RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M B Uddin**

Respondents: **(1) BGC Technology International Limited**
(2) Ms D Patel
(3) Mr A Agosta

Heard at: **East London (by telephone) (audio A)**

On: **28th January 2021**

Before: **Employment Judge Reid**

Representation
Claimant: In person
Respondent: Mr C Rajopaul, Counsel

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was audio (A). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents before the Tribunal were the two bundles provided by the parties, the Claimant's witness statement, the Claimant's two amendment applications and the parties' submissions/skeleton arguments.

JUDGMENT (Reserved)

1. **The Claimant's claims (except for the claim of victimisation on 15th May 2020 which is struck out – see below) were brought outside the time limit set out in s123(1)(a) Equality Act 2010 and the Tribunal decides that it is not just and equitable to extend time under s123(1)(b) Equality Act 2010. These claims are therefore dismissed against all Respondents because the Tribunal does not have jurisdiction to hear them.**

2. **The Claimant's claim of an act of victimisation by the First Respondent claimed to have occurred on 15th May 2020 (ET1 para 53a(iii)) is struck out under Rule 37(1)(a) of the Tribunal Rules 2013 on the basis that it has no reasonable prospect of success and/or is vexatious.**

3. Case management decision: the Claimant's two applications to amend his claim are refused.

4. There are therefore no claims left against any of the Respondents to which a stay (pending determination of the Claimant's County Court claims) can apply.

REASONS

Background and issues for this hearing

1. The Claimant presented this claim on 14th August 2020, making claims of discrimination arising from disability, harassment and victimisation. This was the Claimant's second Tribunal claim; the first one (3203011/2019) was struck out for having no reasonable prospects of success by a judgment of Judge Ross dated 2nd November 2020 following a hearing on 16th October 2020. That first claim was a claim of whistleblowing detriment arising out of a disclosure the Claimant made to the Information Commissioner (ICO) in 2019.

2. This second claim was a discrimination claim relying on a claimed disability of social anxiety and was a claim for discrimination on the grounds of disability, race and religion and belief. It covered events at the time of the Claimant working at the Respondent between July 2016 and December 2016, incidents in March and October 2017 and various incidents from August 2019 onwards.

3. In October 2019 and again in February 2020 the Claimant issued County Court proceedings against each of the Respondents, claiming under the Data Protection Act 1998, the Protection from Harassment Act 1997 and the Equality Act 2010.

4. The issues for this hearing were identified in Judge Ross's case management summary dated 3rd November 2020 (para 11) as follows:

4.1 Whether the Claimant's claims were presented within the 3 month time limit in s123(1)(a) Equality Act 2010 and if not was each claim presented within such further time as was just and equitable

4.2 Whether any claim should be struck out under Rule 37(1)(a) or(b)

4.3 If not struck out whether the complaints had little prospect of success and if so whether a deposit order should be made in respect of each complaint found to have little reasonable prospects of success

4.4 Whether this second claim should be stayed pending resolution of the claims in the county court.

5. The Claimant then made applications to amend his claim on 2nd December 2020 and 25th January 2021 (both updated on 28th January 2021) which were also considered at this hearing.

6. This hearing was listed for 29th January 2021 at the October 2020 hearing, for one day. This hearing was then converted from a video (CVP) hearing to a telephone hearing at the Claimant's request (made on 19th January 2021) because he said he was unable to book a meeting room. The October 2020 hearing had been held on the telephone at the Claimant's request, as an adjustment for his social anxiety. The Tribunal confirmed to the parties on 27th January 2021 that the hearing would take place from 10 am by telephone. The Claimant responded providing written submissions and now placed limitations on the extent to which he would take part on the telephone due he said now to work commitments, saying that he may at his discretion take part for an hour between 2.30pm and 3.30pm to take the judge through his submissions and answer any questions. The Respondent's response to this was that if the Claimant did not attend to answer questions his witness statement could be given less weight and pointing out that by 2.30pm the hearing would probably have finished. The Claimant's response to this was that he was willing to engage at any time and now said this was not just at 2.30pm though he thought cross-examination and his submissions would only take 30 minutes each. On 28th January 2021 the Claimant provided some further written submissions and said he was ready to answer questions now between 10.30 am and 12.30 pm for up to one hour though he might be available for a further 30 minutes between 2.30 and 4pm to answer any further questions. The Claimant was not on the line at 10 am and sent an email at 10.11 saying he would answer questions and make submissions for up to an hour but he needed advance notification (presumably of the timing). Due to reading time the hearing was then due to start at 11.45am of which the Claimant was notified by the Tribunal. He was not on the line at 11.45 but when he was sent a further email saying that there were questions for him, the Claimant attended. The hearing lasted from 11.45am to 3.10 pm with two around 20 minute breaks and the Claimant attended throughout; although rather ambivalent about staying to listen to the Respondents' submissions I encouraged him to do so he could hear the points made, and he decided to do so. The Claimant's strictures around what he was prepared to do and what he was not prepared to do (which shifted including as to the reason) was unhelpful taking into account the hearing had been listed to accommodate his preferred hearing method (telephone) which was the adjustment he had asked for for the previous hearing. In the event he was able to attend the entirety of the hearing without limitation.

7. I asked the Claimant to confirm whether there were any other adjustments he needed for this hearing and he said that there were not. I reminded him that he could ask for a break at any time and checked in with him throughout the hearing as to whether he needed a break or could carry on. As he was unrepresented at this hearing I also checked with him at various stages if he had any questions.

8. The Claimant provided a witness statement and gave oral evidence, having affirmed. There were two bundles – the Respondents' one paginated to page 353 (bundle 1, including some documents from the Claimant in section D) and the Claimant's one paginated to page 47 (bundle 2). Both sides had provided

written submissions/ a skeleton argument (in the Claimant's case, two) (plus in the case of the Respondents, a bundle of authorities) and I heard oral submissions on both sides. I reserved my decision.

9. The Claimant had provided two audio recordings (of a few seconds each) of a partial conversation with his then Counsel Mr Singh said to be on 13th May 2020. When it was identified and explained to the Claimant that he would have to waive privilege in relation to the entire content of the advice from Mr Singh if he wanted to rely on it, he confirmed that he did not want to rely on it.

10. When limitations in his medical evidence were identified with the Claimant on behalf of the Respondents he asked that a medical expert be appointed. I explained to him that whilst expert evidence is sometimes ordered on the issue of whether a claimant is disabled or not it is not ordered when it is the claimant who says that they could not bring their claim in time due to a health condition; in that latter scenario it is for a claimant to produce medical evidence and the burden of proof is on them if their claim is late.

Findings relevant to the issues for this hearing

11. The Claimant said in his witness statement that these were the following reasons why he had not brought this claim in time, namely:

11.1 He did not have the mental capacity to properly engage in litigation (on the basis of worker status) until much later after his relationship with the First Respondent had ended

11.2 He realised he could bring a Tribunal claim for discrimination under the Equality Act 2010 after getting legal advice about his County Court claims

11.3 He had been initially unaware (due to his mental health) of his rights because he had not been aware he could bring a claim in the Tribunal because thinking he was only a contractor, he was not aware that a claim for harassment under the Protection from Harassment Act 1997 was different to a claim under s32 of the Equality Act 2010 and did not know that s120(1)(a) meant that he had to bring the claim in the Tribunal rather than the County Court

11.4 He said that the acts complained of amounted to a continuing act due to events with Mr Young in October 2017, due to the First Respondent accusing him of inappropriate behaviour and then changing its story in December 2020; he said that he had a further ICO review hearing in February 2021 regarding possible re-assessment of his ICO case.

12. The first period covered by the Claimant's claim was events between October 2016 and December 2016 when he was provided by a services company (Bitcoin) to the First Respondent as an IT contractor (from July 2016). In essence his claim was that details of a confidential discussion were leaked by the Second Respondent (in HR) to Ms Malde, a colleague in Compliance. He also said that messages he had sent to Ms Malde (at a time when he said he had

a social anxiety disorder) were shared between colleagues. Those messages included a message dated 14th December 2016 to Ms Malde (for which the Claimant subsequently apologised) saying that she was dressed like a pole dancer and saying it was lucky he knew how to restrain himself and did not regress to being a 14 year old or release 10 years of repressed anger. The Claimant claimed that this behaviour had wrongly been construed (together with claimed harassment of the Second Respondent) as sexual harassment when no formal complaint had been made.

13. The events between October 2016 and December 2016 were out of time by some three years 5 months by the time of presentation of this claim. It will be very difficult for any witnesses to recall what happened, taking into account that although there are some emails, the underlying narrative is that colleagues were aware of sensitive information about him and were talking about the Claimant behind his back or making comments to him about that information and therefore it is largely a case of who knew what when, how they knew and who said what to who and when.

14. The next claimed event was in March 2017 (after the Claimant had left the First Respondent) when the Claimant said the Third Respondent sent him a malicious message from the Third Respondent's personal LinkedIn account referring to the '10 years repressed anger' comment the Claimant had made in his email to Ms Malde (page B1 67) . This incident was over three years before he presented his claim. The Claimant was aware he could make a complaint about this (his redacted emails, page B1 329) but did not take the matter any further. He had brought a Tribunal claim against a previous employer in 2013 and so was aware of the process and how to start a claim.

15. The Claimant claimed a period of continual harassment after March 2017 and explained at this hearing that this was the First Respondent in effect blocking further work from October 2017. He did not suggest that at this time he was put off in any way working for the First Respondent again, entirely at odds with what he claims now happened when he worked there at the end of 2016 and how upset he was about those events and the message from the Third Respondent in March 2017. He accepted at this hearing that Mr Lewis had approached him initially about some work in October 2017, inconsistent with any policy not to rehire him because the approach had come from Mr Lewis (page B1 315). Although the Claimant said that application was not considered it clearly was but in the event the Claimant was not available at the particular time though in principle he was willing to work again at the First Respondent if he was free and terms could be agreed. He was unable to give examples of other jobs for which he said the First Respondent had 'blocked' the opportunity and this claimed policy was in any event inconsistent with successfully remaining employed throughout the period since he left the First Respondent and the approach from Mr Lewis. The Claimant at this hearing referred to not being on an external recruiter's list for work at the First Respondent but that was inconsistent with the approach from Mr Lewis and is a mere suspicion on the part of the Claimant that there was a policy to block his working for the First Respondent again. This is relevant to the merits of his claim about this incident and a claimed policy because that claim is very weak. Given that weakness there is nothing in the period from April 2017 until August 2019 which could 'join up' all the events

between these times so as to amount to a continuing act (the claimed policy from October 2017).

16. The next period was events between August 2019 and 25th February 2020 following the complaint to the ICO made by the Claimant on 10th July 2019 (referred to at page B1 26) and his commencement of the first set of County Court proceedings in October 2019. The last identified date the Claimant gives in his claim form is 25th February 2020 (page B1 51, 52). These are in essence complaints about how the Respondents handled and responded to the Claimant's complaint to the ICO and how the Respondents responded to his County Court claims. The nature of the Claimant's claims therefore shifted significantly from being about what happened when he worked at the First Respondent and its immediate aftermath (in 2016 and 2017) to claims about how the Respondents have responded to the actions he has taken in 2019 and 2020. That change in the nature of the complaint is relevant to the issue of whether these later actions are closely connected to the employment (worker) relationship because that change means that there is less of a clear link between the events of 2016 and 2017 (problems at work and in the aftermath of that engagement arising out of the alleged leaking and misuse of confidential information about him) and the events from 2019 onwards (problems with the Respondents' reaction to his complaint to the ICO and subject access request and his County Court claims). (This point is not relevant to the victimisation claims).

17. The Claimant confirmed at this hearing that he had drafted the October 2019 County Court claims himself. He referred to both s26 Equality Act (harassment) (page B1 100) and to s2 and s3 Protection from Harassment Act 1997 making separate claims under both headings. It was therefore clear that he knew there was a difference between the two types of claims, contrary to his assertion that he had not understood there was a difference until he obtained legal advice in May 2020.

18. He presented his first (whistleblowing) Tribunal claim on 10th December 2019 saying he was a worker (page B1 9). Taking into account the above findings he already had in mind a discrimination (harassment) claim under s26 Equality Act 2020 (because he had included one in his County Court claim as a separate heading to his other claims) and yet did not also include a discrimination claim in his first Tribunal claim, a clear opportunity to do so given it stemmed from the same factual background of what he said had been disclosed about his behaviour in 2016. If he was in any doubt as to the correct place to bring a discrimination claim as a worker the Respondents made it crystal clear in February 2020 (by way of the County Court defence page B1 138 para 120) specifically identifying the relevant section numbers so he could have looked it up, as he had other parts of the Equality Act 2010. He still did not bring the second claim until 14th August 2020, despite knowing how to bring one as he had already brought his first claim in December 2019 and knowing what the Respondents had said in February 2020. It was therefore not the case that he was unaware until May 2020 as claimed in his witness statement (when he said he got advice from Mr Singh) that he should bring the discrimination worker claim in the Tribunal claim and that he could argue he was a worker. It was also not the case as alternatively argued in his additional submissions (para 5c) that he did not know until 1st July 2020 (a different date, apparently aritificial, now much closer to the date he presented his claim) that he could bring such a claim taking

into account he applied for his ACAS certificate (in order to bring the second claim) on 4th June 2020. The Claimant attributed a lack of knowledge to his mental health condition (as to which see findings below) but it is not accepted that his mental state was in fact impaired given he was able to start and draft County Court proceedings in October 2019 (and again in February 2020), bring his first Tribunal claim in December 2019 and deal with his ICO complaint and subject access request, all complex matters.

19. The final group of acts complained of were claimed to have arisen between various dates 'to present' (page B1 51-53 paras 41d, 41e, 46b(v),48(iv), 49a and 53a (iii)). Looking at these claims in turn:

19.1 Para 41d is a very vague and unspecified complaint that the Respondent has misused information (not specified how and to who and when) about what happened in 2016 as false examples of misconduct by the Claimant but all the Respondents have done is responded to his County Court claims and to the referral to the ICO brought by the Claimant and at the very least even considering only the email dated 14th December 2016, telling a female colleague she looks like a pole dancer and making comments about controlling himself is potentially a reasonable basis for considering there may have been misconduct by the Claimant, even though he advances a mental health explanation for that email – it is not therefore a 'false' example because the Claimant accepts he sent the email (even if he says there is an explanation for it linked to a disability of social anxiety); just because there was no complaint does not mean the First Respondent should ignore it

19.2 Para 41e is an allegation of a failure to co-operate with his December 2019 subject access request but the ICO has found (page B1 307) that the first Respondent has complied with its obligations and that there was no evidence of deliberate withholding of information as claimed (page 308)

19.3 Para 46b(iv) is an allegation against the Second Respondent of harassment being her maintaining a 'false position' about what happened in 2016; this is in essence a claim that the Second Respondent disagreeing with the Claimant (when he has sued her) amounts to harassment and in any event any response by her to his County Court claims would be covered by judicial proceedings immunity

19.4 Para 48(iv) is a further vague and unspecified allegation against the Third Respondent about maintaining an 'evasive position' (not specified as to when) about the identities of people (unspecified as to how or what) and 'further information' (not identified at all) about what happened in March 2017;

19.5 Para 49a claims a failure by the First Respondent to investigate the complaints made about the Second and Third Respondents but the First Respondent did investigate what happened during 2016 as is

evident from its defence to the County Court claims (page B1 page 131-135)

19.6 Para 53a(iii) claims that the First Respondent has withheld information (unspecified), most recently on 15th May 2020 (without explanation as to why this is the date) ; what this amounted to ie what happened on 15th May 2020 was not explained; there was however a reference to an email dated 13th May 2020 from the First Respondent at para 24 of the Claimant's first skeleton argument which the Claimant says shows that the First Respondent was refusing to provide copies of relevant messages on its system; whether it is the 13th or 15th May 2020 this claim is struck out as set out below under Rule 37 even though it is within the 3 month time limit.

20. Taking the above findings into account I find that the events said to have arisen to 'present' are claims about how the Respondents have responded to the County Court claims, are claims about their response to the ICO complaint and subject access request, not borne out by the ICO's findings or by any County Court orders or decisions. I therefore find that these allegations couched as 'to present' are an attempt by the Claimant to deal with the time limit point he knew existed and to create the impression of matters arising in the 3 months before he presented his claim and to further his argument of a continuing act. He included 'to present' unspecified events as a way to present a sort of evergreen claim which could never be out of time. This was an approach he was to use again in his amendment application – see below.

21. To the extent that the claimed act on 15th May 2020 (para 53a(iii) (or 13th May 2020) is within time it is struck out as set out below. There are therefore no remaining acts complained of in the 3 months prior to the presentation of his claim which could form part of an in time discrimination claim, the last identified date being 25th February 2020 and there being no ACAS extension to that date because the notification was not made to ACAS until 4th June 2020.

<u>The Claimant's medical evidence</u>

22. The Claimant provided very limited medical evidence (page B1 337-342) to support his assertions that he had had a psychiatric injury because of bullying by the Second and Third Respondents (ws para 2), that his mental health condition affected his ability to engage in litigation (ws para 3) and that he had been initially unaware of his rights as an adult with mental health problems (ws para 5). The medical evidence the Claimant produced was limited and partial because he only disclosed one page of a report (page 340) and did not provide complete copies of the letters at pages 341 and 342. This was despite the advice given by Judge Ross (page B1 92 para 17).

23. I asked the Claimant about page 340 because it was an extract of a report and it had no date on it. He said that it was an OH report from around 2013 when at a previous employer. I find that by producing part only of this document the Claimant was trying by this document to show a mental health condition affecting his ability to conduct litigation or to understand what steps he needed to take in 2019-2020 but it was dated 2013, some years before the events covered by this claim and some years before the relevant period he was claiming he was

affected in his abilities. I find he was being deliberately misleading as to the date of it because he did not want to show it was dated from 2013 but wanted it to look much more recent. He accepted that in another disclosure to the First Respondent of that document it had been a partial document then as well he had made. I do not accept his explanation that he only produced a page because he wanted to keep the bundle within the limits discussed at the hearing on 16th October 2020 in the light of his otherwise often substantial document output and putting together his own separate bundle for this hearing. Given he was also claiming psychiatric injury by the Second and Third Respondents from 2016, producing that partial document in support of that assertion was also particularly deliberately misleading. I therefore have limited confidence that were the Claimant have to produce evidence of disability as part of a general disclosure exercise that he would produce all relevant documents in complete form and unredacted (see further below as regards documents more generally). I have taken into account that he was not represented at this hearing but he has had the benefit of legal advice previously and was aware of the need to produce complete documents.

24. Taken at its highest, the 2020 medical evidence showed that the Claimant was receiving therapy for depression finishing in June 2020 after 8 sessions (page 341). He then attended some group CBT sessions which were due to be followed up with 1:1 sessions (page 341) which he chased in September 2020 (page 337). The evidence did not support the psychiatric damage claimed (or in fact identify any cause for his problems), but that the Claimant had depression and needed some therapy and CBT during 2020. Given the absence of any medical evidence for the period 2017 to early 2020 I find that the Claimant had not been diagnosed with an ongoing mental health condition at a time when he claimed it was affecting his ability to bring his claims within the time limit (bearing in mind the relevant period starts from the end of 2016 when he says the claim arose). I therefore find that the Claimant was not hindered from bringing his claim due to a mental health condition consistent with being able to bring and then conduct both sets of County Court Claims (including the second set in February 2020 when his treatment was just starting or shortly to start) and his first Tribunal claim, deal with the ICO complaint and subject access request and being able to continue to work throughout.

<u>The Claimant's approach to documents</u>

25. An issue with the Claimant's redacting documents was identified at the October 2020 hearing (page B1 93). Notwithstanding this the Claimant provided various redacted documents for this hearing (page B2 28 B1 314, 327-300). In particular he was producing the March 2017 emails in support of his claim about what happened with Mr Young and yet was not showing who the emails were from. He also wanted to include an extract only of the ICO letter dated 30th July 2019 (page B1 336, the complete letter is at page 298). He also relied on emails in his bundle which were incomplete (page B2 14,15.16, 18) which included other people's emails (ie when he was neither the sender or the recipient) he had chopped bits off. This was the Claimant again trying to control the narrative by only showing the bits he wanted considered rather than the whole picture. The issue of redacting documents was also identified by the ICO (page B1 173 para 17, extract letter 22nd November 2019) to the degree that the ICO noted that they were not just redacted but heavily redacted and only extracts.

26. The Claimant's approach to his email address(es) was also concerning (first amendment application para 2 (iii)-(v)). He was being disingenuous about the other email addresses by not referring to them and is unlikely to be reliable about disclosing relevant emails in his possession and likely to fall back on the 'not recalling' method rather than doing a proper search for relevant emails on all relevant email addresses which can be relied on to be complete.

27. I therefore have concerns that when it comes to disclosure of documents the Claimant will not comply with his obligations. He said at this hearing that the Respondents were doing the same thing referring to the County Court defences, but quoting an extract of a document in a defence making it clear that it is an extract is not the same as changing the underlying evidence ie changing in some way the actual document from which the quote comes and presenting only that partial document as evidence.

Relevant law – Equality Act 2010

Acts after the relationship has ended

28. s108 Equality Act 2010 provides that an act of discrimination or harassment can take place after the employment/worker relationship has ended subject to two conditions (a) the discrimination/harassment must arise out of and be closely connected to a relationship which used to exist between them and (b) the conduct would if it happened during that relationship contravene the Equality Act 2010. In *Nicolls v Corin Tech (UKEAT/0290/07)* it was identified that the purpose of the provision is in part at least to ensure that ex-employees are not inhibited in exercising their rights to seek judicial protection of their rights as employees. Post employment victimisation protection does not fall within this but under the victimisation provisions in s27 Equality Act 2010.

Harassment

29. s26 Equality Act 2020 defines harassment as conduct related to the protected characteristic. The conduct must have the purpose or effect of violating dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, in the latter situation the perception of the individual, the other circumstances and whether it is reasonable for the conduct to have that effect must be taken into account.

Vicarious liability

30. s109 Equality Act 2010 provides that anything done by a person in the course of his employment must be treated as also done by the employer.

Time limits

31. The primary time limit for complaints of discrimination is three months from the date of the act complained of (s123(1)(a) Equality Act 2010). Where there is conduct extending over a period (a continuing act), the time limit runs from the end of that period. The Tribunal must not conflate a series of isolated, separate acts with a continuing act even if those separate acts have common features. A continuing act is an ongoing situation or state of affairs.

32. Where an actual decision is made by the employer not to do something and that failure is the act complained of, that it the relevant date for the start of the time limit. Where there is no such actual decision not to do something, in the absence of evidence to the contrary, the employer is taken to have made the decision not to do something when it does something inconsistent with doing the act it has failed to do (s123(4)(a)). If the employer does nothing at all, it is deemed to have decided to not do a particular act at the end of that period within which it might reasonably have been expected to do it (s123(4)(b)).

33. Time does not start to run from when the worker/employee becomes aware of the act (or failure to act).

34. If a claim is presented out of time the Tribunal can extend time for bringing it if it finds that in all the circumstances it is just and equitable to do so (s123(1)(b)). *Robertson v Bexley Community Centre* [2003] IRLR 434 emphasised that time limits are usually exercised strictly in employment cases and that there is no presumption for exercising the Tribunal's discretion in a claimant's favour unless there are grounds; an extension would be the exception rather than the rule. *Chief Constable of Lincolnshire Police v Caston* [2010] IRLR 327 decided that the important thing for the Tribunal is to weigh up all the circumstances and reach a just conclusion whilst bearing in mind that it is for a claimant to establish the Tribunal's jurisdiction.

Relevant law

Strike out

35. Rule 37() of the Tribunal Rules 2013 provides that a Tribunal may strike out all or part of a claim or response on the grounds (a) that is scandalous or vexatious or has no reasonable prospect of success or (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or respondent (as the case may be) has been scandalous, unreasonable or vexatious (the other grounds in Rule 37(1) were not relied on by the Respondents). In decided in *Morgan v DHL Services Limited UKEAT/0246/19* (para 37) the task of the Tribunal is to consider with care the pleaded case and whether on a fair assessment it or any part of it passed the threshold of presenting a reasonably arguable case, taking it at its highest.

Just and Equitable assessment

36. Taking into account the above findings and the overriding objective in Rule 2 I conclude that it is not just and equitable to extend time based on the following factors (taking into account the burden is on the Claimant to show that it is just and equitable):

36.1 Many of the complaints date back to 2016 and 2017 and the Respondents and relevant witnesses will be significantly prejudiced in having to try to recall events from so long ago also taking into account that it is the events of 2016 and 2017 which underpin the Claimant's claim about later events (his argument that he was later wrongly portrayed by the First Respondent as someone who harassed female colleagues)

36.2 there is a considerable gap between the period of engagement in 2016 (and the acts complained of in 2017) and the next period of acts complained of starting in August 2019 which acts are in essence complaints about the Respondents' response to the ICO complaint and the Respondents' response to his County Court litigation meaning that the link to the actual engagement becomes weaker; the close connection to the engagement is therefore diluted by 2019 as there is a clear shift of emphasis from complaints about happened at work and the immediate aftermath of that and complaints about the Respondents' response to his litigation/ICO complaint or data subject access requests

36.3 On the point of relevant evidence of claimed disability in the relevant period the Claimant is not likely to be reliable when disclosing medical evidence to show disability, given his approach so far, or reliable as to the production of a complete set of unredacted documents and emails, which is relevant as the Respondents will be hampered in its defence by an absence of reliable documents from the Claimant, of particular importance given the time which has elapsed since many of the acts complained of (and meaning the Respondent would not be on an equal footing on this particular issue)

36.4 The Claimant had the ability to conduct litigation without help from at least October 2019 (the start of his first set of County Court claims) and knew the distinction between a claim under the Protection from Harassment Act 1997 and a claim of harassment under the Equality Act 2020

36.5 The Claimant presented his first Tribunal claim in December 2019 on the basis he was a worker and could have included in that first claim most of the events he complains of in his second claim, most of them already having arisen; he knew at least by this stage that he could bring a worker status claim in the Tribunal because he brought one and he was reminded of this by the Respondents in February 2020 but still delayed by around a further 6 months

36.6 The Claimant has sought to extend the life of this claim by including various 'until present' claims but these are not specified as to the final date (bar the 15th (or 13th) May 2020 one) and so the Claimant has not shown that they were brought in time because he has not included in his claim form details as to when he says they happened showing that they are in fact in time

36.7 Assessing it in the light of what has happened since the presentation of this claim, the Claimant's approach to his second claim has been to keep his options open at all times as to what he says he wants to claim about – with this claim form he provided a detailed document yet reserved the right to add in further particulars (page B1 39) and included the various 'until present' allegations in an apparent attempt to ensure that his claim could not be viewed as out of time, consistent with two subsequent amendment

applications (see below) to try and reinvigorate the claim in case the rest was out of time

36.8 I have considered the merits of the claims as part of the just and equitable test to the extent possible at this stage but the underlying narrative of the events from July 2019 onwards (ie the ones not quite so badly afflicted by the passage of time) are the Claimant resenting the Respondents' responses to his County Court claims (when they amount to the Respondents legitimately defending themselves) and being dissatisfied with their response to the ICO referral and the ICO decision (which is subject to a further ICO review hearing in February 2021) – these are matters to be taken up either under the County Court procedures (if he considers the Respondents have not acted within its rules) or with the ICO and the underlying complaint the Claimant has is in substance a claimed data protection breach which breach the Tribunal does not have jurisdiction to hear claims about.

Just and equitable extension conclusion

37. Taking the above factors into account I conclude that it is not just and equitable to extend time for the claims arising on and before 25th February 2020.

Strike out (victimisation claim – 15th (or 13th) May 2020) conclusion

38. The remaining claimed act (victimisation) which is not out of time is referred to at para 53a(iii) of the Claimant's claim form (page B1 53), being referred to as the most recent one on 15th May 2020. He had not brought this claim by May 2020 and the ICO complaints are not a protected act. The only act capable of being a protected act at this point was the pre-existing reference to an Equality Act claim in the county court proceedings (para 52 c). The claim (looking at the pleaded case) is however vague, of 'withholding information' (unspecified) under (a) a subject access request made in December 2019 (which the ICO have decided the First Respondent didn't – see above – and is in any event out of time if a decision was in fact made to withhold information at that time) and (b) as part of the County Court proceedings. The Claimant gives the most recent date as 15th May 2020 but does not identify which process that date refers to or what is said to have happened on 15th May 2020. If he meant 13th May 2020 and was referring to the email he quotes at para 24 of his skeleton argument that email is the First Respondent disagreeing with the Claimant as to its obligations, and since then the ICO has confirmed that the First Respondent has complied with its obligations (see above). I do not accept that the First Respondent telling the Claimant that it disagreed with him as to remit of its obligations under the Data Protection Act has any realistic prospect of amounting to victimisation.

39. I therefore strike out this claim because it is so vague that it is not capable of being responded to and has no reasonable prospects of success and/or is vexatious because it is an attempt to insert something (which in fact has no substance) within the 3 months prior to the presentation of the claim in a similar way to keeping the claim alive by way of the two amendment applications (see below). Taken at its highest it does not show a reasonably arguable case.

The Claimant's amendment applications

40. The Claimant made two amendment applications each containing five new claimed detriments amounting to either victimisation or harassment. They sought to both add in claims which predated the presentation date of this claim (though said to only recently have been discovered) and to add in new claims said to arise post presentation of this claim. The Claimant made these applications on 2nd December 2020 and 25th January 2021 but was still adding to them/updating them both on 28th January 2021, the day before this hearing without even at that stage giving further dates said to bring matters to 'present'. In his second application he was again using the 'to present' technique without giving further dates or details even though writing in the present, the day before this hearing. The Claimant by way of his skeleton argument also sought to argue a new claim of indirect discrimination not previously raised at all and not in his two amendment applications (skeleton argument para 17).

41. There was no explanation as to why he did not include the amendments contained in the second application in his first application given the claimed detriments (apart from one on 15th January 2021) were all said to have arisen and be known about before 2nd December 2020.

42. The Claimant had made an unsuccessful amendment application in his first claim (page B1 26-31) so was aware of the process and the way in which such an application is decided from the detailed decision by Judge Russell.

The first amendment application dated 2nd December 2020 (amended on 28th January 2021)

43. Looking at each of the acts said to amount to detriments (either harassment or victimisation) in turn:

43.1 Para 2 (victimisation): this is misconceived because (a) the claimed detriment (3rd October 2019) is before the first claimed protected act (this claim presented on 14th August 2020) and (b) the alternative claimed protected act, the 2019 ICO referral, is not a protected act under the Equality Act 2010; in any event the way in which emails were to be handled (page B2 39) meant that any reference request would have been forwarded to Mr Snelling and not therefore 'blocked'; the Claimant is being deliberately ambiguous/selective when he only refers to one of the four email addresses and says he 'does not recall' sending an email on 3rd October 2019 (when he is clearly a keeper of emails and so could say he had done a search against all four addresses and found nothing for that date, had he in fact done so)

43.2 Para 3 (victimisation): the Claimant does not explain why he says that the without prejudice email has lost its without prejudice status – he merely asserts it has; if the Claimant was asking for information as part of settlement discussions that was not in any event a request/application under the Data Protection Act

43.4 Para 4 (victimisation): the Claimant is mixing up obligations as to disclosure under the Tribunal Rules and obligations under the Data Protection Act which are separate processes with a different remit and different rules; the Respondents did comply with Tribunal disclosure obligations but the Claimant did not and his explanation that this failure is explained by him either (a) not intending to rely on any documents at all himself (unlikely given his approach to this claim) or (b) only relying on what the Respondents' disclosed (unlikely given his response to the Respondents' actions in this claim and in his wider litigation) is fanciful

43.5 Para 5 (harassment): this relates to what was claimed to have been said by the Respondents' Counsel to Judge Ross at the hearing on 16th October 2020 and is covered by judicial proceedings immunity

43.6 Para 6 (harassment): this relates to the email at page B1 333 and the Claimant is saying that this email was an act of harassment because he says it was an attempt to suppress his Article 10 rights but all the email to the ICO does is refer to the Respondents' understanding about publication and ask the ICO for its views in a neutral way; this is an example of the Claimant saying any steps, however legitimate taken in opposition to his actions must amount to victimisation or harassment.

<u>The second amendment application dated 25th January 2021 (amended on 28th January 2021)</u>

44 Looking at each of the acts said to amount to detriments (either harassment or victimisation) in turn:

44.1 Para 1 (victimisation): any ICO referrals are not protected acts (see above); the act complained of is the email at page B2 13 but that is was a legitimate response to what the Claimant was intending to do; the Claimant cannot think the threats were misguided or pointless as he subsequently withdrew these threats; this is a further example of the Claimant saying that any legitimate steps taken in opposition to his actions must amount to victimisation or harassment

44.2 Para 2 (victimisation):): any ICO referrals are not protected acts (see above)

44.3 Para 3 (victimisation): any ICO referrals are not protected acts (see above) and the claimed detriment date of July 2019 is before the date of presentation of this claim (see above) ; this claim is therefore misconceived; this is a reference to without prejudice discussions but in any event no settlement has ever been reached with the Claimant and hence no attempted claimed enforcement of any term as alleged

44.4 Para 4 (victimisation): any ICO referrals are not protected acts (see above); the Claimant is now again using the 'to present ' approach without giving dates or details of anything after May 2020 although writing in the present in January 2021; this claim is a claim for breach of the Data Protection Act and as found above, the ICO wrote to the First Respondent in November 2020 confirming that the subject access request had been complied with and the Claimant has a further ICO hearing in February 2021 at which to pursue any matters within the ICO's remit; the claimed inappropriate sharing relates to matters in 2016 or 2017 and so is considerably out of time

44.5 Para 5 (victimisation and harassment): any ICO referrals are not protected acts (see above); the Claimant complains about the actions of Ms Malde in January 2021 but the First Respondent cannot be vicariously liable for her actions given she left their employment in January 2017; the Claimant is again using the 'to present ' approach without giving dates or details of anything after 15th January 2021 although writing in the present on 28th January 2021; this claim is totally misconceived principally because the First Respondent cannot be liable for actions by Ms Malde after she left their employment.

45 Taking the above analysis of the proposed amendments into account the new claims have no or very little prospect of success and/or are misconceived.

The law relating to amendment of claims

46 The power to amend is a general case management power (Rule 29 of the 2013 Rules of Procedure). I need to consider whether to grant or refuse the application to amend is in accordance with the overriding objective (Rule 2).

47 An amendment application can be made to add in matters arising after the presentation of the claim, without the need to start a new claim *(Prakash v Wolverhampton CC [2006] I All ER (D) 71 Nov).*

48 The power to amend is a judicial discretion to be exercised "in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions": see *Selkent Bus Co v Moore [1996] IRLR 661*. I have reminded myself of the in *Selkent* factors and the Presidential Guidance at relevant paragraphs including 4-5.

49 Whenever the discretion to grant an amendment is invoked, a tribunal should take into account all the circumstances, including the nature of the amendment, the applicability of time limits and the timing and manner of the application. S33(5) Limitation Act 1980 also requires consideration of (a) the length of and reasons for the delay (b) the effect of the delay on the cogency of the evidence (c) the conduct of the parties including the provision of information and whether they acted promptly once aware of relevant information and (d) steps taken to obtain advice.

50 It is then necessary to balance the hardship and injustice of allowing the amendment against the injustice and hardship of refusing it. (*Cocking v Sandhurst [1974] ICR 650*).

51 The Tribunal should not decide the apparent merits of the proposed amendment but merits may be a factor in the consideration of the balance of hardship and injustice test because a claimant does not lose anything if unable to pursue a claim which cannot succeed. *(Herry v Dudley MBC [2018] UKEAT/0170 paras 80-81*).The amendment application would however have to raise the matters relevant and necessary to bring them within the relevant type of discrimination claim (para 83).

Decision and reasons - amendment applications

52 Weighing up the Selkent factors:

53 The two applications to amend are not minor; they add in new claimed acts of discrimination and are in effect a running and ongoing commentary on the way the Claimant views any legitimate action by the Respondents in disagreeing with him or taking legitimate steps in legal action; given the decision on the time limit issue (and the strike out of the one claim which in principle was in time) the two applications are an attempt to reinvigorate a claim (knowing the pre-existing time limit issue) which has otherwise been disposed of – that is a substantial matter. The amendments are not however an entirely new type of claim because they add to the type of claims already brought under the Equality Act 2010.

54 The Claimant says in his first application (para (7)) that the new events complained of in that application were within the three month time limit but that does not get him home if the complaints lack any substance or are misconceived and time limits are not the sole determining factor.

55 The timing and manner of the applications is significant. The Claimant could have included nearly all of his amendments in the first application because the events had already happened and so there was a delay in adding those extra amendments by way of the second application (bar the one said to arise after the first application was made). The use of the 'to present' technique is again an attempt to give the Claimant the opportunity to add in anything he feels like at a later stage and when he considers he is in a position to say what has happened (if anything has) and only give dates/details then; the fact he does not do so indicates that there isn't anything further (given his usual approach to date events by letters or emails) but he is using the 'to present' technique to mask that and try to create an ongoing act or something he can add to as he goes along. I find these two applications were made at this stage because the Claimant was aware that he was in a weak position on the pre-existing time limit issue and wished to create something new to rely on, which on analysis lacks substance. The above analysis of each amendment demonstrates that the Claimant does not lose out on being able to pursue a claim about these additional matters because they are either highly unlikely to succeed or in some cases are entirely misconceived.

56 Therefore balancing the hardship and injustice of allowing the amendment against the injustice and hardship of refusing it in the light of the above factors I conclude that the Claimant's two applications to amend should be refused, taking

into account the overriding objective in Rule 2. The hardship and justice to the Respondents of allowing the applications would significantly outweigh the injustice and hardship to the Claimant.

Employment Judge Reid

10th February 2021