Case No: 1800025/2019

EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING

Claimant:	**Mr L Mbuisa**		
First respondent:	**Burlington Care (Yorkshire) Limited**		
Second respondent:	**Sensecare Limited**		
Heard at:	**Leeds**	**On:**	**25 June 2019**
Before:	**Employment Judge Licorish (sitting alone)**		

Appearances:

For the claimant: In person
For the first respondent: Ms C Lord, Counsel
For the second respondent: Mr D Bayne, Counsel

JUDGMENT

1. According to the complaints and factual allegations set out in the case management summary sent to the parties on 1 May 2019, the claimant's application to amend his claim form is permitted to the extent that he complains of:

    1.1 direct race discrimination against the first respondent, according to paragraph 8;

    1.2 discrimination arising from disability against the first respondent, according to paragraph 9;

    1.3 harassment related to race and/or disability against the first respondent, according to paragraph 10;

    1.4 a failure to make reasonable adjustments against the first respondent, according to paragraph 13;

    1.5 breach of the Agency Worker Regulations 2010 against the first respondent, according to paragraph 14;

    1.6 direct race discrimination against the second respondent, according to paragraph 15;

    1.7 unlawful deductions from wages and/or holiday pay under the Working Time Regulations, according to paragraph 17.

2. The remainder of the claimant's application to amend his claim form to include the basis of his complaint of victimisation under the Equality Act 2010 against

the first respondent, and complaints of breach of contract and automatically unfair dismissal for health and safety reasons against the second respondent, is refused.

3. For the avoidance of doubt, the claimant's complaints of victimisation under the Equality Act 2010 and automatically unfair dismissal for health and safety reasons, indicated and/or listed in his claim form, are struck out as having no reasonable prospects of success.

4. The parties should proceed to comply with separate case management orders dated 27 June 2019.

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REASONS

Background

1. In May 2018, the claimant was placed by the second respondent employment agency (Sensecare) to work for the first respondent (Burlington Care) at one of its residential care homes. There appears to be a dispute about the whether the claimant was a support worker or a healthcare assistant.

2. The claimant last worked a shift for Burlington Care on 15 September 2018. He left that shift before it was due to end. On 1 January 2019, he presented a claim against Burlington Care indicating that he complained of automatically unfair dismissal for health and safety reasons, race and disability discrimination, breach of the Agency Workers Regulations 2010 (the Regulations), and stating that he was owed "*other payments*". No further information was provided.

3. In February 2019, following receipt of Burlington Care's response, the Tribunal asked the claimant whether he also wanted to pursue a claim against Sensecare. The claimant replied that he did and the claim was accordingly served. At around the same time, the claimant also sent further details of his claim to the Tribunal. Those papers included a copy of a county court claim against Sensecare which appeared to reflect his intended Tribunal complaints against Burlington Care, but also contained claims for defamation and negligence. The county court claim has since been issued.

4. At a previously preliminary hearing on 30 April 2019, another Employment Judge explained to the claimant that a clear and comprehensive list of his intended complaints was needed so that the Tribunal and the respondents could properly understand his claim. The claimant accordingly clarified what he was saying had happened and what type of legal complaint he wished to make about each incident. That list was confirmed in a note of the preliminary hearing sent to the parties on 1 May 2019.

5. Among other things, it was explained to the claimant that the production of that list did not necessarily mean that he would be allowed to pursue each and every complaint and/or allegation. He might need permission to amend his claim form if what he was saying went beyond simply providing further information about the complaints he had listed.

6. The respondents were therefore ordered to prepare amended responses based on the claim as clarified at the preliminary hearing on 30 April 2019. Relevant to today's hearing, they were also asked to identify any complaints

they say cannot be pursued unless the claimant is allowed to amend his claim form, specify any objection to such an amendment, and identify any complaints that they say have no or little reasonable prospects of success.

7. In the meantime, the claimant prepared and sent to the parties and the Tribunal evidence he relies on to show that at the time of the events about which he complains, his back condition met the definition of a disability under the Equality Act 2010. His complaint of disability discrimination is made against Burlington Care only. Burlington Care has since conceded that at the relevant times the claimant's back condition met the definition of a disability, but (among other things) denies that it knew or ought to have known that the claimant was a disabled person.

8. This preliminary hearing was therefore listed to determine the following preliminary issues:

   8.1 whether the claimant is required to amend his claim for the Tribunal to determine any complaints raised and, if so, to determine any application to amend;

   8.2 whether to strike out any complaint because it has no reasonable prospects of success;

   8.3 whether to order the claimant to pay a deposit as a condition of continuing to advance any specific allegation or argument if the Tribunal considers that any such allegation or argument has little reasonable prospects of success.

9. In the event, the Tribunal spent the majority of the day hearing submissions on those applications. It was agreed that the Tribunal should take those submissions in turn before arriving at any decision. This is because the merits of a complaint is a relevant factor in deciding whether to allow any amendment.

10. Most importantly the Tribunal also wanted to make sure that the claimant understood what he was required to comment on at each stage, and was given a fair opportunity to answer all matters that the respondents raised. At times, this approach was unfortunately misinterpreted. Most importantly, at one point the claimant suggested that the Tribunal had already decided that his complaints were "*weak*" when it was simply trying to obtain his reply to the respondents' submissions.

11. The Tribunal has therefore set out below the parties' submissions and replies in some detail.

12. Both respondents produced a limited number of documents and legal authorities (marked as R1 and R2 respectively).

The claim

13. At box 8.1 of his claim form presented against Burlington Care on 1 January 2019, the claimant ticks four boxes indicating that he was unfairly dismissed, discriminated against on the grounds of race and disability, he is owed other payments, and makes another type of claim relevant to the Tribunal's jurisdiction. In terms of the last matter, and relevant to these proceedings, he states that he was an "*agency worker*" and claims "*Discrimination – racial, victimisation, harassment … Asserting a disability disclosure detriment … Rights of Agency workers in relation to access to employment and treatment [and] … Automatic Unfair Dismissal for Health and Safety reasons*." At box 8.2, when asked to provide the background to and details of his claim,

including the dates when the events he is complaining about happened, he repeats the same list of complaints, and states that agency workers are entitled to equal treatment after 12 weeks. He also refers to "*pay and working hours, including the Working Time Regulations, annual leave and the National Minimum Wage*" as part of his automatically unfair dismissal complaint.

14. By email on 25 February 2019, the claimant sent to the Tribunal further documents. At the beginning of today's hearing he explained that this was because in its response form submitted on 6 February 2019 Burlington Care stated that his claim lacked any detail. Those documents included:

    14.1 A "*complaint*" dated 17 September 2018, which the claimant today confirmed is a copy of a grievance he raised with Burlington Care on the same date (R1, tab 1). Among other things, the claimant sets out the factual background to some of his previously identified complaints, including the names of the alleged perpetrators who work for Burlington Care, dates on which alleged acts of discrimination on the grounds of race and disability occurred, and that he was not told about suitable permanent vacancies with Burlington Care according to the Regulations. The document contains a further bare assertion that he was unfairly dismissed for health and safety reasons. Within the narrative, he describes events which led him to walk out of his shift on 15 September 2018, he says for his own health and safety.

    14.2 A schedule of loss which contains no details of the other payments he believes he is owed.

    14.3 A copy of the claimant's county court claim against Sensecare. The attached particulars are dated 17 December 2018. In summary, the heads of claim are listed as: breach of contract; racial discrimination; disclosure detriment – disclosed disability; loss of earnings (for the remainder of his last shift and subsequently); defamation, slander and fraud; injury to feelings; negligence, and unlawful deductions (outstanding pay and holiday pay).

15. The case management summary sent to the parties on 1 May 2019 identifies the following complaints that the claimant wishes to bring against Burlington Care:

    15.1 direct race discrimination (on the basis that he is black African),

    15.2 unfavourable treatment because of disability (by reason of a back condition),

    15.3 a failure to make reasonable adjustments,

    15.4 harassment related to race and/or disability,

    15.5 victimisation under the Equality Act 2010, and

    15.6 breach of the Regulations (relating to a vacancy for a permanent senior care assistant which Burlington Care now confirms was filled in July 2018).

16. The complaints the claimant wishes to bring against Sensecare are identified as:

    16.1 direct race discrimination,

    16.2 breach of contract (unlawful suspension on medical grounds),

16.3 unauthorised deductions from wages and/or breach of the Working Time Regulations (9 hours' pay and 150 hours' holiday pay), and

16.4 automatically unfair dismissal for having raised health and safety concerns.

17. In an email dated 29 May 2019, the claimant told Senscare that he did not intend to pursue a Tribunal claim against it (R2). However today he confirmed that, having taken advice, he does wish to pursue complaints against Sensecare relevant to the Tribunal's jurisdiction and he intends to discontinue those complaints in the county court.

18. On 11 July 2019, the county court is otherwise due to consider a strike out application made by Sensecare. Subject to the outcome of today's hearing, the parties have been separately ordered to confirm to the Tribunal how they wish to proceed following the outcome of the county court application.

Amendment

19. Today the claimant confirmed that, if required, he applies to amend his claim form to include the complaints and allegations identified in the case management summary sent to the parties on 1 May 2019. Generally, the claimant maintains that clearly both respondents are potentially liable for what he says has happened to him. It would be fair to allow him to amend his claim form to specify the complaints and factual allegations, and to incorporate all of his intended complaints against Sensecare.

20. Towards the end of hearing submissions on the application to amend, the claimant also provided further information in respect of his unfair dismissal complaint against Sensecare. Effectively, he says that he raised concerns about working "*on the floor*" over the telephone with four of Sensecare's employees on 23 August, and 10 and 15 September 2018. In the circumstances, the Tribunal agreed to consider that information as an additional amendment, along with the list of complaints and issues sent to the parties on 1 May 2019.

Does the claimant need permission to amend his claim form?

21. The Tribunal accepts Burlington Care's argument that permission is required in respect of the complaints against it on the basis that no factual allegations have been pleaded by the claimant. In **Chandhok v Tirkey 2015 IRLR 195** the EAT confirmed: "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond*."

22. Additionally, **Chandhok** states that if a claim is to be understood as being far wider than that set out in the claim form, it would be open to a claimant after a relevant time limit has passed to point to other documents or statements to advance a different case. "*Such an approach defeats the purpose of permitting or denying amendments; it allows the issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus*" (R1, tab 5).

23. The question as to whether a claim form contains a specific complaint has to be judged by reference to the whole ET1, and considering the name given to

the complaint as well as any accompanying factual details (**Office of National Statistics v Ali 2005 IRLR 201, CA**).

24. However, in **Baker v Commissioner of Police of the Metropolis UKEAT/0201/09/CEA** the EAT also confirmed that it was correct for a Tribunal to decide that a claim form did not include a claim for disability discrimination when the claimant had ticked the box marked "*disability*" at section 6, but did not make a complaint which was recognisably an allegation of disability discrimination in the notes attached to his ET1 (R1, tab 7).

25. In terms of his complaints against Burlington Care, the Tribunal is further satisfied that in his claim form the claimant does not set out any details of his disability or race, the alleged treatment he complains of, or how he believes Burlington Care breached the Agency Worker Regulations.

26. On that basis, the Tribunal is satisfied that if the claimant wishes to rely on any of the factual allegations or advance the specific complaints of direct race discrimination, unfavourable treatment because of disability, a failure to make reasonable adjustments, harassment related to race or disability, victimisation or breach of the Regulations against Burlington Care contained in the note of the preliminary hearing dated 1 May 2019, permission to amend is required.

27. The Tribunal further accepts Sensecare's argument that permission to amend is required in respect of the claims against it. First, the claimant does not indicate anywhere in his claim form that he is owed arrears of pay or holiday pay, or otherwise wishes to complain of breach of contract. There is a bare assertion of race discrimination and automatically unfair dismissal. The proposed amendment therefore amounts to the addition of entirely new complaints and/or specific complaints and factual allegations against Sensecare.

Should permission be granted?

28. The relevant factors in deciding whether to allow a claim to be amended are summarised in the Presidential Guidance on general case management. Those factors were discussed during this hearing. The Guidance (among other things) sets out the principles in the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836**. Put very simply, the Tribunal must carry out a careful balancing exercise of all the relevant factors, taking into account the interests of justice and the relative hardship that will be caused to the parties by allowing or refusing any amendment. Relevant factors include (but are not limited to) the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

29. First, the Tribunal is satisfied (according its analysis above) that the further information provided by the claimant goes beyond the correction of errors, the addition of facts or the addition or substitution of facts already described, or a labelling or relabelling of facts already described.

30. As explained earlier, a general complaint in a claim form is not sufficient. Claimants are required to set out specific acts complained of because Tribunals are only able to determine specific complaints. The claimant's proposed amendments are therefore significant and substantial in seeking not only for the first time to specify his complaints, but also to describe the factual basis on which he brings them. The proposed amendments accordingly significantly affect the extent and scope of the original claim.

31. For the purposes of time limits, amendments to Tribunal claims which introduce substantively new complaints or causes of action take effect at the

time permission is given to amend (**Galilee v Commissioner of Police of the Metropolis 2018 ICR 634**). However, the fact that a relevant time limit for presenting a new claim has expired is an important factor but not determinative. The balance of hardship must always be considered.

32. If there is no link between any facts described in the claim form and the proposed amendment, the claimant will be bringing an entirely new cause of action. In such cases the Tribunal must consider whether the new complaint is in time, taking into account the applicable test for extending time limits.

Burlington Care's specific objections and the claimant's reply

33. The time limit for a breach of regulation 13 of the Regulations runs from the date on which other individuals were told about the vacancy. The claimant's colleague was appointed on 2 July 2018 (R1, tabs 3 and 4), in which case Burlington Care estimates that the latest possible date that the vacancy was advertised was at some point in June 2018.

34. Early conciliation in the claimant's case started on 31 October and ended on 1 December 2018. Any act or omission which took before 1 August 2018 is therefore potentially out of time with the effect that the Tribunal may not have jurisdiction. Extensions of time under the Regulations are made on a just and equitable basis. Burlington Care contends that this complaint is a distinct allegation and the claimant has advanced no reason why he did not submit that claim any earlier.

35. Today in reply, the claimant says that he learned about his colleague's appointment in September 2018 at around the time he submitted his grievance. He did not contact ACAS or submit a claim at that point because he thought it would be addressed as part of his grievance.

36. By the time the claimant sent further information to the Tribunal in February 2019, Burlington Care submits that all of the other discrimination complaints he wishes to make against it were out of time. The Tribunal notes that the last allegation occurred on 15 September 2018, in which case the deadline for bringing a claim (extended to take account of early conciliation) expired on 14 January 2019. Extensions of time in respect of discrimination claims are also made on a just and equitable basis.

37. In terms of the timing and manner of the application, according to the Presidential Guidance the claimant also needs to show why the application was not made earlier and why it is being made now.

38. Burlington Care maintains that the claimant has failed to explain himself. He has confirmed that the particulars of his complaint that he sent to the Tribunal towards the end of February 2019 is identical to the grievance he raised on 17 September 2018. In September 2018, he was therefore fully aware of the claims he wished to bring and able to articulate them before any time limit expired.

39. In reply, the claimant said that he did not attach a copy of his internal complaint to his claim form because Burlington Care already had it. His understanding was that he could submit a claim form and a discussion about his claims would take place thereafter. He says that he realised this was not the case only when Burlington Care suggested otherwise in its response.

40. Burlington Care also consider it relevant that further documents provided by the claimant show that he worked as a CAB adviser between 2006 and 2012, and dealt with employment enquiries. In reply, the claimant told the Tribunal

that his role "*had nothing to do with representing people in court*" – he advised individuals about their potential claims, and would refer them to solicitors to draft and submit a claim form.

41. The claimant also later suggested that if he had tried to submit a claim any earlier, the Tribunal would have told him that he needed to exhaust internal procedures. He did not explain why he believed this to be the case. In any event, Burlington Care confirms that the internal grievance process in the claimant's case concluded on 30 November 2018.

42. Burlington Care maintains that the following are also relevant factors. First, it argues that many of the claimant's complaints have little or no reasonable prospects of success. The time spent and costs involved in defending unmeritorious complaints should therefore be weighed in the balance. It also asks the Tribunal to note that Burlington Care is a respondent in the business of providing residential and nursing care homes for vulnerable adults.

43. Secondly, the delay has led to significant evidential prejudice in that three of the individuals named by the claimant as part of his direct race discrimination, harassment, unfavourable treatment because of disability and victimisation complaints left Burlington Care's employment between October and November 2018. The other named colleague left on 1 March 2019, and the then managing director (who heard the claimant's grievance) on 28 February 2019.

44. In terms of the prospects of success of the specific complaints identified, Burlington Care submits that the majority of the claimant's 18 allegations of direct discrimination are bound to fail because he has been unable to describe any prima facie evidence which might lead a Tribunal to infer discrimination. Burlington Care further maintains that allegations involving those also alleged to have subjected the claimant to harassment related to race and disability have little prospects of success.

45. Burlington Care also contends that there are inconsistencies in the claimant's case. For example, in his grievance hearing he refers to a male colleague preventing him from going home at a certain time. He now wishes to complain that a female colleague made him stay at the end of his shift unnecessarily. As part of his grievance he also describes a particular resident as easy to care for, but now alleges that he was difficult.

46. Today in reply, the claimant maintains that he saw his named comparators (who are white) being treated differently. Otherwise, his account is not inconsistent. The named female supervisor instructed his immediate male supervisor at Sensecare to prevent him from going home at a certain time. The claimant otherwise disputes the accuracy of Burlington Care's notes of his grievance meeting.

47. In terms of his discrimination arising from disability complaint, Burlington Care argues that the claimant has failed to explain why his back condition prevented him from working "*on the floor*". This term is used to describe general tasks assisting a number of residents, compared to working "*1:1*". It includes, for example, making drinks and preparing breakfast. The claimant was not required to do any heavy lifting. In terms of the failure to make reasonable adjustments, Burlington Care also says that the claimant was never made to work "*on the floor*" or lift residents.

48. Today in reply, the claimant maintains that Burlington Care was aware of his back complaint from the outset. He specifically stated that he could not do

care work (which involved, for example, lifting residents or repeatedly bending over to wash them) but could do support work. He otherwise did not object to fixing drinks or serving breakfast.

49. In terms of his victimisation complaint, Burlington Care contends that the alleged conversations the claimant describes as protected acts are incapable of amounting to such in law. If any of those fall away, the detriments which the claimant says followed on must also fail as a matter of logic.

50. In reply, the claimant simply disagreed with that contention. In terms of the third conversation, he argues that stating he had a back injury was effectively a reference to his disability and was therefore a protected act.

51. In conclusion, Burlington Care argues that the balance tilts towards it in terms of the claimant's weaker complaints and those involving individuals who have since left its employment.

52. Burlington Care also suggests that the claimant's claim is vexatious. Its notes of his grievance hearing on 30 October 2018 (R1, tab 2) show the claimant as variously stating that:

    52.1 the outcome he was looking for was "*compensation*",

    52.2 he had recorded a conversation with a colleague without her knowledge which he "*will use … in court*",

    52.3 any disputes of fact were "*a matter for the judge*", and

    52.4 Burlington Care's liability for any comments made by its residents was a matter "*for tribunal*".

    The claimant denies making those comments and was never asked to agree the notes of the hearing.

53. Burlington Care also drew the Tribunal's attention to a similar claim that the claimant has made based on his employment for a few months in 2017 (**Mbuisa v Cygnet Healthcare Limited UKEAT/0119/18/BA**). His disability impact statement also refers to another Tribunal claim brought in 2013. Today, the claimant stated that he found the suggestion that he should not bring a claim "*if there is one to be made*" as "*very offensive*".

Sensecare's objections and the claimant's reply

54. Sensecare also argues that the significant amendments the claimant wishes to make amount to bringing new complaints which are all out of time. The last allegation of direct race discrimination against it took place 30 October 2018. All other complaints of breach of contract, deductions from wages and automatically unfair dismissal are alleged to have occurred on around 15 September 2018. Any extension to the time limit for those complaints is subject to test of reasonable practicability.

55. In terms of the timing and manner of the application to amend, the claimant's grievance raised with Burlington Care does not mention any complaints specifically against Sensecare, and it does not refer to a breach of contract or wages complaint at all. Nor does it name the perpetrator of the alleged acts of direct race discrimination, or make any reference to unfair dismissal. The first time the claimant "*set out his stall*" in respect of his complaint against Sensecare was during the preliminary hearing on 30 April 2019.

56. Since then, the claimant has suggested more than once that he does not intend to pursue any Tribunal claim against Sensecare, but today he told the

Tribunal otherwise. He has told the county court that Sensecare is involved in these proceedings for purely evidential purposes. He has offered no proper explanation as to why he did not name Sensecare in his claim form in January 2019, or why he did not make an application to amend any earlier.

57. In terms of the balance of hardship and justice, the claimant has issued near parallel proceedings in the county court. Allowing the amendment would therefore put Sensecare to the trouble of defending two claims rather than one.

58. Today, the claimant told the Tribunal that he realised he should have named Sensecare in his claim form only when the Tribunal raised that issue in February 2019. He also said that he intends to discontinue the elements of his county court proceedings for which the Tribunal has jurisdiction, but will continue with his claims for defamation and negligence. The county court pleadings sent to the Tribunal in February 2019 otherwise set out his intended complaints.

59. Sensecare also submits that the broad merits of each complaint are relevant, even if the complaint has little rather than no prospects of success. Refusing permission to bring a weak claim is not such a hardship, whereas putting a respondent to the time and expense of defending an unmeritorious claim would be an injustice.

60. First, the claimant has to date been unable to describe any evidence which suggests that direct discrimination should be inferred from the basis of his complaint. When the Tribunal tried to obtain the claimant's comments on this submission, it was at this point he suggested that it had already decided that his claim was weak. The claimant was therefore asked whether he wanted a break to gather his thoughts, but he declined. He thereafter replied that he believed that the alleged perpetrator acted in the way that he did because of his race. This is because he witnessed that person treating others with more respect. Sensecare in reply reminded the claimant that, according to his version of events, he had only briefly met that person on two previous occasions. The claimant later stated that he can think of no other reason why he was treated in the way that he was.

61. In terms of the breach of contract and unfair dismissal complaint, the claimant must prove that he was an employee and was dismissed. Sensecare maintains that as part of its arrangement with the claimant he was employed and paid by another company, Payroll Solutions Limited. The claimant denies any knowledge of Payroll Solutions. He says that all his dealings were with Sensecare.

62. During the hearing, Sensecare produced a copy of its terms of engagement with the claimant (R2). The claimant denies that he signed that document and maintains that he has never seen it before today. In summary, the document is described as a contract of engagement with a temporary worker. It mirrors the arrangement as described in the case of **Dacas v Brook Street Bureau 2004 IRLR 358** (R2). Sensecare maintains that, in view of this, the claimant's complaints of unfair dismissal and breach of contract are therefore bound to fail.

63. Even if the claimant can prove that he was an employee, Sensecare also maintains that the claimant remains on its books.

64. The claimant confirmed today that, to date, he has not terminated his contract with Sensecare. His complaint is advanced on the basis that he was

unlawfully suspended on medical grounds on 15 September 2018, which in his view amounted to "*automatically dismissing him*". Sensecare replies that the claimant walked out of his shift with Burlington Care on that day and thereafter presented a note from his doctor on the basis that he was not fit for work.

65. The claimant must also prove that he was at least a worker if he wishes to pursue a complaint of non-payment of wages or holiday pay under the Working Time Regulations. Sensecare says that this will be difficult if he has an employment contract with Payroll Solutions. Nevertheless, the claimant maintains that he has had no dealings with that company and has itemised what he believes he is owed by Sensecare in separate emails.

<u>Conclusion</u>

66. Generally, the Tribunal takes into account that if permission to amendment his claim form in any way is refused, the claimant will be deprived of the opportunity to have those complaints determined on the merits.

67. In considering his application according to reason and fairness, the Tribunal notes that when the claimant presented his claim he chose not to specify any of his complaints or factual allegations. Box 8.2 of the claim form provides space for a claimant to do so. It also emphasises that the details of a claim should include "*the date(s) when the event(s) you are complaining about happened*". This was not an oversight, but the claimant assumed that it would be uncontroversial not to provide any such detail because Burlington Care already had a copy of his grievance.

68. Nevertheless, the claimant has previously brought two sets of Tribunal proceedings. In his grievance, he also uses the terms "*claimant*" and "*respondent*", and has left space for a case number.

69. The Tribunal notes that the previous preliminary hearing would have proceeded very differently if the Tribunal's essential task had been to clarify and ascribe legal labels to the narrative which should have appeared in the claimant's ET1, or otherwise establish a connection between the stated facts and the complaints he has now clarified. In the circumstances, the claimant now effectively seeks to raise entirely new causes of action because there are no facts in the claim form to link to any of his contended complaints. Notwithstanding this, although the respondents criticise the claimant's behaviour on a number of levels, amendments cannot be refused on a purely punitive basis.

Complaints against Burlington Care

70. The Tribunal finds that the balance only just tilts towards the claimant in respect of his direct race discrimination, harassment and disability discrimination complaints. The discretion to extend time is on a just and equitable basis. The claimant has provided a number of reasons why he acted as he did. Some of them are not necessarily sound, but do not appear to be improper. It is just and equitable to extend time.

71. Most importantly, these complaints involve disputes of fact (including disputed documents) which will need to be determined at a final hearing. Burlington Care has also been aware of the substance of those complaints since September 2018.

72. In terms of evidential prejudice, the Tribunal further notes that the individuals named by the claimant who left Burlington Care's employment in 2018 did so

during the primary limitation period for his complaints. The other individual left not long after the extended limitation period. The claimant should not be penalised for the fact that he works in a sector which (as Burlington Care describes) experiences a high turnover of staff. The grievance hearing, in itself, does not form the basis for any of the claimant's complaints against Burlington Care. There was also note taker, who might be able to address any dispute about the record of that hearing. In any event, Burlington Care's current position is that these proceedings should be stayed (resulting in further delay) if the county court claim is to go ahead.

73. Turning to the victimisation complaint, however, the Tribunal finds that the balance tilts towards Burlington Care. It explained today that, when clarifying the protected acts relied upon, the Employment Judge at the previous preliminary hearing was very careful to ask the claimant in open terms precisely what he said to his colleagues in June and August 2018. He simply stated that he thought he was being treated differently. They were not complaints about a protected characteristic. Those conversations are not therefore capable of amounting to a protected act in law.

74. In terms of the third alleged protected act in September 2018, the claimant claims to have stated that "*he had a back injury, could not do duties on the floor*" and complained he was being treated differently. Although he refers to his back condition, he did not allege he was being treated differently because of a protected characteristic. There is little or no reasonable prospect of the claimant establishing that this conversation also amounted to a protected conversation in the legal sense.

75. In the circumstances, refusing permission to bring a complaint with little or no merit causes no hardship to the claimant. The application to amend his claim to include the basis upon which he brings a victimisation complaint is therefore refused.

76. Finally, the claimant's complaint under the Regulations went out of time in around September 2018 at the latest, before he contacted ACAS or presented his claim form. The discretion to extend time is exercised on a just and equitable basis. The claimant has explained the delay. Effectively, he says that he did not make a claim sooner because he assumed that the matter would be resolved as part of his grievance.

77. This complaint also raises a distinct but limited issue: was the claimant made aware of a particular vacancy in around June 2018? The matter was discussed during his grievance hearing in October 2018 (R1, tab 2, page 5). Burlington Care maintains that all internal vacancies are advertised in the staff room. This complaint does not extend the scope of the claimant's claim by a significant extent. In the circumstances, it is just an equitable to extend time and the claimant's application to amend his claim is this respect is allowed.

Complaints against Sensecare

78. According to the proposed amendment to the direct discrimination complaint, the last act alleged took place on 30 October 2018. The claimant first contacted ACAS on 31 October. He complied with early conciliation as a prospective claimant and the primary time limit for his complaints was accordingly extended. Sensecare was added as a respondent after early conciliation ended and the claim was first presented.

79. The current application before the Tribunal comprises an amendment to the existing claim. The Tribunal understands that, on this basis, Sensecare is

unable to argue that the primary time limit for the direct discrimination complaint was not so extended by early conciliation (see **Mist v Derby Community Health Services NHS Trust UKEAT/0170/15** and **Science Warehouse Limited v Mills 2016 IRLR 96**). It appears therefore that the effect of early conciliation was to extend the time limit for that complaint to 1 March 2019.

80. The claim and accompanying documents were served on Sensecare by the Tribunal on 28 February 2018. The discretion to extend time is on a just and equitable basis. The claimant appears to have initially thought that the correct venue for a claim against Sensecare was in the county court. He may not have had a necessarily sound reason for that belief, but there is no suggestion that it was improper. The substance of his Tribunal complaint was thereafter clarified at the preliminary hearing on 30 April 2019. It is just and equitable to extend time.

81. Notwithstanding Sensecare's views of the merits of the direct discrimination complaint, it involves disputes of fact which will need to be determined at a final hearing to establish whether discrimination should be inferred.

82. The allegations are also limited and made against one person. In the circumstances, the balance of hardship just tilts towards the claimant. It does so on the basis that the claimant intends to withdraw his discrimination claim against Sensecare in the county court. Permission is therefore granted to amend the claim to include this complaint.

83. Otherwise, the Tribunal finds that there is no discernible complaint of breach of contract, unlawful deductions from wages or holiday pay on the face of the claim form. It was reasonably practicable for the claimant to have submitted those complaints before the time limit expired in January 2019. Indeed, he produced a document identifying those complaints and the amounts he claims in December 2018 as part of his county court claim.

84. The Tribunal is satisfied that the claimant is aware that Tribunal claims are subject to strict time limits. He has worked as an adviser on employment matters and has brought two Tribunal claims personally. Those complaints are therefore time barred.

85. Further and separately, the claimant's contention that he was dismissed by Sensecare on 15 September 2018, having left his shift at Burlington Care, is legally unsustainable. Most importantly, the claimant suggested today that he was dismissed by Sensecare's "*conduct*", but confirmed to the Tribunal that he did not resign on the day in question, nor has he ever done so. Suspension (if he can prove it) cannot otherwise amount to a dismissal.

86. Therefore, even if the claimant could prove that he was employed by Sensecare (an argument that also currently appears to be problematic but not wholly unsustainable), his complaints of breach of contract and automatically unfair dismissal accordingly have no reasonable prospects of success. Refusing permission to bring a complaint with no merit causes no hardship to the claimant. The application to amend in this respect is therefore refused.

87. Finally, although the wages and holiday pay complaints are time barred, that does not exclude the Tribunal's discretion to allow an amendment, but it is a significant factor. These complaints are also unrelated to the direct discrimination complaint.

88. The arrangement under which the claimant was engaged is in dispute, but that is not fatal to the argument that the claimant was a worker. The Tribunal

currently has no proper basis for doubting the likelihood of the claimant being able to establish the facts essential to that issue. A deposit order is therefore also inappropriate.

89. In the event, Sensecare would not be considerably prejudiced by the amendment, having already received notice of it as part of the county court proceedings. On fine balance, the Tribunal therefore allows the claimant's application to amend his claim form to add complaints of unlawful deductions from wages and/or breach of the Working Time Regulations against Sensecare. The circumstances which swing the balance back the other way is the claimant's intention to discontinue those proceedings in the county court.

Strike out

90. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 provides that all or any part of a claim may be struck out if, among other things, it "*has no reasonable prospect of success*". The power to strike out a claim requires a Tribunal to form a view on the merits of a case and only where it is satisfied that the claim no reasonable prospect of succeeding can it exercise its power.

91. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In the case of **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391**, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination.

92. In **Ezsias v North Glamorgan NHS Trust 2007 IRLR 603**, the Court of Appeal confirmed that an exceptional case that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with undisputed contemporaneous documentation. The Tribunal should take the claimant's case as set out in the claim at its highest, unless contradicted by plainly inconsistent documents.

93. In the circumstances, following determination of the claimant's application to amend his claim, and to the extent that a complaint of victimisation under the Equality Act and/or automatically unfair dismissal for health and safety reasons appears on the face of the claim form, those complaints are struck out as having no prospects of success.

Employment Judge Licorish
Date: 11 July 2019