in the County Court the rule in Henderson –v-Henderson prevented a wrongful dismissal claim being brought there. Mr Maxwell could give no undertaking not to raise that argument. What Mr Maxwell certainly cannot do is argue any such claim has been withdrawn here, because his primary position is no such claim was made in the first place .

2.14. That being the case, I am not dealing, on time limit or any other point, with wrongful dismissal. We therefore have a situation considered undesirable by Lord Justice Briggs' recent report into civil justice. An unfair dismissal case, because of the "Burchell test" does not "clear the name" of a person accused of dishonesty . In the EqA claims, the claimant must prove primary facts from which the Tribunal **could** conclude unlawful conduct has occurred to shift the burden of proof to the respondent to show it did not . The Tribunal **may find** R1 R2 and/or R3 suspected the claimant had done something wrong but the claimant **may show** they would not have escalated their concerns but for his sexuality and /or previous complaints. Both causes of action can only be tried in a Tribunal. Whether he had acted dishonestly or not, may never be decided , but if it is, it will not be in this forum . When I have dealt with the withdrawal and time issue, there will be no reason for delay in reaching trial. I now return to the alleged facts.

2.15. On 15th June HSBC suspended the claimant. When interviewed, he denied any wrongdoing. He says an HSBC fraud team investigator accepted his innocence on 11th July, hence no report was made to the police or the FSA. The claimant assumed he was "in the clear". HSBC's account of the Fraud Team's report differs.

2.16. For whatever reason, the claimant decided to leave HSBC . He applied for a job with Santander on about 21st June 2016. He was interviewed on 13th July and given a job, subject to checks and references. On 10th August Santander received a reference from HSBC allegedly stating there was no reason to question his honesty or integrity. Mr Maxwell says the claimant decided to leave because he knew he was

guilty and HSBC would discipline him. The claimant denied this saying he had worked for Santander before and wanted to escape the atmosphere at HSBC (see bold in 2.8.1. above)

2.17. In mid to late August 2016 the claimant says he was interviewed by Ms Claire McManus of HR to outline the grounds of his formal grievance. R1 R2 and R3 were also interviewed by her. In an overstated passage the claimant's statement says
I aver that they did not for the main part tell the truth. Sadly, in mid 2016 I thought that justice would in any event prevail. It did not, However, this may well have been because I was up against a cunning clan of manipulative respondents who all articulated the same web of malicious lies, denial and deceit. They knew there was 'strength in numbers' and they sure took advantage of that fact. Looking back it is evident to me (and my witness(es) that the respondents compared notes and their 'stories' in order to deceive R4's employee relations staff, and in particular Claire McManus. Said deceit continues to the present day. I am particularly disappointed in the branch manager, Ian Richardson (R2).

2.18. The claimant was by letter of 25th August invited to a meeting on 1st September**.** A good deal of questioning by both Counsel today was about encrypted messages sent electronically by Ms McManus about the time and place of what was to be the combined disciplinary and grievance hearing . The claimant told her he could not open the messages or attachments on his only means of receiving them which was his I-phone. Why she did not post the information earlier is puzzling, but the claimant accepts he was communicating with her by telephone too. His statement says
The disciplinary hearing held on 1 September 2016 was something I did not attend because R4 sent encrypted emails to me in the days immediately prior to that. Because I was suspended - I could not readily access them and R4 should have known I could not access them. It was unfair to conduct the hearing without me so I could hear what they were accusing me of and I could make my defence. I was finally "verbally" told of the hearing the day before and, as I do not drive and was caring for my sick father at the time, it was not practicable for me to travel from a smallish town in the North East (Stockton) to Manchester. I requested that the hearing be re-arranged and/or in the alternative I make written and/or oral representation by telephone. For a first disciplinary hearing this would in accordance with good practice be an entirely fair and reasonable request given the prevailing circumstances. Nonetheless, my request was in effect ignored and R4 proceeded with the hearing in my absence.
At the hearing I learnt some one month later - see more below - that my formal grievance re homophobic harassment, victimisation and direct discrimination was also heard on 1 September 2016 but was not upheld.

2.19. The claimant showed me the messages on the I-phone and they did not "open". What he says about having to care for his sick father, and he added today his dog, I also accept. However, I find he must have known, earlier than the day before, a decision with potentially serious consequences was to be made in Manchester in the very near future. He had already resigned on 10th August giving notice to expire 3rd September.

2.20. The claimant had started at Santander on 5th September. He says he did not receive HSBC's decision until 27th September by registered post, as though it was emailed on 13th September, again he could not open it . It gave a right of appeal in 10 days. The dismissal letter says " *you behaved in a manner that **suggests** that you have been dishonest* ", but, he says, does not find he **was** dishonest. He says it does not convict him of stealing and, if it had, he would have been reported to police and FCA. Mr Maxwell reads it differently, and so do I. Mr Maxwell argues this shows the claimant deliberately trying to conceal information from Santander was the motive behind him not issuing a claim against HSBC which would probably have resulted in publicity, come to the notice of Santander and led to dismissal. Having heard the claimant, I do not accept he thought of it in that way. I will return to his thinking soon.

2.21 . In or about January 2017 , someone, referred to in my earlier orders as " the source", expressed surprise to someone else from Santander that the claimant was working for it because he had been dismissed by HSBC for dishonesty. The facts of his dismissal would have been known to him, anyone he told, probably most other HSBC employees in the Stockton branch ,HSBC managers and HR officers based elsewhere who dealt with it. The information which reached Santander must have **originated** from one of these, but may have passed from one person to another. The claimant says whoever did this was motivated by his sexuality and/or their belief he had done or may do a protected act. This triggered a series of steps by Santander which were subject to the claim number 2500502/17 which has settled.

2.22. The claimant did not appeal against his dismissal until 3rd February 2017 when he also raised a post termination grievance. HSBC rejected the appeal because it was made out of time, but did deal with the grievance which was rejected by Ms Helen Kelly for reasons pleaded at paragraphs 28-30 of its response.

2.23 On 9th February 2017, ie between **19 and 21 weeks (not the 13 permitted)** after dismissal depending on what date he received notice of it, the claimant contacted ACAS to commence Early Conciliation (EC) against HSBC Global Services Ltd . An EC certificate was issued on 2nd March. On 16th March the claimant contacted ACAS to commence EC against R1 R2 and R3.. An EC certificate was issued on 17th March. The claim form, presented on 22nd March 2017, named HSBC Holdings plc. On 3rd April Employment Judge Buchanan rejected that claim because the difference in names between the claim form and EC certificate was more than a "minor error". He ordered the particulars given on 2nd April be added to the claim prior to service.

2.24. The claims brought on that day were:
(a) harassment **prior to** any act against him in regard to the alleged dishonesty, which is what I call the " free standing " harassment claim
(b) direct discrimination and victimisation, mainly by R1 and R3, in making the allegations of dishonesty and by R2 conducting a biased investigation
(c) direct discrimination, victimisation and unfair dismissal by dismissing him

(d) post termination direct discrimination and victimisation relating to the information given to Santander which put his new job in jeopardy

2.25. The claims he could have brought earlier are (a) to (c) above. Time for (a) would have started to run in about June. For (b) and (c) it would have started to run in late September at best. However, until (d) happened, direct financial loss on (b) and (c) would have been minimal. When the claimant issued he was given part remission of the normal issue fee of £250 and had to pay £40. His witness statement contains these very relevant passages as to why he did not issue earlier

The main reason *is that I couldn't afford the Tribunal fees.* ***I rang ACAS*** *and was told (and this was witnessed/ overheard by a friend who can support this) that any fee rebate (if any) would be minor: so I would have to pay* ***all or most of the fees****. At that time I simply could not afford such a sum (I was in debt and remain in significant debt). I had no significant disposable income at the time.*

.. as I had found a new job ***I wanted to put the*** *plethora of inter connected and continuing* ***unlawful incidents*** *that were carried out by the respondents over a period of years* ***behind me.*** *I was a simple and modestly paid personal banker at the time – and I considered that any damages/ award resulting from a claim might be worth no more than say 1.5 x the outlay plus the cost of holiday days and public transport expenses*

Although said events within "HSBC" were truly shocking I found alternative employment thus mitigating any potential UD award against R4, and that, ***coupled with*** *the barrier posed by the illegal fee regime, were the reasons that at the time a claim was not pursued:*

I thought I could put it all behind me and move on *to a new job and although I would have liked to have* ***sued to clear my name*** *and complain about the way the disciplinary process happened right at the very end (after I had secured a job elsewhere) the costs made it impossible AND in effect on balance it was not worth doing for a non legally qualified layperson.*

Why do I want to sue now?

Since R4 staff.. have maliciously called my new employer – Santander - to try and get me sacked from my new gainful employment the unfair dismissal/discrimination now has unfair and extremely serious and career threatening ramifications for me.

As I said earlier, neither an unfair dismissal nor an EqA claim will "clear his name". He also said today he had rung the Tribunal service, not ACAS, though he appeared to conflate the two. Whichever he spoke to, I do not accept, had he explained his financial situation, he would not have been told about fee remission. Indeed the phrase "*all* ***or most*** *of the fees"* suggests remission was discussed. His finances were worse in the last quarter of 2016 than when he issued in March 2017.Had he made reasonable enquiry in 2016 he would have found he had to pay little or nothing. .

2.26. The first PH at which any substantive issues were addressed was before me on 21st July 2017. I recorded the claimant **decided** not to issue earlier against HSBC for unfair dismissal **due to fees and the fact his losses were minimal** or against HSBC or anyone else for harassment or direct discrimination in respect of earlier acts of homophobic abuse he alleged . I will deal shortly with the " withdrawal" of claims. Another PH was fixed for 31st August at which Santander would also be present. The

claimant made applications by e-mail on 30th August to re-instate the unfair dismissal as well as the allegations of unlawful conduct under the EqA during his employment .

2.27. On 31st August 2017 I wrote "*I urged the claimant on 21st July to consider CLFIS UK Ltd –v-Reynolds and Royal Mail-v-Jhuti which discuss the circumstances in which "tainted information" given by one person to the person who makes the decision can be attributed to the employer of both. In an unfair dismissal claim , the binding authority , not cited in the other two cases, is Orr-v-Milton Keynes Council .* Since I wrote that, the Court of Appeal have decided Jhuti . It affirmed Orr as regards ordinary unfair dismissal claims which held that if a dismissing officer, after reasonable investigation, reasonably believed information from a manager who had withheld exculpatory facts, the dismissal would be fair because the knowledge of the manager could not be attributed to "the employer" who was, for this purpose, represented by the dismissing officer. It also affirmed Reynolds as to EqA claims. Givers of " tainted information" subject someone to detriment . If that results in dismissal decided upon by someone who accepted the tainted information as true, their decision to dismiss would not be for a discriminatory reason. If the giver of information had such reason, the claimant could recover compensation for her lost employment under the EqA, provided her case had been pleaded in that way, because it resulted from the subjection of her to detriment , but the dismissing officer would not personally be liable . Mr Finlay again made a wise concession that the claimant does not wish to pursue an argument the dismissing officers discriminated. The quote in paragraph 2.17 shows the claimant recognising the givers of tainted information may have lied so convincingly that the dismissing officers believed them.

3. The Withdrawal Point

3.1. On 21st July 2017 at the private PH, at which the claimant was not present, I recorded Mr Dean "withdrew" parts of the claim "*as explained in paragraph 19 of the reasons* ". That paragraph recorded the post termination claims were in time and added, " *Mr Dean said he **did not intend to pursue** the other parts, which will, probably **at the hearing**, be dismissed. He said he may go to the County Court to claim wrongful dismissal.*

3.2. Rules 51 and 52 as far as relevant say :
51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end,
52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it .. unless—
(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
*(b) the Tribunal believes that to issue such a judgment would not be **in the interests of justice.***

3.3. On 21st July 2017 , **I raised** the time limit problems in the unfair dismissal and pre termination EqA claims to encourage the claimant to think about whether they would add anything to remedy even if he overcame the time limit challenges. Without consulting the claimant even by telephone, Mr Dean said he would not pursue those

claims, and he may have used the word "withdraw". Mr Finlay was present but as I recall played no part. I did not issue a dismissal judgment as I thought the claimant himself should be told of the effects of withdrawal rather than via a lay representative. His claim for wrongful dismissal could be heard in the County Court, so if such claim was brought in the Tribunal paragraph 52(a) applied anyway.

3.4. On 31st August , I expressed my reasoning thus
20. .On 21st July 2017 Mr Dean agreed the post termination discrimination and victimisation detriments were the only part of the claim which was in time. He said the claimant did not intend to pursue the other parts. As the claimant was not present to confirm his intentions, I erred on the side of caution ***and, in the interests of justice, did not dismiss under rule 52.*** *I recorded they would probably,* ***at the hearing,*** *be dismissed on withdrawal. He said he may go to the County Court to claim wrongful dismissal. There has been no dismissal judgment.*

3.5. Mr Maxwell says my use of the phrase " in the interests of justice" , shows I thought at the time rule 52 was engaged. He was present and thought so. I accept this note was badly worded by me. I was trying to avoid saying I doubted Mr Dean's authority to commit Mr Dent . On 31st August, I also wrote
21….There are three cases under the 2004 Rules about withdrawal Khan-v_Heywood and Middleton PCT 2007 ICR 24 , Ako-v-Rothschild Asset Management 2002 ICR 899.and British Association of Shooting-v-Cokayne 2008 ICR 185. How these will impact on what the claimant now asks is a matter for him to consider. He may issue a new claim if he thinks they prevent a withdrawal being revisited.

3.6. Mr Maxwell relies on Khan ,decided under the 2004 Rules, as authority for the proposition a "withdrawn" claim, even if not dismissed so as to create a "res judicata" situation, cannot be "revived", rather a fresh claim can be issued unless there is some other impediment to doing so, such as limitation periods. Ako, decided under the 1993 Rules, held possible revival of a claim depended upon whether at the time of "withdrawal" it could be found the claimant was really abandoning the right to raise a further claim . Mummery LJ said, obiter, it would be wise for a Judge to check before dismissing a claim what the claimant really intended.

3.7. The "withdrawal" was in my view equivocal in the sense Mr Dean did not check with the claimant he had authority to say what he did . I am not departing from any of the authorities or distinguishing them on the basis the rules have changed. Rule 51 starts *Where* ***a claimant*** *informs the Tribunal, .. in the course of a hearing, that a claim, or part of it, is withdrawn.* The issue here is whether I, as the Employment Judge on 21st July, have the right to say I was not satisfied that what Mr Dean said , however well intentioned, amounted to withdrawal **by the claimant** . I believe I do have that right. Had I been satisfied Mr Dean had the claimant's fully informed authority , I would have issued a separate dismissal judgment on the unfair dismissal and discrimination/victimisation during employment claims on that day . Not doing so was a conscious decision, not an oversight.

3.8. My first decision today is that nothing said by Mr Dean on 21st July had the effect that any part of the claim as issued on 22nd March 2017 was brought to an end . It remains for me to decide: whether any parts other than the post termination detriments , are prima facie out of time and can, or should, not be considered.

4. The Law on Time Limits

4.1. Section 111 of the Employment Rights Act 1996 (the ERA) says the Tribunal **shall not consider** a complaint under the section unless it is presented to the Tribunal: -
(a) before the end of the period of three months beginning with the effective date of termination, or
(b) within such further period as the Tribunal considers reasonable in a case where it is satisfied it was **not reasonably practicable** for the complaint to be presented before the end of that period of three months.

4.2. Even if the claimant did not receive notification of his dismissal until 27th September, if this was the only relevant provision, the claim needed to be presented before midnight on 26th December 2016. With effect from 6th April 2014, s 207B provides for extension of time limits to facilitate Early Conciliation (EC) before proceedings. The claimant first contacted ACAS on 9th February 2017. The time limit had already expired so s 207B is not engaged. If I do not find it was not reasonable practicable for him to have commenced EC by 26th December and thereafter issue in time, I have no further discretion to exercise.

4.3. In Palmer v Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held to limit the meaning of "reasonably practicable" to that which is reasonably capable physically of being done would be too restrictive a construction. The best approach is to ask "Was it reasonably **feasible** to present the complaint within three months?" A word commonly substituted for " feasible" is "do-able". The question is one of fact for the Tribunal **taking all the circumstances into account**. It should consider **the substantial cause** of the failure to comply with the time limit eg had he been physically prevented by illness, a postal strike, or something similar. It may be relevant to investigate whether and when, he **knew** he had the right to complain. It will frequently be necessary to know whether he was being advised at any material time and, if so, by whom. It will be relevant in most cases to ask whether there was any substantial fault on the part of the claimant or his advisor which led to the failure to comply with the time limit.

4.4. Section 111 could be read literally as empowering the Tribunal to ask whether **objectively** there was a factor which made it not reasonably practicable for a hypothetical claimant to issue in time regardless of whether that factor had any influence on the claimant. In my view, consistent case law for over three decades has not adopted that reading.

4.5. In Machine Tool Industry Research Association-v- Simpson 1988 IRLR 212, throughout the limitation period there were crucial facts reasonably unknown to the claimant. When she found out about them, she issued. That is not the case here, but Lord Justice Purchas made points of general application " *fundamentally the exercise to be performed is* ***a study of the subjective state of mind of the employee when, at a late stage, he or she decides that after all there is a case to bring before the ..Tribunal."*** This case concerns the subjective state of mind of Mr Dent when he **failed to take any step**, including starting EC, in the last quarter of 2016. In Simpson, Purchas LJ upheld submissions of Counsel expressed in terms of the state of mind of Mrs Simpson when she decided to issue, but in reality it was her state of

mind when she failed to issue. Counsel submitted the phrase 'reasonably practicable' imports three stages, the proof of which rests on the claimant . The first is that it was reasonable for her not to be aware of the factual basis upon which she could bring a claim during the limitation period. The second is she must establish the knowledge she later gained was crucial, fundamental or important to her change of mind and third she reasonably and genuinely came to believe she now had a ground for making a claim. In the words used, *"it is an objective qualification of reasonableness, in the circumstances, to a subjective test of the applicant's state of mind".* Simpson is not an exact parallel but, on the s111 test, Mr Maxwell is, in my view, right to say I must look at what was in the mind of this claimant at the time he failed to issue **and the reasonableness of his views at that time.**

4.6. Mr Maxwell also relies on Biggs-v-Somerset County Council 1996 IRLR 203, a case mentioned in the first article I read after Unison. In Biggs, the Court of Appeal had to consider a case where the claimant had not issued a claim of unfair dismissal in 1976 because , at the time , an employee who worked less than 16 hours per week, as she did , could not claim. The House of Lords in 1994 set that rule aside as incompatible with European Law , whereupon the claimant issued her claim. It was held when case law appears to change the law, it is actually only stating what the law always was, even if it was not so understood at the time. Ms Biggs could have issued and asked the Tribunal to set aside a provision incompatible with European law, so it was reasonably practicable for her to have done so. Mr Maxwell says this is analogous to situation of the claimant before Unison which declared fees has always been unlawful.

4.7. **I disagree**. Ms Biggs **could** have presented a claim which would have been met by a defence that she did not work 16 hours. A Judge would consider that and may well have asked her to show cause why her claim should not be struck out but she **had the opportunity** to be the "trail blazer" showing UK law was in contravention of European law. In sharp contrast, the fee regime meant those who did not submit with their claim either the correct fee or a statement they were applying for remission had their claims rejected by the Tribunal administration without any judicial input . If they paid the wrong fee, they were sent a notice giving a date for payment of the balance. If their remission application was not granted, wholly or partly, again they were sent a notice to pay. If payment was not made by the date in the notice ,their claims were rejected by the Tribunal administration without any judicial input . Many claims rejected in this way are now being automatically re-instated again by the Tribunal administration without any judicial decision, about which I will say more later. The fee regime prevented potential claimants having their case even seen, let alone considered, by a Judge In my view, Biggs is no analogy at all.

4.8. Unison takes us into uncharted waters in many respects but I see nothing in it to warrant departing from a line of Court of Appeal authority on the " not reasonably practicable test". The unlawful fee regime must have had at least **some** effect on the particular claimant's decision not to issue. I will return to **how much** effect later . Also it must have been reasonable for the particular claimant to believe it to be a sufficient factor to dissuade him or her from issuing the potential claim in time.

4.9. In Unison Lord Reed placed emphasis on low value claims thus:

96. Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it ***futile or irrational*** *to bring a claim. …. Many claims which do seek a financial award are for modest amounts, as explained earlier. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 (such is the median award in claims for unlawful deductions from wages),* ***no sensible person*** *will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full****. If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded.***

4.10. The example given by Lord Reed is not the only one where it would be reasonable not to issue. An employee who has been unfairly dismissed after just over two years continuous employment may find another equally paid job very quickly. His compensation would be a small basic award and compensation for loss of statutory rights which may well not even equal the fees payable.

4.11. Section 120 of the Equality Act 2010 includes:
(1) Proceedings on a complaint within section 120 **may not be brought** after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

(3) For the purposes of this section—

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

4.12. The question of acts " extending over a period" has been considered in a number of cases notably Cast-v-Croydon College 1998 IRLR 318 Hendricks-v-Commissioner of Police for the Metropolis 2003 IRLR 96. The latter held that a succession of isolated unconnected acts are not an act extending over a period. Mr Finlay did not argue the post termination detriments were a continuation of the pre-termination ones. Such an argument would not have been hopeless, but ambitious, and I commend his decision.

4.13. Mr Maxwell cites Robertson-v-Bexley Community Centre as authority for the proposition that allowing claims to be pursued which were issued more than three months after the date of the act complained of is the exception not the rule. On that point, I am not convinced it is still good law. The wording of s120 is significantly different from its various predecessor Acts. Earlier formulations said a Tribunal " *shall not consider*" a claim presented beyond three months and, in a different subsection, said it " ***may nevertheless***" do so if it is just and equitable. I do not see why Parliament would depart from tried and tested wording unless it intended to effect some change. That said, the new test is not well worded saying a claim " may not be brought". Claims **are brought ,** in the sense of issued, and limitation then has to be decided. However, if Robertson is still good law, I would not change my decision

because the case itself makes clear a Tribunal has a very wide discretion to consider a claim if it is just and equitable to do so and may take into account **anything it considers relevant .** I still find the guidelines on exercising that discretion are best described in British Coal Corporation v Keeble [1997] IRLR 336. In this case the most important appear to me to be the length of and reasons for the delay, whether the claimant was being advised at the time and if so by whom, and the extent to which the quality of the evidence is impaired by the passage of time.

4.14. What relevance, if any, does the strength of the case have? In Keeble the tribunal said the claim appeared unanswerable apart from the limitation point. Counsel for British Coal conceded that was so. In Keeble, the strength of the case was a factor, so in other cases, I believe . could the weakness of a case. By analogy with another area in which Tribunals exercise discretion , whether to grant leave to amend, in Woodhouse-v-Hampshire Hospitals HH Judge McMullen said *It is true in the assessment of the balance of hardship and balance of prejudice there may in all the circumstances include an examination of the merits – in other words, there is no point in allowing an amendment to add an utterly hopeless case."* In this case, no-one can predict the outcome until the evidence is heard and tested, so this factor has not influenced me , other than marginally on the “free standing” harassment claim .

4.15. It is often said the " not reasonably practicable" test is harder for the employee than the "just and equitable" test. I have no doubt **the burden in both is on the employee** and that the two tests are different. Cases since Unison have illustrated the former can be easier for employees and harder on employers. In the example given by Lord Reed in paragraph 96 of Unison an employee with a small claim for unpaid overtime could easily show fees were the predominant factor which prevented him issuing and, if he issued soon after Unison was decided, he would have a strong argument his case should be considered even if the non-payment of wages happened in August 2013, the employer had shredded "timesheets " so could not challenge effectively the hours the claimant said he worked. If the just and equitable test applied, it would be harder for the claimant, because as the quality of evidence would have been impaired by passage of time, so a Tribunal may think it unjust and inequitable to consider the case despite the valid reason for not issuing .

4.16.1. This brings me to an argument not expressed by Mr Finlay but which I have heard in other cases and I feel I should consider for completeness. People who informed themselves fully of the fee regime and either could not afford the fees or took the view endorsed by Lord Reed in paragraph 96 that the amount at stake and or chances of recovery made it *futile or irrational* to issue are to be commended for not wasting public time and money by trying to issue without paying the fee. Many claims were issued without the fee, and rejected, but now are automatically re-instated, again by the Tribunal administration without any judicial decision. The fee regime was in place for four years so in many cases evidence will have been discarded in the normal course of business and recollections of witnesses have faded, but, without any judicial discretion being exercised, those who issued but did not pay the fee , even many years earlier , will still have " their day in Court". In suitable circumstances an employer may try to establish the case should be struck

out under Rule 37 of the Employment Tribunal Rules of Procedure 2013 (the Rules) as a fair trial is no longer possible , but that is a heavy burden which rests on him.

4.16.2. Superficially attractive though the argument is that it is not "just" a person who "did the right thing" should be in a worse position than one who did not , in my judgment, this is an example of the old proverb " two wrongs do not make a right " . The Government's decisions on how to deal with the effects of Unison will throw up anomalies, but I believe it would take a decision of a higher Court or Tribunal to warrant departing from established guidelines on the tests for considering cases which are prima facie "out of time". To do otherwise would be to elevate the deterrent effect of fees on issuing claims to a **paramount** consideration rather than one of many factors. I also believe their Lordships in Unison foresaw such arguments would be advanced and, had they believed existing lines of authority should not be followed , would have given some indication to that effect.

4.17. Another consideration , in my view, is that a Tribunal must consider evidence of acts beyond the claim upon which it adjudicates which points to proscribed grounds being, or not being , the cause of acts of which complaint is made, as established in Chattopadhay-v-Holloway School, Din-v-Carrington Viyella, explained by Mummery J in Qureshi v Victoria University of Manchester from which Sedley LJ quoted in Anya-v-University of Oxford thus (" applicant " was the former word fot "claimant")

As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. …The Tribunal must consider the direct oral and documentary evidence available, …. It must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits? This case is an illustration of the problem. The complaint of racial discrimination is usually sparked by a core concern of the applicant: in this case his failure to obtain support and recommendations for his promotion to a senior lecturer in the Faculty of Law. Dr. Qureshi relied extensively on circumstantial evidence that there was a racial ground for the acts and decisions he complained about. The circumstantial evidence included incidents ranging over a period of nearly six years, from 1988 to 1994. The incidents relied on by him ante-date, accompany and post-date the alleged acts of racial discrimination and victimisation particularised in his 1993 and 1994 applications. ***It was necessary for the Tribunal to find the facts relating to those incidents.*** *They are facts (evidentiary facts) relied upon as evidence relevant to a crucial fact in issue namely, whether the acts and decisions complained of in the proceedings were discriminatory "on racial grounds". The function of the Tribunal in relation to that evidence was therefore two-fold: first, to establish what the facts were on the various incidents alleged by Dr Qureshi and, secondly, whether the Tribunal might legitimately infer from all those facts, as well as from all the other circumstances of the case, that there was a racial ground for the acts of discrimination complained of. The temptation for*

the complainant and his advisers, in these circumstances, is to introduce into the case as many items as possible as material from which the Tribunal might make an inference that "racial grounds" are established. The respondent has to respond to the introduction of those items. He may dispute some of them as factually incorrect. He may seek to introduce other evidence to negative any possible inference of racial grounds eg, non-racial explanations for his acts and decisions. The result .. .is the parties and their advisers may confuse each other (and the Tribunal) as to what the Tribunal really has to decide; as to what is directly relevant to the decision which it has to make and as to what is only marginally relevant or background.

4.18. "Evidentiary facts" may be aired, as Mummery J said kept within reasonable limits, and findings will be made. If the Tribunal find hostility to the claimant's sexuality by R1 R2 and R3, and that they gave "tainted information" against the claimant resulting in him facing a disciplinary change of dishonesty, **but do not find** sufficient primary fact from which they could conclude they were the "source" of the information given to Santander , would it be "just and equitable" the claim should fail purely because the proven part of a cohesive history of events was "time barred" ? I believe that is a valid consideration, though not decisive in itself.

4.19. There is another aspect to that consideration. At a preliminary hearing of this nature, it is inevitable that I focus on the claimant's case assuming, other than in exceptionally clear circumstances, that he will be able to prove what he alleges. The allegations made against him by the respondents were serious but so are the allegations he is now making against them. Doing what is "just and equitable" means being fair to both sides . Mr Maxwell said today, unprompted by any suggestion to the contrary from me or Mr Finlay , the respondents were not attempting to avoid or delay this claim being heard on its factual merits . In my judgment, it is hard to see how any of the individuals involved could have fair findings made in respect of the post termination allegations without such findings being made on the allegation that the claimant was "framed", something R1,R2 and R3 vigorously deny .

4.20. Finally , one of the Keeble considerations is the reason for the delay, which is also a major element of the s111ERA test as explained in Palmer . I am not eliding the two tests by drawing an analogy with the facts in Simpson . In that case, as in this, something which happened after the time limit expired changed the claimant's view as to whether to issue , which was that his new job and career came under threat. It is permissible, in my view , even if that does not satisfy the s111ERA test , for it to be a relevant consideration in the s120 EqA test

5. Conclusions

5.1. Why did the claimant not issue any claim before 22nd March 2017? **It was on 21st July 2017** Mr Dean told me, and I recorded, the claimant decided not to issue earlier *"due to fees and the fact his losses were minimal "*. No-one knew what would be said by the Supreme Court a few days later.The fact fees were mentioned as a factor that day, shows they were **genuinely part** of the reason. However, fees were still charged when he did issue in March 2017 and the claimant said today his financial position was worse in the last quarter of 2016 than the following March when he was granted almost total remission.

5.2. In my view , there are three parts to the ERA time limit issue: (a) what were the **substantial causes** (Mr Maxwell says it must be the **main** cause) of the claimant not issuing in time? (b) did fees, or any other factor render it "not **reasonably** practicable" to issue in time? (c) if so, was the claim presented within such further period as the Tribunal considers reasonable?

5.3.1. I have no difficulty saying the **main** cause of the claimant's failure to issue in time was **not the fees.** Although this is a perfect example of what Lord Reed was addressing in the paragraphs I have quoted, and, using his Lordship's terminology, no " *sensible person* "would have risked issuing a claim of unfair dismissal, even if he thought he had a good case, in light of the minimal potential gains, other factors were **the effective causes** of this claimant's decision.

5.3.2. First, because he had not gone to the disciplinary hearing , the chances of him showing no reasonable employer would have dismissed were slim. He had some advice at the time, so he said today, from Mr Dean who would know that was the test a Tribunal would apply. Mr Finlay today said the dismissal was procedurally flawed, and that may be so, but if it was found to be substantively fair such a finding would not "clear the name" of the claimant.

5.3.3. Second, the claimant believed the fact he had not been reported to either the police or the Financial Conduct Authority meant there was no real prospect of his future career being blighted. Although I read the dismissal letter as " convicting " the claimant of theft, he did not , so although he may have liked to clear his name of all suspicion there was , in his mind, no pressing need to do so.

5.3.4.. That said, the claimant knew the facts he needed to know in order to issue in the last quarter of 2016. He says in the " Concluding Remarks "section of his statement " *What is evident to me (and should be to any reasonable person or fair minded disciplinary chair) is that it makes no sense whatsoever for a person employed in the financial sector and with an unblemished record to risk their entire career for an alleged petty theft of up to £20, which would have been done in front of CCTV cameras. I did NOT commit any act of theft or malpractice*". On his own version he knew he had been "set up". Yet he let time slip by without bringing a claim or starting EC.

5.3.5. Last but not least, he had another job and , though he was sure he had been "framed" by a clique of people at the Stockton branch, he decided to put the past behind him.

5.3.6. In short , if I ask myself whether , had there been no fees , the claimant would have issued in time, my answer is "probably not". I accept fees were an added disincentive but had he felt strongly enough he would have appealed the grievance outcome earlier embarked on EC and, most importantly made far more diligent enquiries into fee remission. He would have found he could afford to bring the claim in the last quarter of 2016, as he did in March 2017. I find it was reasonably practicable to have brought the claim in time. I have no further discretion under s111 ERA. The claim of unfair dismissal cannot be considered and is dismissed.

5.4. As for the claims relating to subjection to detriment by those who allegedly gave tainted information the test under s 120 of the EqA is different . It would have been

reasonably practicable to issue this claim too but that is only one of several considerations

5.5. The time gap between the events to which the claim relates and the date of issue is less than 9 months Some cases involve evidence which is mainly the recollection of witnesses as to what they did and why. Others depend largely on documentary evidence. However, witnesses can be expected better to remember events, if documents are created contemporaneously during a grievance or disciplinary process as they were here

5.6. As for the reason for delay, the only way the claimant could have recovered substantial compensation for being "framed" would have been to prove a breach of the EqA. That would have been a more difficult task for the claimant before he had evidence of someone contacting Santander . A declared purpose of Government when fees were introduced was to discourage weak claims. The failing of the regime which caused the Supreme Court to declare it unlawful was that it discouraged strong claims too. In my judgment the claimant in the last quarter of 2016 felt he had been wronged, realised it would be hard to prove and decided to " put it all behind him ". However, when he learned in March his new job and future career were at risk not only was there a greater need to do something about it but another factor came into play. It has always been his case that the information which reached Santander did not originate, directly or indirectly, from him. That possibility, raised properly by Mr Maxwell at an earlier hearing, is a triable issue. If the claimant's version is accepted, it is unlikely the information originated from officers of HSBC responsible for the disciplinary process which leaves as the “source” someone from the Stockton branch. On his version, which has yet to be tested, his claim that he had been “framed” pre-termination by the same people became more arguable . In my view it is neither just nor equitable to penalise a claimant who did not issue when his argument was far from guaranteed to succeed , by denying him the chance to be heard when a change of circumstances makes his claim not only more important to him but , on his version, stronger . Also, as I set out in 4.18-19 above all the evidence will be heard anyway , and both sides have a legitimate interest in having it heard fully for their positions to be vindicated.

5.7. Following Keeble but confining myself to the main points
(a) the length of the delay was modest

(b) the reason for the delay included the fees and the other, in my judgment good, reasons explained in the last paragraph

(c) the extent to which the quality of the evidence is impaired by the passage of time is negligible It was the subject matter of grievances so there should be records to help refresh the memory of witnesses.

(d) the evidence of what happened in May -June 2016, and maybe some evidence of previous conduct by individuals who are accused of treating the claimant unfavourably due to his sexual orientation and/or the fact he made complaints of homophobic behaviour will be heard as part of the claim which is in time

5.8.1. Therefore I find it is just and equitable to consider that part of the EqA complaint. On an earlier occasion I sought the parties agreement on the issues and suggested

Pre Termination Discrimination/Victimisation

(a) Are there facts from which a Tribunal could conclude R1 R2 R3 **or any other person for whose acts HSBC are liable under s109** subjected the claimant to detriment by giving information to the investigating/dismissing officers which , at least in part, caused them to act as they did (ii) if so, was the conscious or subconscious motivation for doing so his sexual orientation and/or that he had done a protected act , or they believed he had done, or might do a protected act?

(b) if so, do the respondents show they were not so motivated?.

Post Termination Discrimination /Victimisation

(c) Are there facts from which a Tribunal could conclude R1 R2 R3 **or any other person for whose acts HSBC are liable under s109** (i) gave information directly or indirectly to Santander which caused it to suspend and start disciplinary proceedings against the claimant and (ii) if so, that their conscious or subconscious motive for doing so was sexual orientation and/or that the claimant had by his allegations on or about 14th June 2016 done a protected act , or they believed he had done, or might do a protected act ?

(d) if so, do the respondents show they were not so motivated?

5.8.2. Mr Maxwell said the words I have emboldened went too far. He made the valid point HSBC is entitled to know the case it has to meet. On 28th April 2017 the ET3's of R1 R2 and R3 denied they gave such information In Price-v-Surrey County Council Carnwath LJ, sitting in the EAT observed

"even where lists of issues have been agreed between the parties, they should not be accepted uncritically by employment judges at the case management stage. They have their own duty to ensure the case is clearly and efficiently presented. Equally the tribunal which hears the case is not required slavishly to follow the list presented"

In Davies-v- Sandwell Metropolitan Borough Council Lewison LJ said

If the parties have failed in their duty to assist the tribunal to further the overriding objective, the ET must itself take a firm grip on the case. To do otherwise wastes public money; prevents other cases from being heard in a timely fashion, and is unfair to the parties in subjecting them to increased costs ... An appellate court or tribunal (whether the EAT or this court) should, wherever legally possible, uphold robust but fair case management decisions:

5.8.3. As recently confirmed by the Court of Appeal in Ayodele-v-Citylink Ltd it is for the claimant to establish a prima facie case from which a Tribunal **could** conclude discrimination had occurred. However, that may be done if he shows **someone** from Stockton branch is likely to have been the "source". It is rare, but I have known, evidence, sometimes from a witness for the respondent, to provide facts which show that person was not one of those whom the claimant suspected. If such evidence takes a respondent by surprise at the hearing, a postponement may be granted.

However, if I were the trial Judge, if evidence exists and is within the claimant's knowledge but not contained in his witness statement I would not permit it to be given. My broader wording of the issues is to take account of a possibility similar to that which arose in CLIFS –v-Reynolds, of the pleaded case and/or list of issues not being wide enough to encompass events raised properly raised and aired in the evidence. It is not a licence for the claimant to "spring" evidence.

5.9. The "free standing harassment claims are different again . Some of the evidence would relate to events dating back to 2013. Other events are said to have taken place in 2016. None of it was the subject of a formal grievance until mid 2016. Many claimants put up with low levels of harassment without raising such grievances but the claimant, on his own evidence (disputed by the respondent) says he raised concerns informally and locally in the branch. In an organisation the size of this respondent, he must have known of routes to raise such concerns at a more senior level. I do not accept the claimant would have issued a claim for such behaviour at the time it was allegedly happening even had there been no fees. He still has not particularised the acts alleged.

5.10. Again following Keeble but confining myself to the main points
(a) the length of the delay was for most events considerable

(b) the reason for the delay is not a good one

(c) the extent to which the quality of the evidence is impaired by the passage of time is considerable and there will be no contemporaneous records to help refresh the memory of witnesses.

(d) as the case stands, it is so unspecified , despite the claimant having had ample opportunity to clarify it, as to be weak in the sense the claimant will be saying there was a general atmosphere of homophobic abuse and the respondent will say the opposite . Without clear examples such a claim is unlikely to succeed.

5.11. On that basis while he must be permitted within reasonable bounds to lead evidence of harassing behaviour in so far as it sheds light on the issues above, it is not just and equitable to consider them as claims in themselves

6. Costs

6.1. On 31st August , Mr Maxwell made an application for costs on the basis of the lateness of the application made by e-mail at 18:29 on 30th August. He argues that between the date of the Supreme Court judgment on 26th July 2017 and 30th August the claimant should have acted sooner . Some claimants who have advice from lawyers or unions could reasonably be expected to have known of Unison almost as soon as it was published. Others may reasonably not have found out about it for several weeks. This claimant found out quite quickly but I would not expect an unrepresented claimant to take less than a few weeks to decide how to proceed.

6.2. I wrote on 31st August that I agreed had the application been made earlier the 31st August hearing could have been converted to a public one and the points I have decided today dealt with then thus saving an extra attendance .I have changed my view. The hearing on that day was jointly with the Santander case and a great deal of progress was made especially in that. I do not believe there would have been time on that day to deal with what has been done today

6.3. Rule 76 includes
(1) A Tribunal may make a costs order .., and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously**,** abusively, disruptively or **otherwise unreasonably** in either the bringing of the proceedings (or part) or **the way that the proceedings (or part) have been conducted**;

Rule 84 says
In deciding whether to make a costs.. order, and if so in what amount, the Tribunal may have regard to the paying party's …ability to pay.

6.4. The Court of Appeal and EAT have said costs orders in the Employment Tribunal:

(a) are rare and exceptional.
(b) whether the Tribunal has the right to make a costs order is separate and distinct from whether it should exercise its discretion to do so
(c) the paying party's conduct as a whole needs to be considered, per Mummery LJ in Barnsley MBC v. Yerrakalva [2011] EWCA 1255 at para. 41: "*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had*."

6.5 The claimant's main creditor is HSBC. His statement includes

It was impossible for reason of my extended and extremely poor health immediately prior to (pre-op) and post (undertook major bariatric surgery with serious potentially life threatening complications) the SC decision of 26 July 2017 to decide upon, prepare and submit said fair and just application any earlier than the working week commencing 29 August 2017. Said slight delay was compounded by illness related to my lay representative (Andrew Dean's) disability

I cannot afford to pay any costs order in any event (I am in significant debt). ***However, for the respondents (aka "HSBC") on 31 August 2017 to have evident malice aforethought, then threaten and then attempt to make an ex parte cost application on the same day amounted to what I believe is yet another act of intimidation and another act of victimisation contrary to Sn 108 of the Act****.*
I can explain in more detail my debts at the hearing – but as has been said before I had a dispute with my former partner that left me with a legacy of big debts I am still trying to deal with, and R4 are by far my largest creditor. I have no savings or investments or cash to draw on to pay legal fees and such assistance as I have had

from Andrew Dean my disabled lay representative has been the free advice of a good friend. Counsel's help at the hearings has been offered to me for free – for which I will be forever grateful.

I met the claimant for the first time at this hearing . The wording and tone of the bold print above does not appear to be his. The rest is basically right.

6.6. In my judgment the conduct of the claimant and Mr Dean in not making the application sooner does not even reach the threshold of unreasonable conduct of the proceedings. The pre-trial conflicts between Mr Dean and the respondent's solicitors are not matters I am being asked to consider today and I would be reluctant even to try to apportion blame. I do however urge the parties to co-operate as required by Rule 2 to achieve the overriding objective of getting what is now a **sufficiently clear** case to a prompt and effective trial.

Employment Judge Garnon
JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 7th March 2018