Case Numbers: 2303263/2018, 2304319/2018, 3306927/2018, 3331198/2018, 2300054/2019, 2205013/2019, 2301188/2019, and 3335166/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr D Akhigbe

Respondents: (1) St Edward Homes Limited ('SEH')
(2) All Knight Safety Limited (in voluntary liquidation)
(3) Ms Julia Oldbury-Davies
(4) Mr Alan Edgar
(5) Mr Allan Michaels
(6) Professional Construction Recruitment Limited ('PCR')
(7) Ms Stephanie Osbourne
(8) Niblock Electrical Services Limited ('NES')
(9) Mr Peter Burcow
(10) Mr Thomas Laing

Heard at: Amersham Law Courts
Watford Employment Tribunal
Watford Employment Tribunal

On: 14 and 15 July 2020 (in person)
27 August 2020 (hybrid)
1 December 2020 (in person), 2 December 2020, 4 and 5 February 2021 (in chambers)

Before: Employment Judge George

Appearances:
For the Claimant: in person

For the Respondent: Mr J Williams, counsel (SEH, Mr Edgar, Mr Michaels)
All Knight Safety Limited – not represented
Ms Oldbury-Davies – in person
Mr A Baines, consultant (PCR, Ms Osbourne, Mr Laing)
Mr Burcow (NES, and in person)

RESERVED JUDGMENT

1. The claimant's application for a restricted reported order under r.50 of the Employment Tribunal (Rules of Procedure) 2013 is dismissed.

2. In relation to Case Nos: 3306927/2018 and 2303263/2018 (insofar as it concerns the first, fourth and fifth respondents – SEH, Mr Edgar and Mr Michaels):

a. The Employment Tribunal has no jurisdiction to hear a claim of breach of contract because it was not presented within three months of the effective date of termination;

b. All other claims against the first, fourth and fifth respondents are struck out on the basis that they are *res judicata*, an abuse of process and/or have no reasonable prospects of success.

3. In relation to Case No: 2303263/2018 (insofar as it concerns the third and fourth respondents – ASKL and Ms Oldbury-Davies):

    a. All claims against the third and fourth are struck out on the basis that they have no reasonable prospects of success.

4. In relation to Case Nos: 3331198-2018, 3335166-2018, 2304319/2018 and 2301188/2019: the sixth, seventh and tenth respondents (PCR, Ms Osbourne and Mr Laing)

    a. The respondents' application for orders striking out the claims are dismissed.

    b. A separate order is made in relation to the application for deposit orders.

    c. No order is made on the application for a preparation time order which may be considered further at a final hearing or otherwise renewed on further application.

5. In relation to Case Nos: 2300054/2019 and 2205013/2019 (the eighth and ninth respondents):

    a. All claims against the eighth and ninth respondents are dismissed.

6. Since it appears to the Tribunal that the claims against the first to fifth respondents and/or the eighth and ninth respondents had no reasonable prospects of success and that the claimant has conducted the proceedings against the first to fifth repondents unreasonably, it shall consider whether to make a costs order or preparation time orders.

REASONS

1. In these reasons I refer to the first, fourth and fifth respondents as the Berkeley respondents. The first respondent (hereafter SEH) is a company within the Berkeley Group, Mr Edgar was at the time of the claimant's dismissal in 2015 a non-statutory director of SEH and Mr Michaels was a non-statutory Finance Director of SEH. I will refer to the second respondent as ASKL. Ms Oldbury-Davies was, at the relevant time, a director of AKSL which went into voluntary liquidation in October 2019. I refer to the sixth, seventh and tenth respondents as the PCR respondents.

Ms Osbourne is a director of PCR and Mr Laing was, at the relevant time, an employee of PCR. I refer to the eighth and ninth respondents as the NES respondents. Mr Burcow is a director of the eighth respondent, NES.

2. On 24 January 2020, EJ Lewis directed that there be an open preliminary hearing in these cases to decide the following issues:

   a. Whether to combine, if not already done so, any further claims in addition to the seven then before him;

   b. Whether any claim or part of claim should be struck out;

   c. Whether any deposit order or orders should be made;

   d. Whether any order for costs or preparation time should be made;

   e. Whether the continuing claims, if any, should be separated for hearing;

   f. To set a case management timetable to bring the continuing claims to hearing, including listing;

   g. To decide on any other matters of case management.

3. These issues were first listed to be considered by me at an open preliminary hearing scheduled for 14 to 16 July 2020. The claimant made an application for a postponement of the hearing which I refused for reasons given orally at the time and in writing sent to the parties on [DATE]. This hearing was adjourned part heard, on 15 July 2020, in circumstances which I set out in my record of the preliminary hearing sent to the parties on 16 July 2020 which I do not repeat but to which I refer. The hearing resumed on 27 August 2020 but that hearing had to be aborted in circumstances set out in my record sent to the parties on 30 September 2020, to which I likewise refer. On that occasion, Case No: 2205013/2019 Akhigbe v NES was combined with the seven originally before EJ Lewis, with the consent of all affected parties.

4. In accordance with the direction of EJ Lewis, the claimant on 28 February 2020 had written to the tribunal to inform them of the totality of the claims which he believed to be outstanding against these respondents. The list also included Case No: 2301412/2017 against PCR in London South ET. However, Mr Baines, informed me that he had made enquiries and London South ET informed him that they were not aware of such an outstanding claim being live before them. No application having been made for that to be transferred to this region, I am not concerned with the issues, if any, in that case.

5. On 27 August 2020, for reasons set out in my record of hearing, I added to the issues for consideration the question of whether the claims should be struck out pursuant to rule 37(1)(e) of the Employment Tribunals Rules of Procedure 2013 (hereafter the Rules of Procedure 2013), on the grounds that it is no longer possible to have a fair hearing of the claims, essentially because of the apparent difficulty of the claimant in attending and participating at an in-person hearing to its conclusion; a difficulty which was – and remains – unexplained by expert medical evidence. I

made case management orders for the respondents to provide any further applications, written submissions and evidence by 25 September 2020 and for the claimant to provide any written response and evidence by 6 November 2020.

6. At the hearing and resumed hearing, I had available to me the following documents:

   a. A bundle prepared by Messrs Goodman Derrick, representatives of the Berkeley respondents which (including the additional documents inserted at and since the hearing in July 2020) extends to 907 pages; page numbers in that bundle are referred to in this judgment as SEH pages 1 to 907.

   b. A separate section after that bundle (Tab B) which contained 28 pages produced by Ms Oldbury-Davies; page numbers in that bundle are referred to in this judgment as Tab B pages 1 to 28.

   c. A bundle prepared by Mr Baines, on behalf of the PCR respondents which is in 8 sections and contains the documents listed in the index; I refer to those documents in these reasons as PCR Item 1.1 or as the case may be.

   d. A bundle prepared by Mr Burcow, on behalf of himself and NES which is in 14 sections; I refer to those documents as the NES bundle.

   e. A skeleton argument written by the claimant (hereafter referred to as the CSA) and a bundle of further documents sent to the tribunal by Mr Akhigbe on 30 November 2020.

   f. Additional pages were added into SEH bundle during the course of the hearing on 1 December 2020 as set out below.

7. The Berkeley respondents bundle included a skeleton argument written on their behalf by Mr Williams in compliance with the order of EJ Lewis of 24 January 2020 (hereafter referred to as R1SA), a supplemental skeleton argument by Mr Williams written in compliance with my order made on 27 August 2020 and a copy of the claimant's skeleton argument which was likewise written in compliance with my order. Mr Williams had also provided a bundle of authorities and a supplementary bundle of authorities.

Correspondence between 27 August 2020 and 1 December 2020.

8. A summary of the arguments of the Berkeley respondents from Mr Williams's supplementary skeleton argument is that there is no "medical or other evidence about the reasons for his inability to complete a hearing" nor a request for "any realistic adjustments to enable this to happen." They argued that there was clear evidence that the claimant's difficulties were triggered by the litigation process; there was nothing to assist the Tribunal in establishing the claimant's ability to take part in any future hearings, and that the claimant remained able to conduct litigation by correspondence. They hoped that the claimant would be able to attend and participate fully in the resumed open preliminary hearing on 1 December 2020.

9. Mr Burcow, on behalf of the NES respondents, sent to the Tribunal and the other parties an updated skeleton argument on 25 September 2020 by which he expressed their intention to rely upon their original skeleton and adopt the arguments of Mr Williams. Ms Oldbury-Davies did likewise.

10. On 6 November 2020, in compliance with the case management order, the claimant sent to the Tribunal and to the other parties a 7-page skeleton argument which contained a statement of truth and had been signed by the claimant on 6 November 2020.

11. The claimant appended to that skeleton argument a letter notifying him of an appointment for an echocardiogram test to take place on 9 October 2020 and another which showed that he was to be fitted with an ambulatory heart monitor on the same day which would provide results of a 24-hour period. The report of that monitoring (appendix 4 to the skeleton) stated that referral had been to investigate whether there was a cardiac cause for episodes of syncope. The results indicated "normal biventricular size and systolic function. No significant valvular abnormalities." On 30 November 2020, the claimant sent to the parties and to the Tribunal print outs of the trace recorded on the monitor. He confirmed to me that the effect of this investigation as he understood it was that there was nothing wrong with his heart.

12. In his letter of 30 November, he stated that "My GP haven't yet invited me to discuss the result but the Physiologist told me that there was nothing wrong with me physically". He continued "I need more time to get the right treatment and I shouldn't be punished for the slowness of the NHS".

13. As well as that update to the effect that a heart condition had been ruled out as a possible cause of his fainting, the claimant appended to his skeleton argument a record of his attendance at Accident & Emergency in Romford on 19 October 2020. In his skeleton argument, the claimant states that this was when he collapsed at court in a hearing which concerns disclosure issues. The diagnosis has been recorded as "Anxiety disorder – panic attack h/o stress disorder, known Depression, multiple collapse while in court trials". The recommendation to the GP was to refer him for CBT and as well need SSRI for panic attacks secondary to PTSD. The claimant provided information about his treatment in the skeleton argument: he started sessions with the psychologist and "I'm coping very well with the depression" including when he, sadly, suffered a bereavement. He referred to the A&E doctor as making and "informal" diagnosis of PTSD. He had discussed this with his GP (see para.23 of the skeleton argument) who apparently confirmed that that was their suspicion but that they had wanted to rule out physiological causes before investigating psychological ones.

14. He refuted the suggestion that his difficulties were caused by court hearings but argues that, he believes, they are caused by the respondents concealing evidence "which triggers the flashbacks and PTSD". He states that he has never been formally diagnosed and it cannot be said that he could never participate in court hearings but "I can only produce correspondence where there are no issues of disclosure, I struggle where there are issues of disclosure".

15. In a section headed "Reasonable Adjustment" he argued that requiring him to produce medical evidence was unfair when it was due to NHS delays. He asked for voluntary disclosure as he requested on 20 March 2020 (his para.61). he argued that the timetable (set out in paragraph 14 of the order sent to the parties on 16 July 2020) which only allocated him 15 more minutes to give "evidence" was unfair and that he needed more time. He said that he had been unable to get anyone to represent him because he was unable to pay for representation and the Waterloo Legal Centre was closed.

16. In relation to a skeleton argument on the substantive issues, "anytime I sit down to write a skeleton argument I start feeling myself drifting into a dark place and this is due to there being disclosure issues around the case" (see his para.71). Had he a diagnosis, he would take medicine before starting to write the skeleton. He argued that, in a work environment, he would never suffer a detriment for refusing to take any action which is detrimental to his health and that it was strange that the respondents were asking the Tribunal to punish him for taking that action.

17. Under possible solutions, the claimant confirmed that he had no medical evidence to support any request for reasonable adjustments but said that if the Tribunal wanted to be fair it could do away with the need for medical evidence and direct the respondent to disclosure documents and witness statements; that the respondent should make such disclosure voluntarily, and that the Tribunal should see this as lack of genuine intention to progress matters by the respondents.

Conduct of the hearing of 1 December 2020

18. On 14 July 2020 the claimant had asked that he be able first to respond to the PCR respondents' submissions so that he should have time to prepare to respond to Mr Williams' submissions. Mr Baines agreed to go first. His oral submissions (to supplement his written application) took about 20 minutes. The claimant's submissions in relation to the PCR respondents lasted between 45 and 50 minutes. This meant that the claimant had overnight to further prepare his submissions in response to the SEH's respondent's written skeleton.

19. Mr Williams' submissions exceeded, with permission, the 45 minutes which I had originally allocated. Those submissions took approximately 1 hour and 30 minutes. During them, the claimant asked to be able to record an audio note to himself on his phone or tablet in relation to the degree of overlap between the 4 claims brought against the SEH respondents. Permission was granted for him to do this. The claimant started his oral submissions in response to Mr Williams at 12.20, following a short break. I verified at 13.00 that everyone was content to continue and they were. The claimant suspended his submissions at 13.20 and the hearing was abandoned as set out in paragraphs 7 to 10 of the order sent to the parties on 16 July 2020.

20. I had calculated the difference in time between the length of Mr Williams' submissions and the claimant's to be 15 minutes: hence my case management order. Revisiting the file, I now think that the above timing is correct and that I should have allocated the claimant 30 minutes in order to balance that taken by Mr Williams. Subject to that, the time remaining for the timetabled submissions was:

a. 30 minutes for any further oral submissions from the claimant in response to the applications of the Berkeley respondents;

b. 10 minutes for any oral submissions from Ms Oldbury-Davies to supplement her written applications dated 13 May 2020;

c. 45 minutes for any oral submissions from the claimant in response to Ms Oldbury-Davies's applications;

d. 10 minutes for any oral submissions from the claimant in response to Mr Burcow's submissions on behalf of the NES respondents.

21. The SEH respondents sent, on request, a further copy of their original skeleton argument to the claimant by email on 14 September 2020.

22. Prior to the start of the hearing on 1 December 2020, it was reported to me that the claimant had fainted in the entrance hall of the Tribunal building. The clerk reported to me that the claimant said that he did not want medical attention and wanted to be here. He was given a separate room and time to compose himself.

23. I asked the claimant how he was feeling. He said that he felt sick; he felt weak and that he had had a flashback that morning. However "I think I've no choice but to continue. I don't feel good."

24. Mr Williams argued that there was presently no medical evidence which supported an argument that the claimant was unable to continue. The amount of time required to complete the issues listed for the original open preliminary hearing in July 2020 was limited and it was sensible to continue today. He argued that the claimant was able to make his own judgment about whether he should attend the hearing, but he had not provided medical evidence which explained an inability to attend.

25. The respondents did not argue that the evidence provided by the claimant meant that the Tribunal was yet at the point where it was necessary to strike out the claims when it was possible for a hearing of the present issues to take place in his absence. It was argued "It would be potentially unfair on C at this stage to adopt the draconian course of striking out his claim and unfair on the respondents to permit the current impasse regarding C's attendance to continue." (para.31 of the skeleton argument of Mr Williams of 25 September 2020).

26. It was clear to me that the claimant was willing to continue to make his submissions although he described himself as not having a choice but to continue. None of the parties argued that there should be a strike out of the claims under r.37(1)(e) of the Rules of Procedure. I considered whether I should, of my own motion, adjourn the hearing further because the claimant had had a further episode that morning. I was mindful that he had made focussed and relevant submissions in relation to the PCR respondents and one hour of submissions in relation to the SEH respondents in July 2020. He had had the opportunity to put in a written response to the applications in the case management orders of EJ Lewis (RB page 556 at 564 para.11) which had been repeated by me (SEH page 779 para.16). He had not done so. His explanation for why he had not done so is not backed by medical evidence. When invited by EJ Lewis (SEH page 563 paras. 4 & 5) to explain what adjustments to the

Tribunal procedure could be made to enable him to participate he applied for "Reasonable Adjustments" of the respondents "making witness statements answering all the allegations levelled against them" (see SEH page 643). This was not a reasonable request but, more to the point, was not an adjustment to the Tribunal process which might facilitate his participation in a hearing. In those circumstances it seemed in accordance with the overriding objective to suggest to the parties that the 1 December 2020 be used, not to argue the question of r.37(1)(e) but to conclude submissions on the respondents' applications.

27. I asked the claimant how much longer he thought that he needed to reply to Mr Williams' submissions and he estimated 30 minutes. I explained to the claimant that I intended to take a break after approximately every 45 minutes. His submissions started at about 10.55. I asked him the two matters in clarification which I needed to ask him following Mr Williams' submissions. The claimant was able to refer me to an exchange of email correspondence between him and Messrs Goodman Derrick from September 2018 which the solicitors were able to produce to the Tribunal and which was added to the bundle, by consent.

28. Following a short break, during which the claimant stayed in the hearing room at his request (accompanied by the clerk), the claimant continued with what he wanted to say in response to my enquiries. I then asked him about his response to the costs application. I could see that the claimant at times found it difficult to continue, and complained of feeling nauseous, but he did continue and asked relevant questions and made relevant points – as can be seen from the outline of the parties' respective submissions below.

29. During a comfort break, starting at 12.20, it was reported to me that the claimant had been found to have fainted in the room set aside for his use. Again, after he recovered, he declined medical attention and told the clerk that he wished to continue.

30. He confirmed this to me when the hearing resumed at 13.00. He asked that he be able to conclude his response to the SEH respondents submissions later. He complained that he had double vision and was unable to read the paperwork concerning the SEH respondents.

31. Ms Oldbury-Davies then made her submissions in 3 areas for about 10 minutes. The claimant responded and was able to address each of the three questions she raised. He was able to explain to me what the basis for his claim against AKSL and Ms Oldbury-Davies was (see paras. 194 - 196 below).

32. When explaining his complaint that there was a detriment to him by AKSL having, as he alleges, created a phoenix company, he complained that he was worried because his chest was hurting and said that he needed to go to hospital, but said that he did not know whether he could get there. I asked the clerk to contact the emergency services to explain that the claimant had twice fainted at the Tribunal and was presently complaining of blurred vision and chest pain. The hearing was adjourned. I did not note the time on the record of hearing but it was at approximately 13.45.

33. Paramedics attending the Tribunal and treated the claimant. At the claimant's request, they were provided with the medical evidence which he had been relying on. I asked them to come into the Tribunal room and later reported to the parties that they told me that they had not found anything of concern. The told me that the claimant had a temperature of 37.8 degrees Celsius which they described as "a temperature". They offered to take him to hospital but he had declined.

34. The parties returned to the hearing room at 15.10. Again the claimant expressed himself willing to continue. He said "I think we should continue". I raised the question of whether the hearing should continue in the knowledge that the claimant had an elevated temperature of 37.8 degrees and directed the parties to remain masked unless they were speaking. I said that anyone who had concluded their submissions was free to go. I said that there were the options of continuing; returning tomorrow; adjourning and continuing the next day by CVP (although the claimant has previously indicated that he would be disadvantaged by CVP). All parties indicated their preference to continue.

35. Again, I considered whether I should suggest that the hearing be postponed but, essentially for the reasons I outline in paragraph 26 above, decided that the claimant's expressed wish to continue should be respected.

36. It was agreed that I should then reserve judgment on the applications for strike out and deposit orders and on the question of whether either or both of the tests set out in r.76(1) of the Rules of Procedure 2013 were met and use the second day scheduled for the hearing to deliberate. In the event that the test in r.76(1) was met in respect of any claim the issue of whether or not to make a costs order or preparation time order would be addressed at a later stage. The issues raised in the several applications before me cover relatively involved points of law and facts and I was not able to complete deliberations in one day. This has led to a delay in completion of this judgment due to competing work commitments for which I apologise.

37. The claimant asked that Mr Williams repeat his oral submissions so that he could respond to them. I therefore directed that Mr Burcow make his submissions and asked Mr Williams to use the time to summarise 3 to 4 points which could be outlined to the claimant so that he could be satisfied that, given his previous oral submissions and answers to my enquiries, he had covered the points argued against him by the SEH respondents.

38. To assist the claimant in focusing his submissions in relation to the NES respondents I identified 5 key points and he responded to those. The hearing then continued without further break. Mr Williams outlined two broad elements to his submissions and the claimant responded to those in turn.

39. The claimant and the respondents then made their submissions in relation to the claimant's application for an anonymity order and the hearing concluded at 17.05.

The Law applicable to the applications

40. Among the various statutory provisions to which I have had reference in considering the applications before me are the following:

Employment Rights Act 1996 c. 18

44.— Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) …

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) …

47B.— Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) …

48.— Complaints to [employment tribunals].

(1) An employee may present a complaint to an [employment tribunal][1] that he has been subjected to a detriment in contravention of [section …, 44, …

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

…

(2) On [a complaint under subsection (1), (1ZA), (1A) or (1B)][8] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

…

(3) An [employment tribunal] shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of *a series of similar acts or failures* , the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the *"date of the act"* means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer [, a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Equality Act 2010 c. 15

13 Direct discrimination

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) …

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

(1) …

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) …

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment. …

41 Contract workers

(1) A principal must not discriminate against a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(2) ...

(3) A principal must not victimise a contract worker—

(a) as to the terms on which the principal allows the worker to do the work;

(b) by not allowing the worker to do, or to continue to do, the work;

(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;

(d) by subjecting the worker to any other detriment.

(4) ...

(5) A "principal" is a person who makes work available for an individual who is—

(a) employed by another person, and

(b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

(6) "Contract work" is work such as is mentioned in subsection (5).

(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) *"Employment"* means—

(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work; …

108 Relationships that have ended

(1) A person (A) must not discriminate against another (B) if—

(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them, and

(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act. …

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval. …

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be). …

120 Jurisdiction

(1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to—

(a) a contravention of Part 5 (work);

(b) a contravention of section 108, 111 or 112 that relates to Part 5. …

123 Time limits

(1) [Subject to [the effect of early conciliation] proceedings] on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

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

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision. …

41. **The Employment Tribunals (Rules of Procedure) 2013 Sch.1** include the following:

37.— Striking out

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

…

39.— Deposit orders

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

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

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

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out…..

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

(a) the paying party shall be treated as having acted unreasonably in pursuing

that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

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

otherwise the deposit shall be refunded.

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

50.— Privacy and restrictions on disclosure

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses at a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

42. The power to strike out a claim on the ground that it has no reasonable prospect of success comes from rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013. It is a power to be exercised sparingly, particularly where there are allegations of discrimination and unlawful detriment on grounds such as protected disclosure or health and safety grounds.

43. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out

a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

44. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination, whether on grounds of race or other protected characteristic, represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof. Furthermore, s.44 and s.47B of the ERA provide for the respondent to show the reason why the act complained of was done. Therefore at this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of his claim, taking into account the burden of proof in respect of each of those elements.

45. That said, where it is plain that a discrimination claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

46. Another example might be where the claim amounts to *res judicata* or an abuse of process. Five principles were distilled from the authorities in this area by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 UKSC paragraph 17 in a passage headed "Res judicata: general principles". First, cause of action estoppel is where a cause of action has been held to exist or not to exist in one set of proceedings then the outcome may not be challenged by either party in subsequent proceedings. Secondly, where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action. Thirdly, a cause of action is extinguished once judgment has been given on it and the claimant's sole right is a right on the judgment. Fourth, there is the principle that where some issue which is necessarily common to the first action and the subsequent action was decided on the earlier occasion such that, even where the cause of action is not the same, the decision on that issue is binding upon the parties. Fifth there is what is called the rule in *Henderson v Henderson* (1843) 3 Hare 100 which precludes a party from

raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Such a claim is liable to be struck out as an abuse of process. The doctrine of *res judicata* applies to the Employment Tribunal: Munir v Jang Publications Ltd [1989] I.C.R. 1. There are examples of claims being struck out as an abuse of process where the subsequent claim is brought against different respondents to the first claim: See cases cited by Mr Williams in particular Dexter Ltd v Vlieland-Boddy [2003] EWCA Civ 14 and Aldi Stores Ltd v WSP Group plc [2008] 1 W.L.R. 748 CA.

47. The claimant relied upon Manson v Vooght No 1 [1998] 11 WLUK 21 CA to argue that it was axiomatic that a court will not strike out a claim as an abuse after much careful consideration. I accept that submission, unreservedly. However, it is worth noting that, as this passage makes clear, the case itself is in fact an illustration of a situation where the same party was sued in a different capacity in subsequent proceedings.

> "We are not concerned with cases where a court has decided the matter; but rather cases where the court has not decided the matter, but where in a (usually late) succeeding action someone wants to bring a claim which should have been brought, if at all, in earlier concluded proceedings. If in all the circumstances the bringing of the claim in the succeeding action is an abuse, the court will strike it out unless there are special circumstances. To find that there are special circumstance may, for practical purposes, be the same thing as deciding that there is no abuse, as Sir Thomas Bingham M.R. came close to holding on the facts in Barrow . The bringing of a claim which could have been brought in earlier proceedings may not be an abuse. It may in particular cases be sensible to advance cases separately. It depends on all the circumstances of each case. Once the court's consideration is directed clearly towards the question of abuse, it will be seen that the passage from Sir James Wigram V.-C.'s judgment in Henderson is a full modern statement of the law so long as it is not picked over semantically as if it were a tax statute.
>
> The extent of any coincidence of causes of action, facts or even the capacities in which parties are sued, though relevant, will not necessarily determine the outcome.
> …
> It is of course axiomatic that the court will only strike out a claim as an abuse after most careful consideration. But the court has to balance a plaintiff's right to bring before the court genuine and legitimate claims with a defendant's right to be protected from being harassed by multiple proceedings where one should have sufficed. Abuse of process is a concept which defies precise definition in the abstract. In particular cases, the court has to decide whether there is abuse sufficiently serious to justify preventing the offending litigant from proceeding. In cases such as the present, the abuse is sufficiently defined in Henderson which itself is encapsulated in the proposition that the litigant could and should have raised the matter in question in earlier concluded proceedings. Special circumstances may negative or excuse what would otherwise be an abuse. But there may in particular cases be elements of abuse additional to the mere fact that the matter could and should have been raised in the earlier proceedings.
>
> In the present appeal, I have no doubt but that the master and the judge were right to conclude that the claims which Mr Manson wants to bring by the proposed amended Statement of Claim could and should have been raised in the 1990 action. That action

> concerned a short period in December 1988 and January 1989. It was brought against the receivers and its subject matter included the circumstances of their appointment and the financial consequences for Mr Manson resulting from their appointment. The circumstances in which Cork Gully and the first defendant came on the scene in early December 1988 before they were appointed receivers are specifically described in Judge Baker's judgment. So is Mr Manson's claim to be the owner of furnishings and antiques. Granted both that Judge Baker held that the 1990 claims should have been against the company and that the first defendant was sued in those proceedings as receiver and not in a personal capacity, it is nevertheless in my judgment quite clear that Mr Manson should have advanced his present claims against the first defendant, if at all, in the 1990 proceedings. It would in my view be unjust harassment of the first defendant, if he had to face further claims concerning the part which he played in the demise of Thomas Christy Limited in a second action started after the first action had been tried to conclusion.
>
> Mr Manson relies on special circumstances to negative or excuse the abuse. He says that the scope of the 1990 action was limited because he had legal expenses insurance for that action which only covered some of his claims and that the insurers were not prepared to support the claims which he now wants to bring. Although this may be an explanation, in my view it does not excuse the abuse nor does it amount to special circumstances. It is commonplace for litigants to have difficulties in affording the cost of litigation. But lack of means cannot stand as an excuse for abuse of process."

48. It does not follow that the presentation of a second claim which could and should have been part of an earlier one necessarily gives rise to abuse of process such that the subsequent claim should be struck out: Bradford & Bingley Building Society v Seddon [1999] 1 W.L.R. 1482 CA. Some additional element is required such as successive actions amounting to unjust harassment (see Auld LJ at page 1493 B to C). It is for the person who alleges abuse of process to show what makes the subsequent litigation an abuse.

49. The test under rule 37 contrasts with that under rule 39 of "little reasonable prospects of success". This has been described as being less rigorous than that for a strike out under rule 37 but "there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence." (Hemdan v Ismail [2017] I.C.R. 486 EAT para 13). In doing so, the Employment Judge may take into account more than simply the legal issues but may take into account the likelihood of a party establishing the facts essential to their case: Arthur v Hertforshire Partnership University NHS Trust (UKEAT/0121/19). Before making such an order the Employment Judge must take reasonable steps to find out whether the party will be able to satisfy a deposit order and take account of that information when exercising the discretion whether or not to make the order.

50. The requirement that a claimant be able to show that they have suffered a detriment is common to non-dismissal claims on grounds of health & safety (s.44(1) ERA – s.44(1)(c) in the present case) and protected disclosure (s.47B(1) ERA) as well as claims of discrimination and victimisation. This is a question of fact. The classic definition is that;

"by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."

De Souza v Automobile Association [1986] I.R.L.R. 103 at 107 CA.

51. This can cover a wide range of situations including after termination of the employment relationship. However, an unjustified sense of grievance is insufficient for the claimant to have suffered a detriment (Shamoon v Chief Constable of Royal Ulster Constabulary [2003] I.R.L.R. 285 HL).

52. Section 108 EQA sets out the circumstances in which complaint can be made to the Employment Tribunal arising out of acts which post-date the termination of the employment relationship, including alleged acts of victimisation (Rowstock Ltd v Jessemey [2014] I.C.R. 550 CA). In order to fall within s.108, the act complained of should both arise out of and be closely connected to the relationship which use to exist between the parties: see Aston v Martlet Group Ltd UKEAT/0274/18.

53. It is worth looking at the facts of Aston because there are some similarities to the situation in the NES claims and it is relied upon by the NES respondents, in particular, to argue that the claimant's complaint against them cannot fall within s.108 EQA. Mr Aston had had a period of long term sick leave from his role and discussions about an alternative role within the company had not been successful in achieving a return to work. He was offered a sum as a gesture of goodwill which was initially accepted by him and then withdrawn when the parties were unable to come to terms. The claim brought claims for disability discrimination and at a preliminary hearing, in evidence, a director of the employer confirmed that the offer was a gift and that he was still willing to pay it. In later correspondence between solicitors the employer argued that the payment had depended upon the claimant withdrawing his claims. The claimant brought a second claim for victimization contending that the change of position from offering an ex gratia payment to making it conditional was a detriment done on grounds of the first tribunal proceedings.

54. Two matters of note for the purposes of the present claims appear from the judgment of HH Judge Auerbach in the EAT. First, he held that the claimant would be unable to show the fact of the detriment without relying upon the evidence of a witness and that attracted judicial proceedings immunity. Since the offer of a goodwill payment made in evidence at the preliminary hearing could not be relied on, the claimant could not show that the detriment of change of position had occurred. Secondly, the learned judge considered the scope of s.108 EQA and confirmed that the existence of that section does not mean that there is "jurisdiction to entertain any and every claim of discrimination or victimization presented by an ex-employee" (para.99 of the judgement). In paragraphs 100 to 106, while making clear that it is the words of the statutory test which should be applied, he made the following points,

    a. The conduct relied upon must both be something that "arises out of" the past relationship, and also must be "closely connected" to it.

    b. The second test must add something to the first;

c. There must not merely be a connection, but a close one;

d. The tests would not by themselves be satisfied by a "but for" test being passed nor by a finding that the conduct was done in the capacity of ex-employer. Mere passage of time was not determinative but it may be a relevant consideration.

55. On the facts of Aston, HH Judge Auerbach then went on to consider that the test in s.108(1)(a) was not met on the facts of that case. On the one hand, the offer was made in the capacity of ex-employer and arose from the former employment in the sense that "but for" that employment the offer would not have been made. However there were too many links in the chain between employment and the offer and

> "the clear water between the original, later withdrawn offer, and the fresh and distinct context in which the offer relied upon […] was elicited, and specifically, the fact that the context was cross-examination during the course of the giving o live evidence under oath at a tribunal hearing, mean that the test of close connection is not satisfied". (paragraph 105)

56. In direct discrimination cases, the claimant is required to show that he has been subjected to less favourable treatment than a comparator would have been subjected to and that that treatment was on grounds of, for example, religion. The comparator must be in the same position in all material respects as the alleged victim save only that he or SEH does not share their protected characteristic (section 23(1) EQA). The relevant circumstances which must be the same are thos which the alleged discriminator takes into account when deciding to treat the alleged victim as they do: Shamoon paragraph 134 of the judgment of Lord Rodger.

57. However it is not sufficient in a claim for direct discrimination for the claimant to show different in treatment and difference in the protected characteristic. There must be something more to satisfy the requirement of s.136 EQA to show facts from which it might, in the absence of any other explanation, be inferred that the reason for the treatment was the protected characteristic: Madarassy v Nomura International plc [2007] ICR 867 CA.

Application for anonymity order under r.50 of the Rules of Procedure 2013

58. I drew the parties attention to the fact that the claimant had applied for an anonymity order from the EAT in his notice of appeal against my refusal of his application for an adjournment on 14 July 2020 (see para.30 of the order sent to the parties on 30 September 2020 at SEH page 901). On 6 November 2020 the claimant applied for a restriction in reporting due to the fact that mental health is still a stigma in Nigeria. He argues that a refusal would make his relocation to Nigeria very difficult as he is currently on a limited visa.

59. I explained to the claimant that I took that to be an application for an order under r.50 of the Rules of Procedure 2013. The powers under ss.11 and 12 of the Employment Tribunals Act 1996 did not seem to be applicable to the situation and it was therefore for the claimant to show that one of his rights under the European Convention on Human Rights (presumably his art.8 right to a private life) was impacted by the publication of his identity and that it was proportionate, taking into account the requirement in rule 50(2) that I give full weight to the principle of open

justice and to the Art.10 ECHR right to freedom of expression, that I order that his identity be anonymised.

60. The claimant argued that for a period of time, which he suggested should be 10 years, his name should be anonymised. He explained that he expects and hopes to relocate to Nigeria and, even if he did not choose to do so, that might be necessitated if the Home Office decide not to renew his leave to remain. Relocation would be difficult if he were identified as the claimant in this case because of the details contained in any judgment (such as this one) about his mental health because there is a stigma attaching to mental health in Nigeria, the country to which he wishes to relocate and to which he would have to relocate were his leave to remain in the U.K. to come to an end. He had provided a 2017 document which referred to a specific mental health condition which had required treatment between 5 July 2017 and 26 July 2017 (see SEH: 7 page 471 at 474, which seems to have been sent to all parties on 14 July 2020 - SEH page 757 – a fact I only became aware of when deliberating).

61. This application was opposed by the respondents. Mr Williams made fully articulated arguments with which the other parties and representatives wished to be associated. He argued that the principle of open justice was an important consideration, particularly in the case of the claimant who has brought numerous claims against numerous respondents. Anonymity would make it harder for the extent of his litigiousness to because clear to any respondent or to the Tribunal. The matters which he relies upon as wishing not to be revealed have been put in issue by the claimant himself as an explanation for the difficulties he has had in pursuing his claims.

62. Mr Williams relied upon Khujar v Times Newspapers [2019] AC 161 UKSC to argue that clear and cogent evidence was required that there would be harm to the private rights of the person in question and the derogation from the right to freedom of expression should only be permitted where it was strictly necessary.

63. I start by considering the extent to which the claimant's mental health is likely to need to be revealed through the course of these reasons or the proceedings, should they continue beyond this preliminary hearing. The claimant argues that his right to respect for private life will be impacted by being required to reveal details of his mental health. Contrary to what the claimant says in his CSA (paragraph 1), the claims themselves do not require any consideration of the claimant's health. Although, at the abortive hearing in August 2020, I raised the issue of whether the time had come to consider whether the claims should be struck out on the basis that it was no longer possible to have a fair hearing, it was effectively common ground at the December 2020 hearing that, the claimant having expressed himself willing to continue, that did not need to be addressed. Therefore, I did not need to go in detail into the claimant's health matters. I have needed to recount the events at the hearings and the claimant has argued that personal life events are reasons why the claims he has brought should not be regarded as an abuse of process.

64. The reason why the claimant seeks a restricted reporting order is that he fears that he would be stigmatised were he to return to live in Nigeria. He does not say that such a move is imminent or even likely. In the event that he does return to live in Nigeria, I do not consider it to be a realistic prospect that personal information would

become common knowledge through an internet search for this judgment. Such information as it has been necessary to record in order to explain my judgment in these reasons has been put forward by the claimant himself in order to explain his actions and does not, in my view, amount to an interference with his Art.8 ECHR rights such as to outweigh the principle of open justice and the Art.10 ECHR right to which I must give full weight.

The PCR respondents – Case Nos: 3331198-2018, 3335166-2018, 2304319/2018 and 2301188/2019: Discussion and decision

65. Mr Baines for the PCR respondents made the first submission. He relied upon the application made on behalf of PCR, Ms Osbourne, and Mr Laing on 27 March 2020 (Item 8.2). The PCR respondents' application for a preparation time order was also due to be considered by me (Item 8.3).

66. The issues in the claims against the PCR respondents are found in the relevant claim forms and response forms. There are four claims in total.

67. **Case No: 3331198-2018 (hereafter the First 2018 PCR claim)** was presented on 7 July 2018 in Watford ET (Item 3.1). The claimant claims to have been continuously employed by PCR as a labourer since 6 December 2016. The claimant's ticked the relevant boxes for age discrimination and "another type of claim which the ET can deal with" and cited "victimisation for making a Protected Act contrary to s.27 EqA 2010". The respondents were PCR and Mr Laing who defended by responses received on 4 March 2019. In Box 4 "Employment details" they stated that the dates of employment were not correct, added "Note that the Claimant is not an employee of [PCR or Mr Laing]" but said that the association (to use a neutral word) started on 16 September 2016 and was continuing.

68. The details of the claim make clear (as he confirmed orally to me) that the claimant's complaint was that he suffered age discrimination during his work as an agency worker for NES on 9 October 2017 and brought Tribunal proceedings against them on 9 February 2018. This is relied on as a "Protected Act against their client". His allegation is that he made a telephone request for documentation from PCR which he claims would disprove allegations made by NES in their response to the ET claim but that because he had brought Tribunal proceedings against PCR's client, NES, the former, through Mr Laing,

    a. on 23 April 2018 refused his request for information (first alleged detriment),
    b. was uncooperative in providing the claimant with his own name (second alleged detriment); and
    c. refused to let the claimant speak to his own manager (third alleged detriment).

69. The claimant then complains that
    a. PCR (presumably again Mr Laing) refused to permit the claimant on 24 and 25 April 2018 to speak to his manager (fourth alleged detriment) or
    b. Refused to give him notes of the job with NES (fifth alleged detriment) and
    c. on 27/4/2018 gave a deficient response to his request for documents (sixth alleged detriment).

70. He also complained that when he wrote on 29 April 2018 describing the document he wanted and offered (on 2 May 2018) to allow commercially sensitive information to be redacted, Ms Osbourne ignored C's email and did not provide the information about when his replacement was contacted. (seventh alleged detriment)

71. He also complained that PCR refused to conciliate (eighth alleged detriment). The allegations about 2 May 2018 and failure to conciliate were included in an application to amend because the document he had attempted to insert into box 8.2 had not been inserted in full. The claimant confirmed that on 8 August 2018 in a letter to Watford Employment Tribunal which is at pages 21 to 24 of Item 3.1. I have given those allegations detriment numbers which are not the same as the numbers allocated to them by the claimant (V1 to V12). The reason for that is that some of the lines which either refer to the claimant's own conduct or can conveniently be rendered as a single alleged detriment (see e.g. V3 to V5).

72. **Case No: 3335166-2018 (hereafter the Second 2018 PCR Claim: Item 1.1)** was presented on 3 December 2018 following a period of early conciliation. The respondents are PCR and Ms Osbourne. In Box 8.2 the claimant describes PCR as "an agency" and also refers to "recruitment agencies". The specified allegation against Ms Osborne is that on 21.09.2018 the claimant made a DSAR to PCR to which Ms Osborne responded on 18 October 2018 disclosing merely 4 pages (ninth alleged detriment). He then complained that she failed to respond to an 18 October 2018 email asking whether the data provided was truly all that PCR had on record (tenth alleged detriment). He states within Box 8.2 that he has applied to amend his first claim to include the tenth alleged detriment) but "I feel it is best to issues a new Claim with a new ACAS number as I'm also adding a new respondent". He seeks consolidation. The date of the final allegation is therefore 18 October 2018 (to judge by comparing the two ET1 claim forms). It was at a PHR listed in this case in Reading Employment Tribunal on 4 September 2019 that the claimant collapsed, and an ambulance needed to be called.

73. **Case No: 2304319/2018 (hereafter the Third 2018 PCR Claim: item 2.1)** was presented at London South ET on 4 December 2018. The allegations are word for word identical to the Second 2018 PCR claim and it relies upon the same EC certificate numbers save for two matters. It gives Ms Osbourne a different address and also, the claimant explained in the body of the claim form that he was bringing an additional claim because he had previously made a "minor error" in the address of Ms Osbourne.

74. The grounds of response by PCR and Ms Osbourne in the Third 2018 PCR Claim were presented on 30 January 2019. Ms Osbourne's response to the ninth and tenth alleged detriments are that, in sending the claimant's personal data to him, SEH confirmed that this was the entirety of his personal data held by PCR and therefore saw no need to respond to his further request for that confirmation. SEH denies that he suffered any detriment.

75. **Case No: 2301188/2019 (hereafter the 2019 PCR Claim: Item 4.1)** was presented in London South on 4 April 2019. It is against PCR alone. It refers to the release on 19 February 2019 of 33 more pages of personal data (eleventh alleged detriment) and argues that a costs warning issued on 30.1.2019 was an act of victimisation on

grounds of the earlier ET claim against PCR and cites St Helens Borough Council v Derbyshire [2007] UKHL 16 (twelfth alleged detriment). He stated that he wished to consolidate this claim with the Third 2018 PCR Claim and was bringing another claim in order to protect his position re time limits in accordance with the advice of Jackson LJ in Chandra v Brooke North [2013] EWCA Civ 1559.

76. In their responses – to summarise the defences raised to the substantive arguments in the four claims - PCR deny that the claimant is an employee. They state that C is a "self-employment contractor". They produce a "subcontract for services" (Item 7.3) and "PCR Ltd Client Terms of Business 2017" (Item 7.1). I infer that, under the latter, they place people such as the claimant with clients such as NES. The placed the claimant with clients in construction roles including one with NES. They take the point in Case No: 2304319/2018 (the third 2018 PDR claim) that any complaint in relation to matters pre-dating 3 May 2018 should have been brought by 2 September 2018 at the latest and, since it was presented on 4 December 2018 it should be struck out.

77. PCR accepts that, at the time of the alleged conduct of Mr Laing, they knew that proceedings had been brought against NES but assert they knew no details about the claim. It is said that Mr Laing could not provide the documents in question as they did not belong to the claimant and that he, Mr Laing, did not wish to become involved in the dispute. PCR argues that the online request for information on 23 April 2018 was responded to and that they have no knowledge of telephone calls made by the claimant on 24 or 25 April. They say that, in response to the later request, that they would disclose documentation as ordered by ET in the NES case – and have done so – but would not volunteer the release of commercially sensitive documentation (see para. 6.1 to 6.9 of the ET3 in the Third 2018 PCR Claim). Overall, it was accepted by Mr Baines, that the claimant had received what he called "poor customer care" but denied that there was any evidence of victimisation.

78. The application by PCR respondents to strike out is made on the basis that the claims are vexatious and have no reasonable prospects of success. It became apparent that the PCR respondents were under a misconception as to the nature of the claim they are facing: there is no age discrimination claim against them – that is against NES; there is no claim of protected disclosure. It seemed to have been understood that the claimant alleged that his Data Subject Access Request was a protected act whereas, in fact, he relies in the three 2018 PCR Claims upon his Employment Tribunal claim against NES and in the 2019 PCR Claim he relies upon the earlier 3 claims against PCR.

79. Once the claims were properly identified the submissions by PCR were relatively broad. It was alleged that there was no evidence of any detriment suffered by the claimant in relation to the alleged acts of victimisation; the victimisation was denied; the multiple claims brought by the claimant involving a large number of respondents (in addition to those listed for the present PH) pointed to the claimant being a "serial, and arguably vexatious litigant". PCR pointed to several claims arising from the same events and argued that the intention of the multiple overlapping claims was to subject the respondents to inconvenience, harassment and expense out of proportion to the importance of the claims. Furthermore, Mr Baines argued that it could not reasonably be regarded as a detriment that an email was not responded

to. In the alternative, PCR argued that deposit orders of £1,000 per claim should be made.

80. In summary, the claimant's submissions were that the PCR arguments were broad in nature. He had taken NES to the Employment Tribunal and, on his oral account to me (but not his claim form), Mr Laing had called him wanting to speak about his taking NES to Tribunal. The claimant had asked for all personal documents with any personal comments on him: e.g. about a poor work record. Mr Laing had refused him. It had been a detriment to him not to be provided with the information which he wanted – it had been the failure to provide the information which he had wanted which was detrimental. It was for the respondent to prove evidence of poor customer care not him.

Decision on the applications under r.37 and r.39 by the PCR Respondents.

81. The word "vexatious" in rule 37 describes a situation where an employee brings a hopeless claim, not with any expectation of recovering compensation but out of spite to harass his employers or for some other improper motive: ET Marler Ltd v Robertson [1974] ICR 72 NIRC. That was a case involved in whether the power to award costs arose but the same definition should apply in both circumstances. Lord Bingham CJ emphasised the effect of the conduct rather than the motive in his formulation in A-G v Barker [2000] 1 FLR 759*,* at para 19*,* but it is, plainly, still a high hurdle.

> ''Vexatious is a familiar term in legal parlance. The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.''

82. Furthermore, there must be consideration of whether striking out a claim which is vexatious, or which has been conducted vexatiously, is a proportionate response. The question of whether there are no reasonable prospects of success is a high threshold as has been held in Anyanwu and Ezsias to which I have already referred in more detail.

83. There is no doubt that, on a practical level, the claimant's practice of issuing a new claim whenever he has an interaction with a respondent into which he copies the history of existing claims has a tendency to confuse. Time is taken unnecessarily in trying to understand the difference between the claims. Time is taken in verifying whether the claims are brought within the appropriate time limits. That is not the same as the claims being brought with the intention of harassing the respondents or from some improper motive. It seems to be the argument of the PCR respondents that it can be inferred simply from the multiple claims brought against each of these respondents and references to multiple claims brought against other respondents which are not before me that the claimant is a vexatious litigant.

84. I reject that argument. The claimant is a committed litigant. He may be misguided in his assessment that a justiciable wrong has been done to him in respect of every

allegation which he has included in his several claim forms: although that should be looked at on a case-by-case basis. That is not the same as having an improper motive. In my view there needs to be a greater degree of scrutiny of his reasons for all this litigation than simply to point to the multiplicity of claims and argue that he is vexatious.

85. The claimant's essential point about the multiple claims is that when a subsequent event gives rise to a valid claim, Chandra v Brooke North advises a new claim as well as an application to amend. That may be but Jackson LJ did not advise such a litigant to cut and paste the entirety of the first claim into the second and thus duplicate the action. Furthermore, his point presupposes that there are valid grounds for complaint of an allegedly unlawful act giving rise to a justiciable claim before the Employment Tribunal in relation to the later act. It also should be recalled that the purposes of the Tribunal system include for deserving claimants to enforce their rights to compensation for harm done to them – not as a forum for complaint about every action with which they are unhappy. In particular, the Tribunal does not have jurisdiction under the Data Protection Act.

86. For claims to be vexatious such as to be struck out under rule 37(1)(a) requires more than a hopeless claim. It requires a conclusion that the claim has been brought out of spite or in order to or with the effect to harass out of proportion to the possible benefit to the claimant. I am not persuaded that these claims meet that test. I do take into account that the claimant has presented these claims in different Employment Tribunals which makes managing them and responding to them challenging and might be said to be inconsistent with his stated aim to preserve his position if he applies to amend one claim in one employment tribunal while "preserving his position" by a second claim in a different employment tribunal. I should say that in finding that the PCR claims are not vexatious, I make no finding about the claimant's conduct of them.

87. I have considered whether any of the claims appear to be clearly out of time (as alleged by PCR in the Third 2018 PCR Claim). If there are time points they are not obvious. The earliest act complained of in the First 2018 PCR Claim is dated 23 April 2018 and that claim was presented on 7 July 2018. Based upon the information before me there is no basis for concluding that the Employment Tribunal lacks jurisdiction because any of the four claims were presented out of time. It is true that, in the section of the Third 2018 PCR Claim headed "Old Claim" the claimant replicates the narrative from the First 2018 PCR Claim. In contrast with the situation in the Berkeley cases, none of the PCR claims have been the subject of a Tribunal judgment. It is not the case that the Third 2018 PCR Claim is an abuse of process because it includes the same allegations as in the First 2018 PCR Claim in those circumstances. They may be out of time as complaints within the Third 2018 PCR Claim but the First 2018 PCR Claim which cover the same ground, was not, on the face of it, presented outside the three months mandated by s.123 EQA.

88. Overall, the claims against the PCR respondents will require the Tribunal to consider the following:

    a. Does the claimant bring claims which fall within Part 5 of the EQA? This is likely to involve consideration of whether one of sections 39, 41 or 55 of the

EQA is applicable to the situation and whether the claimant an employee within the extended meaning of that phrase in s.83(2) of the EQA?

b. Did the events relied on as the first to twelfth alleged detriments happen as alleged by the claimant?

c. Were they detriments?

d. Were they done on the grounds that the claimant had brought age discrimination claims in the Employment Tribunal against NES or, in the case of the eleventh and twelfth alleged detriments, on the grounds that the claimant had brought the First to Third 2018 PCR Claims?

89. As to the grounds for the PCR respondents' actions, the respondents accept that they knew about the claims against NES but say that they were unaware of the detail of it. On 11 October 2018 they were served with an order for Third Party disclosure in those proceedings which were then ongoing. The claimant points to a surprisingly small number of documents having been disclosed initially (confirmed by the larger number disclosed subsequently). It seems to me that there is a fundamental dispute of fact about whether the PCR respondents were materially influenced in their response to the claimant by him having brought a claim against their client. At a final hearing the claimant does not have to show that it was their main or predominant reason for acting as they did.

90. It also seems to me that it cannot be said that there are either no or little reasonable prospects of the claimant showing that he was covered by Part 5 of the EQA. As to whether he was an employee within the meaning of s.83(2) EQA, The Subcontract for Services is referred to as a "Contract for Services" but it is not clear from the copy provided to me who the parties to that were. One of the emails which I have been provided with by PCR on 24 June 2019 timed at 11:49 states that the claimant was in fact contracted with Sprite Technical Services Ltd. See also paragraph 1 of the grounds of resistance for the Third 2018 PCR Claim. I do not know what that company was. Clearly those are not the only pieces of evidence likely to be relevant to the question of his employment status but that is a notoriously fact sensitive issue. It's fair to say that this issue was not addressed in detailed submissions before me and, beyond the statement that he "worked for" PCR and that they are an agency, it is not clear how the claimant would bring himself within Part 5. My view is that there are better than "little" reasonable prospects of showing that the relationship between the claimant and PCR fell within one of ss.39, 41 or 55 EQA. I note that the PCR respondents appear to accept in their response forms that the relationship, which they claim to be that of sub-contractor, is ongoing at the time of presentation of the claim. If so, then this claim does not, based upon what is in front of me, seem to be a question of alleged post-termination detriments.

91. That leaves the question of whether there are little or no reasonable prospects of the claimant showing that the acts happened as alleged, and that they were detriments to him in his employment. Where I have come to the conclusion that a particular allegation has little reasonable prospect of success, that will be the subject of a separate order which will be kept sealed on the file until the determination of the case. Otherwise, my conclusions are as follows:

a. I have been shown by PCR emails dated 20 February, 21 February and 28 February 2019 between PCR and the claimant. In those the additional 33 pages of disclosure were sent to the claimant, he expressed views on that and Ms Osbourne responded, apologising for not having disclosed them before. It seems to me that, as in the Berkeley claims, the claimant is complaining of a continued failure to disclose all of his personal data, despite the additional disclosure. Ms Osbourne has told him that no comments of the kind he refers to were retained. I am mindful that at this stage I should merely be taking an impressionistic approach to the evidence. In the light of the scale of difference between the initial disclosure and the subsequent disclosure my view is that it cannot be said that there are no reasonable prospects of showing that there is a continued failure to disclose.

b. There are allegations, broadly speaking, that Mr Laing was uncooperative in the period 23 to 25 April 2018, and that PCR sought to avoid disclosing documents to the claimant to which he was entitled because the claimant had brought an age discrimination claim against one of their clients. The emails from the claimant are interrogating, asking a number of different questions.

c. PCR's position, rightly or wrongly, is that they are not the claimant's employer and that, until a DSAR request is made or Tribunal order served, they were under no obligation to provide the requested information. I am mindful that the claimant was seeking information for the purposes of his Employment Tribunal claim against NES. These are matters which might affect whether the claimant has suffered a detriment within s.39, s.41 or s.55 of the EQA

d. In the correspondence, the respondent puts forward explanations such as the information requested is commercially sensitive, it would be contrary to the DPA to provide the surname of the employee whom the claimant had spoken to and they would provide disclosure in response to a court order. I do not think that this is entirely consistent with the explanation of "poor customer service". The validity of the respondents' various explanations would need to be weighed by any Tribunal making a judgment about the reasons for their actions.

e. It is argued that it cannot reasonably be said to be a detriment if the claimant did not receive a response to an email. Ms Osbourne sent the first disclosure under cover of an email which said "Please find attached all the personal information that we hold about you." The claimant complains that the failure to answer the email "Please can you confirm that this is all my personal data which is in your possession" was a detrimental act of victimisation.

f. Overrall, there is a difference between the scenario in the PCR claims and that in the Berkeley claims. In the Berkeley claims the employment of the claimant had happened years in the past as had the alleged protected

disclosures. SEH had voluntarily disclosed additional documents with an explanation for how they had come to be disclosed. Where there are live issues as to whether the claimant had an ongoing relationship with PCR or not, whether Mr Laing was uncooperative and why, and whether a reasonable and proportionate search was carried out at the time of the first response to the DSAR, I am not persuaded that there are little reasonable prospects of the claimant showing that any other detrimental acts he relies on happened as alleged.

g. As to the costs warning letter, the PCR bundle does not include the ET3 in that case and am unaware about whether it is accepted that a costs warning letter was sent or the circumstances and wording of it, if any. I am not persuaded, therefore, that there are little reasonable prospects of the claimant succeeding in showing that the sending of the costs warning letter was unlawful victimisation rather than an ordinary step to defend, settle or compromise the claim.

92. I dismiss the PCR respondents' application for orders striking out the claims. The application for deposit orders is the subject of a separate order.

93. The PCR respondents' application for a preparation time order is made on the basis that the claims are vexatious or have no reasonable prospects of success (see the application dated 1 July 2020). For reasons which I explain above, I do not consider that those tests are made out on the information available to me. However, whether or not a claim had no reasonable prospects of success is sometimes best judged at the time of a final decision in the case and I postpone the application to be considered at a final hearing. If PCR wish to make their application at that stage on written notice to the claimant relying on the conduct of these proceedings, that is a matter for them.

94. Separate correspondence will be sent to the claimant and the PCR respondents in relation to the future conduct of this litigation.

The Berkeley claims – Case Nos: 3306927/2018 and 2303263/2018 and the claim against AKSL and Ms Oldbury-Davies – Case No: 2303263/2018: Discussion and decision

95. The background to these claims is that the claimant was employed by one of the Berkeley Group of companies from 22 September 2014 to 13 February 2015. During October or November 2014, he underwent training provided by AKSL. Ms Oldbury-Davies was at the relevant time an employee of AKSL (now in voluntary liquidation). The claimant has brought previous claims against companies in the Berkeley group of companies. The claimant had first brought proceedings against SEH and the Berkeley Group plc (hereafter referred to as Berkeley) by Case No: 3300013/2016 on 5 January 2016, alleging that he had been subjected to a number of detriments on grounds of protected disclosures (contrary to s.47B of the ERA) and on health & safety grounds (contrary to s.44 of the ERA) by his employer (hereafter referred to as the 2016 claim – see SEH Tab A5).

96. The first two respondents were dismissed from the proceedings and Berkeley Homes (Urban Renaissance) Ltd (hereafter referred to as "Urban Renaissance") substituted at a preliminary hearing on 6 January 2017 (SEH p.297) because it was asserted by the employer that that was the identity of the correct employer. The claims as a whole were struck out by EJ Bedeau following that preliminary hearing on 6 January 2017 and Kerr J dismissed the appeal against that judgment on 26 February 2019 UKEAT/0005/18 (SEH p.325 and following). The decision to strike out that claim turned upon a finding by EJ Bedeau that there was no reasonable prospect of the claimant succeeding in his argument that he had been subjected to a detriment in relation to the last act in time and, otherwise, the claim was out of time so that the employment tribunal did not have jurisdiction to consider it. I take into account the whole of the reasoning of EJ Bedeau (SEH: 5 page 297 and following) but, in particular, note that that allegation is recorded in paragraph 9 of his reasons as being "persistent refusal to release his personal data despite his subject access request" and is said to be dated 9 October 2015.

97. The claimant also presented another claim against the present respondent (the 2017 claim - SEH Tab A6) purporting to rely upon the same early conciliation certificate. By the 2017 claim he referred to "new evidence" and said that he now believed that he was the victim of racial discrimination (paragraphs 2 to 4 of SEH page 348) in addition to repeating the complaints under s.47B and s.44 of the ERA. This was rejected by EJ Bedeau on 28 December 2017 (SEH page 365).

98. An appeal to the EAT (UKEAT/0110/18) was dismissed at a full hearing heard consecutively to UKEAT/0005/18 (SEH page 380 - judgment handed down on 8 March 2019) on the basis that, although EJ Bedeau should not have rejected the second claim under r.12(1)(c) of the Employment Tribunal Rules of Procedure 2013, he had been bound to reject to claim under r.12(1)(b) as an abuse of process because "the second claim sought to relitigate the struck out first claim and to litigate a new race discrimination claim which could and should have been litigated, if at all, in the first claim." (paragraph 60 of the judgment of Kerr J SEH p.400) Leave to appeal to the Court of Appeal was refused (SEH A:6 p.483).

99. There is an issue about which of the companies within the Berkeley Group was the claimant's employer. As I say in paragraph 96 above, Urban Renaissance was substituted for the present first respondent and Berkeley in the 2016 Claim before that claim was struck out. The claimant told me that he had consented to that at the time and had not then been aware that Urban Renaissance was a dormant company.

100. It is clear that it is an issue about which the claimant feels strongly. Mr Williams accepted that, were the claims or any part of them to proceed to a final hearing, the identity of the claimant's employer would be an issue to be decided by the Employment Tribunal. At this stage, it is not relevant to the applications which I have to decide. This is because the identity of the employer is not relevant to the merits of the claimant's underlying claims and it is the latter with which I am concerned. In particular, the present first respondent, SEH, was originally a respondent to the 2016 Claim and was a respondent to the 2017 Claim so, the arguments about whether the claimant is estopped from bringing the 2018 Claims or

whether they are an abuse of process are not affected by which company was, in law, the employer.

101. The claimant comes across as having a firm conviction that, as he put it, Berkeley are using a dormant company as a front. He relies upon this belief as being special circumstances which would justify him presenting a claim which apparently duplicates earlier claims.

102. The Employment Tribunal has such jurisdiction as is given to it by parliament: it has jurisdiction, subject to the Rules of Procedure, to consider claims presented to it within the applicable time limits which arise out of acts done to the claimant which are unlawful under Employment Law. It is not the forum for a general investigation of the corporate affairs of the Berkeley Group plc or its member corporate bodies or for complaints under the DPA about the response to a DSAR, unless that is separately said to be a breach of Employment Law.

103. The claimant accepts the possibility that Berkeley uses a dormant company for good business reasons (see paragraph 134). The reason relied upon is explained by SEH in paragraph 22 of the Grounds of Resistance for Frist 2018 Claim. There they say that Urban Renaissance employs over 100 people and is a subsidiary of and acts as an agent for Berkeley Homes plc. As a consequence, it is said, the transactions of Urban Renaissance are recorded in the accounts of Berkeley Homes plc and there is a disclosure to that effect in the accounts of Urban Renaissance. Berkeley has confirmed that any of the three companies involved would be able to meet any award that might eventually be made in the claimant's favour (SEH: page 36 paragraph 26).

104. Given that Berkeley has confirmed that any award against any of the three companies involved would be satisfied and the fact that the Employment Tribunal's jurisdiction is limited to the enforcement of the claimant's rights in Employment Law, I am of the view that identity of the claimant's employer is not relevant to the decision before me.

105. It is clear that Kerr J was aware of the complaint about Urban Renaissance being a dormant company (paragraph 17 of his judgment in UKEAT/0110/18 SEH: 7 page 388).

106. I understand the claimant to argue that his discovery of what he believes to be the use of a dormant company as a front justifies presenting the 2018 Claims and I shall consider that argument below.

107. Against that background, an abbreviated relevant chronology is:

22.09.2014	Start of C's employment	
3 and 12.11.14	Dates of the alleged qualifying disclosures	A: 5 page 299
13.02.2015	C's dismissal	
24.07.2015	C's 1st DSAR	A: 5 page 303 para.36
5.1.2016	2016 claim presented	A:5 p.277
6.1.2017	C's application to amend 2016 claim	A:5 p.297

	refused. 2016 claim struck out	
6.12.2017	2017 claim presented	A:6 p.342
28.12.2017	2017 claim struck out under r.12(1)(c)	A: 6p.365
29.3.2018	Berkeley notifies C that there are some additional documents which have been discovered. They are sent by email and post.	A: 8 p.486
3.4.2018	R delivers some documents to C as additional DSAR response	A: 8 p.485
3.4.2018	EC Day A in 1st 2018 claim	A: 1 p.25
19.04.2018	C requests details from AKSL of the identity of the company who paid for his training during his employment	A: 2 p.166
20.04.2018	C is informed that Berkeley Homes (Central London) Ltd paid for his training	
22.04.2018	C emails AKSL asking for a copy of the invoice	A: 11 p.680
25.04.2018	ASKL forwards the 22 April 2018 email to Berkeley	
25.04.2018	C is informed by AKSL that his request for a copy of the invoice has been sent to Berkeley Group plc	
28.4.2018	C makes DSAR request of AKSL	A: 11 p.681
3.5.2018	EC Day B in 1st 2018 claim	A:1 p.25
3.5.2018	ET1 in 3306927/2018 presented (1st 2018 claim)	A: 1 p.1
22.06.2018	ET3 in 1st 2018 claim presented	A: 1 p.27
26.8.2018	C's 2nd DSAR directed to the Berkeley Group plc	Page 637D
05.09.2018	ET in 2303263/2018 presented in London South (2nd 2018 claim) against SEH, AKSL, Ms Oldbury-Davies, Mr Edgar and Mr Michaels.	A:2 p.67
5.10.2018	C submits "Complete and Original Particulars of Claim" in the 2nd 2018 Claim alleging that some parts of the claim included with the submitted ET1 appeared to have been truncated	A: 2 p.92
20.10.2018	ET3 of Ms Oldbury-Davies	A: 2 p.149
25.10.2018	ET3 of the Berkeley respondents	A: 2 p.128
8.3.2019	EAT judgments dismiss appeals against the striking out of 2016 claim and confirm the decision to strike out the 2017 claim on different grounds (r.12(1)(b))	A: 5 p. 325 and A: 6 p.380
22.07 .2019	CA (Bean LJ) refuses leave to appeal against decisions of Kerr J	A: 8 p.483

108. In addition to the above, the procedural chronology of the present proceedings in relation to the Berkeley respondents, ASKL and Ms Oldbury-Davies includes that the second 2018 Claim was listed for a preliminary hearing on 28 January 2019 (which was not heard due to lack of judicial resource) at which SEH indicated that it would seek for it to be transferred to the Watford Employment Tribunal to enable common case management of the other claims presented by the claimant against it. This was renewed on paper and it was transferred from the London South ET on 8 March 2019.

109. After a preliminary hearing was postponed because not all respondents had been notified of the hearing, it was re-listed for 17 April 2019 but vacated as that was inconvenient for the claimant and a subsequent relisted for 6 September 2019 was vacated in the light of EJ Foxwells' suggestion that the claims should be consolidated. The 24 January 2020 hearing (together with the other claims presently before me) was then conducted by EJ Lewis following which the open preliminary hearing was listed for 14 to 16 July 2020.

110. The First 2018 Claim: In broad terms, by this claim the claimant alleged automatic unfair dismissal for the reason or principal reason that the claimant had made a protected disclosure of information, pre and post termination detriments on grounds of protected disclosure and pre and post termination detriments on health and safety grounds (SEH 1: p.23 paragraphs 128 to 134). On the face of the 1st 2018 claim it appears that the claimant is setting out to rely upon new evidence which emerged on 3 April 2018 that has led him to believe that he was a victim of concealment and malicious falsehood because he made a protected disclosure (SEH: A1 p.7 paragraphs 7 & 8).

111. The respondent defended on a number of bases including that the claim seeks to raise issues which either had already been raised and determined in previous Tribunal proceedings or could and should have been litigated in those proceedings and therefore should be struck out as an abuse of process. Secondly, the respondent argued that the claim was out of time and the Tribunal had no jurisdiction to consider the claim. Thirdly, to the extent that the claimant sought to complain about a Data Subject Access Request response (hereafter DSAR) which the respondent had given on 3 April 2018 (A: 1 p.38 para.35), he had applied to amend the 2016 Claim to include the alleged failure to disclose the same documents it so it was an abuse of process to seek to raise new detriments both in the 2016 claim and by issuing a new claim. Furthermore, the respondent responded to the claims on their merits.

112. **The Second 2018 Claim**: The claims listed by the claimant on this ET1 are set out on SEH: 2 p.72 and, in broad terms allege the same types of claims alleged in the First 2108 Claim as well as breach of contract, racial discrimination. Additional respondents were AKSL, Ms Oldbury-Davies, Mr Edgar and Mr Michaels. The rider to the Second 2018 ET1 sets out substantially the same allegations as in the rider to the First 2018 ET1 (I return to a more detailed analysis of the similarities and differences below). As against Mr Edgar and Mr Michaels, the allegations are that Mr Edgar failed to disclose to the claimant in 2015 an email dated 9 September 2014; failure to disclose an email dated 24 November 2014 and failure to disclose the minute of a meeting referred to in the email of 9 September 2014 (SEH: 2 page

88 & 89 paragraphs 150 to 154 and SEH: 2 page 90 to 91 paragraphs 185 to 190) and concealment of notes allegedly made by Mr Michaels (SEH: 2 p.89 paragraph 157). The subsequent email to the Tribunal on 5 October 2018 (SEH: 2 page 92) makes clear that these are the entirety of the allegations made against Mr Edgar and Mr Michaels.

113. **The response of the Berkeley respondents to the 2nd 2018 claim** is set out in grounds of resistance at SEH: 2 page 135 and following. In essence, they argued that almost all of the Second 2018 claim duplicated the First 2018 Claim and should be struck out. They referred to their defence of the First 2018 Claim and, in paragraph 7 and 8 and the Appendix to the grounds of resistance (SEH: 2 page 145), analysed the extent to which they perceived the Second 2018 Claim as being different to the First.

114. The substantive defence to the allegations raised against Mr Edgar and Mr Michaels is at para.18 and following (SEH: 2 page 140). First, the Berkeley respondents correctly note that the Employment Tribunal has no jurisdiction to consider a complaint about a response to a DSAR under the Data Protection Act 1998. Secondly, they argue that any ongoing failure to provide documents in response to the claimant's DSAR as an ongoing detriment as a result of alleged protected disclosures are misconceived and out of time. Among the matters relied upon for that submission is the fact that the email dated 9 September 2014 which was belatedly disclosed was originally sent to the claimant's personal email account and had been sent by the claimant to SEH on 11 July 2018. The factual basis for the allegation of detriment was therefore within the claimant's knowledge much earlier, he could have raised the issue before and was out of time for the purposes of s.48(3) of the ERA. The DPA 1998 (the then applicable Act) gives a right to obtain data, not documents and all the data in the email of 9 September 2014 had been provided to the claimant already as part of the response to his DSAR in September 2015. Finally, persistent refusal to release his personal data had previously been raised within previous litigation.

115. The allegation that there has been a breach of contract was argued to be misconceived and out of time. It is relevant for these purposes that it was argued that any claim which could have arisen out of the contract of employment between the claimant and SEH, and been outstanding on termination of the claimant's employment would have been over three years out of time by reason of Art. 7(c) of the Extension of Jurisdiction Order.

116. Alternatively, the Berkeley respondents indicated an intention to apply for deposit orders against the claimant on the basis that the claims had little reasonable prospects of success.

117. Mr Williams repeated these arguments in his skeleton argument (hereafter referred to as R1SA), which he developed orally on 15 July 2020 and (briefly) on 1 December 2020. In summary, he argued that the majority of the claims which the claimant sought to bring by the First and Second 2018 Claims were an abuse of process because they had or ought reasonably to have been litigated in earlier litigation. He pointed to a full analysis which had been carried out of the degree of

overlap of the claims in tabular form (appended to the R1SA SEH page 31). The only allegedly unlawful acts which were introduced by the First 2018 Claim (and which were not found in the 2016 or the 2017 claim) were the following:

a. An allegation that an employee of SEH had subjected him to a detriment in November 2014 but giving him the wrong shirt size and had then tried to conceal this. On 29 March 2018, Berkeley had sent the claimant a copy of emails originally sent to him at his home email address which had been revealed by a new search in circumstances explained in the letter at A: 8 page 486. These emails include one (filling in the blanks in the claimant's case somewhat) at A: 8 page 488 in which the claimant mailed the colleague and told her his clothing sizes.

b. A complaint that the claimant had suffered a detriment in that SEH had deliberately concealed certain emails which were then provided as part of the above additional DSAR response on 29 March 2018.

c. A complaint that the claimant was reported for having taken a long lunchbreak.

118. Turning to the Second 2018 Claim, the only matters concerning the Berkeley respondents which were introduced by the Second 2018 Claim were, argued Mr Williams, the following:

a. Claims against Mr Edgar and Mr Michaels;

b. Three new paragraphs (paras. 104, 154 and 198).

119. He argued that the two 2018 Claims in respect of the Berkeley respondents were *res judicata* and abuse of process either because of cause of action estoppel, issue estoppel or the rule in Henderson v Henderson. In relation to the respondents not previously sued, the rule in Henderson v Henderson could be invoked: relying upon Johnson v Gore Wood & Co [2002] 2 AC 1 as explained in Dexter Ltd v Vlieland-Boddy [2003] EWCA Civ 14 at para.49 to 53. The nub of his argument is found in paragraph 59 of the R1SA. Essentially, he argues that the reasoning of Kerr J by which the 2017 claim was rejected must apply to both 2018 claims at least to the extent that they duplicate the 2017 claim for reasons which are expanded in paragraphs 65 to 70 of the RSA (in relation to the First 2018 Claim) and paragraphs 71 to 75 of the RSA (in relation to the Second 2018 Claim).

120. In relation to the First 2018 Claim he described these as the concealment issue; the wrong size shirt issue and the lunchbreak issue. He argued that the claimant had no reasonable prospects of showing that he had suffered a detriment in relation to alleged concealment of emails for reasons set out in paragraph 67 & 68 of the R1SA; the wrong size shirt issue was out of time for reasons explained in paragraph 65 of the R1SA and the lunchbreak issue could not succeed because, properly understood the actions could not amount to a detriment and had, in any event, been raised with the 2016 Claim (paragraph 66 of the R1SA).

121. In relation to the Second 2018 Claim, Mr Williams acknowledged that the claimant had ticked the box (A: 2 page 72) denoting a race discrimination claim but that had

been included in the 2017 Clam and struck out by Kerr J as an abuse of process. As to the claims against Mr Edgar and Mr Michaels, he argued that this was an instance of the rare cases where the claim should be struck out, despite the two claims being against different parties, because the action was oppressive or an abuse of process: Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 UKSC. He argued that that test was met in the present case because the allegations simply related to the alleged failure to provide documents in response to a DSAR. This could not be a detriment for reasons explained by EJ Bedeau in striking out the 2016 Claim and Kerr J in upholding that decision – both of whom had been aware that the claimant had not been provided with all the documents that he wanted. The DSAR had not been addressed to a named individual and the claimant did not allege that it had been (A1 page 109 paras.185 – 190). The allegations there relate to the same allegations in earlier claims. The claims arise out of the claimant's employment with Berkeley and Mr Edgar and Mr Michaels were at the time employees or non-statutory directors of SEH who was, therefore vicariously liable for their actions. The claimant could have known that the documents were missing when he made his 2016 or certainly his 2017 claim and there was no reason why he could not claim against them in those. To bring the claims now more than 3 years later when he had previously brought 3 claims against his employer was clearly oppressive. The substance relates to at least one email that the claimant has always had in his possession because it was sent to his personal email address. In those circumstances, it could be inferred that the claims were oppressive.

122. An alternative argument was made that the claims should be struck out under rule 37(1)(b) on the basis that the manner in which the proceedings have been conducted by the claimant has been scandalous, unreasonable, or vexatious. Full submissions on that were set out in Section E of the R1SA. The same arguments were made in support of the Berkeley respondent's costs application.

123. He went on to argue that any claims which were permitted to proceed should be subject to a deposit order. He also argued, in particular in relation to claims which were struck out by reason of cause of action estoppel and issue estoppel that they were bound to fail and should be certified totally without merit: Nursing & Midwifery Council v Harrold (No 2) [2016] I.R.L.R. 497 para.127 to 129 & 139.

124. The claimant started his oral submissions on 15 July 2020 by stating that twice the Berkeley respondents had released additional documents, in April 2018 and just before the hearing at the EAT. A series of emails was added to the bundle by consent at his request - SEH: 10 page 637A to 637C. He had made his second DSAR (to the Berkeley Group plc) and the Berkeley respondents had had the right to say that it was vexatious but [instead] had agreed to comply with it. He had mentioned specific documents which were not disclosed and the First 2018 Claim was about those specific documents which had not been disclosed. He agreed that those were, specifically, the documents at SEH: 8 page 510 (which advises him to keep the receipt for CSCS test because it would be covered by "St Edward") and 512 (in which there is an exchange between two undisclosed individuals one of whom notes that the claimant had been out in his car during the lunchbreak).

125. When he had been provided with further documents Berkeley had not released all: a note made by Mr Michaels had still not been released (see the email at SEH: 10 page 637C for the respondent's response on this point). He argued that EJ Bedeau had not made a binding finding in this regard because he had made an assumption. It seems to me that the claimant was probably referring to para.52 of the judgment of EJ Bedeau (SEH: 5 page 305) where he referred to a statement by the Berkeley solicitor that Mr Michaels could not recall making notes but, if he had and they were found then they would be sent to the claimant and then continues "… no such notes were sent to him. The conclusion to be drawn from that being that they were not found."

126. In fact, argued the claimant, referring to his paragraphs 185 to 190 of the 2nd 2018 Claim (SEH: 2 page 109), there had been a failure to disclose the email of 9 September 2014 (which was an outline offer of employment added to the bundle). In the light of the email from the Berkeley respondent's solicitors of 8 August 2018 at page 637C, I asked what showed that the documents which he claimed to be concealed, still existed. He had been present at the meeting with Mr Michaels when the notes were written (para.188). The reason why the claimant argued that there had been a failure to disclose the email of 9 September 2014 was that he had disclosed other emails between them sent to the claimant's personal account and that hadn't been disclosed "as it would reveal my true employment" which caused the claimant to conclude that the failure to disclose it had not been an oversight.

127. The claimant argued that the claim could not be out of time since the documents were still being withheld. As to the question of whether he suffered a detriment by reason of the concealment, he argued that even if there was no detriment suffered at the time of the strike out of the 2016 Claim, if new information should that the Berkeley respondents are deliberately holding back documents then that was detrimental to him, he argued.

128. He accepted that a full disclosure was not always possible and that everyone was human but argued that the documents being withheld were key documents and therefore this was not a case of incompetence or being overwhelmed by work: these were deliberate actions and the email of 9 September 2014 was specifically withheld because the Berkeley respondents had withheld all the others.

129. He accepted that he had realised at the time of the response to his first DSAR that that email of 9 September 2014 had not been disclosed but argued that the issue of his true employer had not been so crucial at that time. He had accepted the substitution of respondent at the preliminary hearing before EJ Bedeau but when he had discovered that they were using a dormant company as a front he had gone back and realised that the failure to disclose was not human error, it was deliberate.

130. The claimant referred to the argument raised by Mr Williams in the respondent's PTA Statement (SEH: 6 page 455 to 457) and secondly rejecting the claimant's assertion that evidence should have been heard on the appeal against the rejection of the 2017 Claim. He did not accept that: a claim should not be struck out as an abuse of process without careful consideration. He referred to Manson v Vooght No 1 [1998] 11 WLUK 21 CA in which it was said to be axiomatic that the court will not strike an action out as an abuse without much careful consideration.

Why could Kerr J not have heard evidence? It was an appeal and there had to be clear evidence, perhaps from Mr Michaels as to whether the notes did exist. He, the claimant, had been told that the notes were being taken and that was why he disputed the Berkeley respondent's assertion that they did not exist.

131. He also referred to Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482 @ 1492H and the dicta of Auld LJ that,

> "In my judgment mere "re"—litigation, in circumstances not giving rise to cause of action or issue estoppel, does not necessarily give rise to abuse of process. Equally, the maintenance of a second claim which could have been part of an earlier one, or which conflicts with an earlier one, should not, per se, be regarded as an abuse of process."

132. I should note, he argued, that specific circumstances may negate or excuse what would otherwise be an abuse. He then outlined the specific circumstances which he argued meant that it was not an abuse in his case. He drew attention to the fact that all of the cases he had presented he had asked for one thing – disclosure. Mr Baines had asked about the many cases which the claimant had withdrawn: he had withdrawn after there had been disclosure. If there was disclosure he was willing and ready to withdraw without taking money from anyone. It was at this point that he recounted the incident to which I refer in paragraph 7 of my record of the hearing of 15 July 2020 (SEH: 11 page 777). See also the CSA paragraph 2.

133. The connection with disclosure was that he had been falsely accused of theft while at boarding school and corporal punishment was administered but disclosure of a visitors log had vindicated him. It was following this incident as a schoolboy that he had been subjected to conduct which he detailed in his application for a postponement of the hearing of 15 July 2020 (see the application dated 13 July 2020 at A: 11 page 751). His explanation in the CSA is that, when having to address issues of disclosure, he suffers depression and flashbacks which cause the difficulties with attendance and presenting his case. He also seemed to be arguing that these personal circumstances to him were specific circumstances which meant that there was no abuse of process in his case.

134. He continued to allege that the Berkeley Group uses dormant company as a front. He acknowledged that there may be good business reasons for doing so but he believes that they are doing so to avoid liability and that, he argued, would quality as special circumstances. It was at this point that it became necessary to suspend his submissions and, eventually, the hearing in circumstances explained in paragraph 8 to 10 of the record of hearing sent to the parties on 16 July 2020.

135. When the claimant resumed his response to the Berkeley respondent's applications on 1 December 2020, I asked him why he had not presented the previous 3 claims against Mr Edgar and/or Mr Michaels. His answer was that Mr Michaels had had a second opportunity to release the notes and was refusing to do so. Following correspondence which started in July 2018, he had received an email dated 4 September 2018 from Goodman Derrick (solicitors for the Berkeley respondents) in relation to his DSAR. Ms Gilroy-Scott was in tribunal and was able to locate the relevant exchange of emails in her correspondence bundle which was then added to the bundle at pages 637 DD to H with the email dated 4 September 2018 at page 637 F & G. This had caused the claimant to believe that the

respondents were not going to disclose more information to him; the letter insinuated that he wasn't going to get the note. This correspondence was a different event and when it turned out that it was true (that he did not receive the notes) he put in the claim on 5 September 2018.

136. So far as Mr Edgar was concerned, the reason why he had been joined was the information from Ms Oldbury-Davies and AKSL that Berkeley Homes (Central London) Ltd had paid the invoice. Mr Edgar had been told of this particular email and that was a series of continuous acts.

137. He returned to this point later saying that the Second 2018 claim was based upon the series of emails starting at page 637A, especially that of 4 September 2018, following which he had put his claim in on 5 September. This was based upon a different event from the other 2 cases.

138. I asked the claimant whether he agreed or not with Mr Williams' analysis of the similarities and differences between the 4 claims against SEH. He stated that he had not been able to check that because the Legal Centre had not been open during the pandemic in order for him to take advice.

139. A claimant should take steps to protect himself, he argued, by issuing separate proceedings in respect of a new claim as well as applying for permission to amend an original claim: Chandra v Brooke North [2013] EWCA Civ 1559 para 69. Where the new claim for which the claimant permission to amend is arguably out of time then issuing a new claim would protect the position. The paragraph relied on continues "If permission to amend is granted, then the second action can be allowed to lapse. If permission to amend is refused, the claimant can pursue his new claim in the second action. The two actions will probably be consolidated and the question of limitation can be determined at trial."

140. He addressed the arguments relied upon by the Berkeley respondents to argue that he had conducted the proceedings in an abusive manner. The argument (R1SA para.80(f)) that he had provided inaccurate information to the Tribunal on 4 December 2016 when he had written (A: 10 pages 617 – 619) setting out his reasons for his application for early disclosure of documents and stated that this was a direction of HH Judge Eady QC (as she then was) had been a misunderstanding of what the learned judge was saying (SEH: 10 page 619A). He thought she was saying he should give his reasons for wanting early disclosure and accepted that he should not have used the word "direct".

141. Where they complained about repeated applications which he is alleged to have made he asked whether they had identified which ones? He thought that in the present proceedings he had perhaps made one application. The application for costs on the basis of unreasonable conduct of the proceedings should relate to the conduct of these proceedings alone. When the Berkeley respondent referred to a lot of proceedings, they were talking about the 2016 claim. They had raised it as a reason why the Employment Judge should not exercise his discretion in the claimant's favour in the 2016 claim.

142. In relation to the application for costs first he argued that the respondent should have taken steps to mitigate their losses and he had not heard anything which suggested that they had done so.

143. Mr Williams accepted that, to an extent, his submissions on the application to strike out under r.37(1)(b) and the application for costs had relied upon unreasonable conduct of proceedings other than those with which I am concerned. However, he did not withdraw the applications, pointing to the correspondence of 14 November 2020 at SEH page 905 as an example in which the claimant wrote to the in house solicitor for Berkeley (copied to Ms Oldbury-Davies) alleging that Ms Oldbury-Davies and Ms McClelland both know that the invoice disclosed by Ms Oldbury-Davies falsely purported to show that Berkeley Homes plc paid for his training and that he would report Ms McClelland to the Solicitors Regulatory Authority when the truth came out if Ms Oldbury-Davies did not admit that the invoice was a fake.

144. In response to that the claimant said how could it be said to be unreasonable conduct of the proceedings simply to point out that someone was breaking the law. If it were true that Ms Oldbury-Davies was not misleading the Tribunal then he would not be able to publish the allegation. He asked what evidence he needed to provide because he was simply pointing out that someone was breaking the law and another person was complicit in it.

Decision on the applications under r.37 and r.39 by the Berkeley respondents

145. I start with the question of the reliability of the table of paragraph references in the claimant's four Tribunal claims. First, I note that the documents used are plainly referenced so that the claims about overlap can be verified. Secondly, the Berkeley respondents have taken account of the "amended rider" which the claimant sought to rely on in his 2016 claim.

146. It should be pointed out that the Berkeley respondents have clearly stated their case on this from as long ago as their grounds of resistance to the Second 2018 Claimant where (at paragraphs 6 to 8 on A: 2 page 137) they set out what they believe to be "new (or differently worded)" elements of the Second 2018 Claim – although they argue that those elements should still be struck out. The also appended a table setting out their case on the degree of overlap between the First and Second 2018 Claims.

147. The claimant has therefore had since 25 October 2018 (when the ET3 of the Berkeley respondents was presented) to take issue with the overlap they alleged that there was between the first and second 2018 claims (which were also stated to be liable to be struck out as abuse of process). He has had since 27 March 2020 (the date of R1SA) to consider the degree of overlap alleged to be between the 4 claims. The closure of the Legal Centre, though doubtless an inconvenience to the claimant, would not have prevented the claimant from checking for himself whether Mr Williams' statements as to the extent of the novel claims was accurate or not.

148. In any event, I can see from reading through the four claim forms and addenda that the extent of the overlap is as alleged. I also have had the benefit of the

claimant's explanations of his reasons for bringing the two 2018 claims which point to the allegations which he regards as being new.

149. I remind myself of the dicta of Lord Sumption JSC in Virgin Atlantic paragraph 25 (page 185G of the report at [2014] AC 160) where he said that "*Res judicata* is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers." And in paragraph 26 "Where the existence or non-existence of a cause of action has been decided in earlier proceedings, to allow a direct challenge to the outcome, even in changed circumstances and with material not available before, offends the core policy against the re-litigation of identical claims."

150. It is quite clear that all of the complaints found in paragraphs in the First and Second 2018 Claims which duplicate paragraphs found in either the 2016 Claim or the 2017 Claim are *res judicata*. The non-existence of those causes of action has been decided in the 2016 and 2017 proceedings, which were appealed unsuccessfully and the rights to appeal are exhausted.

151. I therefore accept that the only aspects of the First and Second 2018 Claims which are not caught by the first of the Lord Sumption's five categories (see paragraph 17 of Virgin Atlantic) are the following:

    a. An allegation that an employee of SEH had subjected him to a detriment in November 2014 but giving him the wrong shirt size and had then tried to conceal this (paras.36 to 40 – SEH A:1 page 16).

    b. A complaint that the claimant had suffered a detriment in that SEH had deliberately concealed certain emails and notes made by Mr Michaels of a meeting which were then provided as part of the above additional DSAR response on 29 March 2018. (paragraph 76 on SEH A: 1 page 19 ; paragraph 121 SEH A: 1 page 23; paragraph 125 to 127 SEH A: 1 page 23)

    c. A complaint that the claimant was made to look as though he had taken a long lunchbreak. (paragraph 122 SEH A: 1 page 23)

    d. Claims against Mr Edgar and Mr Michaels (paragraphs 185 to 190, SEH A: 2 page 90 to 91);

    e. Three new paragraphs (paras. 104, 154 and 198).

152. The wrong size shirt allegation is raised against an individual who was the subject of different previous allegations (para.41 & 46 SEH A: 1 page 17). On 29 March 2018, Berkeley had sent the claimant a copy of emails originally sent to him at his home email address which had been revealed by a new search in circumstances explained in the letter at A: 8 page 486. These emails include one (filling in the blanks in the claimant's case somewhat) at SEH A: 8 page 488 in which the claimant mailed the colleague and told her his clothing sizes. It is patent that the relevant information to bring a complaint about the provision of the wrong size shirt would have been known to the claimant at the time he presented the 2016 Claim: assuming the facts to be as he alleges them, he knew that he had been issued with the wrong shirt size; that he had emailed the colleague with his correct sizes, he knew that the emails in question had not been disclosed within the first DSAR

response. The circumstances of SEH notifying him that another search has revealed the existence of the document did not provide him with the knowledge he needed to bring a complaint based upon this incident at the same time as the other complaints against this individual. Both the facts of the alleged act and the evidence from which he sought to infer motivation (the failure to disclose in the first instance) were known to him in 2015 (see para.40 of the judgment of EJ Bedeau at A:5 page 303). This seems to me to be something which quite clearly could and should have been raised in the 2016 Claim.

153. In relation to the allegation of the concealment of emails and alleged notes by Mr Michaels in the First 2018 Claim, the claimant confirmed these to be SEH page 510 (an email send to him on 23 September 2014 in which he is advised to keep the receipts when booking with the CSCS test because "costs will be covered by St Edward") and SEH: page 512: an email between two redacted names dated 26 November 2014 reporting (essentially) that the claimant had taken a long lunch break. He also complaints about the failure to disclose Mr Michaels' notes.

154. If the complaint at paragraph 123 of the First 2018 Claim is about the sending of the email itself and a failure to investigate the incident, then I agree that there are no reasonable prospects of the claimant showing that the sending of an email which resulted in no action whatsoever being taken by his employer is a detriment within the meaning in Shamoon. To that extent, the complaint has no reasonable prospects of success.

155. The claimant made an application for reconsideration of the judgment of 6 January 2017 striking out his claim in reliance upon the disclosure of the two emails at pages 510 and 512 (see paragraph 3 and 6 of the reconsideration judgment of EJ Bedeau at SEH A: 5 page 319). The argument then appears to have been that EJ Bedeau was inaccurate in his previous conclusion that all correspondence had been disclosed as demonstrated by the additional disclosure. It seems that the claimant was arguing that this suggested that the conclusion that there was no persistent refusal to disclose was assailable.

156. If it is argued by the respondent that there was an application to amend to rely upon the failure to disclose these documents as detriments within the 2016 claim then I do not think that is what is revealed by the judgment. EJ Bedeau declined to reconsider his strike out judgment because there was at that stage a live appeal in which the April 2018 disclosure of documents was relied on as evidence that he had been subjected to a detriment by not being provided with all of the documents requested as part of his DSAR (see para.12 of the reconsideration judgment of EJ Bedeau at SEH A: 5 page 320).

157. Kerr J refers to this in paragraphs 49 to 51 of his judgment in UKEAT/0005/18 (SEH A: 5 page 339 to 340) where he states as follows:

    a. The finding of EJ Bedeau that Mr Wall's conduct in disclosing only some information to the claimant "could not be described as 'persistent refusal' was a finding that the claimant had no reasonable prospect of showing persistent refusal";

b. That finding is not flawed by any error of law. "It is plain that his case below was that the deliberate failure to act comprising this detriment was a conscious refusal to disclose documents to the claimant to which the respondent believed he had an entitlement under the Data Protection Act 1998. The claimant was not relying on an innocent failure in good faith to disclose documents which the respondent did not consider itself obliged to disclose."

c. The claimant was not assistant by pointing to the content of recently disclosed documents. That did not help the learned judge to decide whether EJ Bedeau erred in law in the way he approached his decision. However, "It does not follow that any content in those subsequently disclosed documents that might favour the claimant's then case demonstrates either an error of law in the treatment of the detriment issue or an absence of good faith on the part of Mr Wall or anyone else dealing with the subject access request at the time."

158. My conclusions on the April 2018 disclosure of pages 510 and 512 are:

a. The claimant did not apply to amend the 2016 claim (after the judgment) to allege that there was a continuing detrimental act extending up to 3 April 2018 of persistent failure to disclose emails or failure to disclose those specific emails;

b. Kerr J did not take those emails into account in deciding whether EJ Bedeau's finding that there were no reasonable prospects of the claimant successfully showing that there was a persistent failure to disclose documents was flawed by any error of law.

c. The sentence quoted in paragraph 157.c. above could be read as a conclusion that it could not be inferred that the late disclosed documents themselves demonstrated a lack of good faith in dealing with the subject access request. In any event, there has been a decision on the issue of whether the claimant has no reasonable prospect of succeeding in showing that he suffered a detriment in relation to failure to disclose documents prior to 9 October 2015 and that is an issue which would also be under consideration when considering whether the documents disclosed on 3 April 2018 showed that there had been a persistent failure to disclose prior to that date. On that basis I accept that, in effect, the claimant is seeking to relitigate an issue which has already been decided and that is an abuse of process.

d. In any event, it is clear to me, as it was to EJ Bedeau and Kerr J, that the claimant is relying upon a conscious and persistent failure to disclose documents. The Respondent has put forward an explanation in the letter of 29 March 2018 for how the then recently disclosed documents came to be found. It is relevant that the solicitor in 2015, Mr Wall, had provided reassurance in respect of a search which subsequent events proved to be imperfect. The fact that the overwhelming majority of the disclosure sent on 3 April 2018 was innocuous is consistent with the explanation given for its discovery.

e. For those reasons, even if this is not a point on which Kerr J expressed a concluded view (since whether there had been a different ongoing detriment up to 3 April 2018 was not, expressly, part of the 2016 Claim) I am of the view that there are no reasonable prospects of the claimant showing that the failure to disclose pages 510 and 512 prior to that date was a persistent or deliberate failure to disclose documents on the part of the respondent. I am able to reach that conclusion, even without evidence from the respondent on this point because I cannot see the claimant's case becoming stronger on this. It is worth noting that the complaint is about the obligation to comply with the DPA 1998, to disclose data and to undertake a reasonable and proportionate search. Although I do not lightly come to the conclusion that a particular contention has no reasonable prospects of success, neither should a claimant be permitted to continue with litigation in the hope that something may turn up in cross-examination.

159. I deal with the alleged failure to provide the notes allegedly taken by Mr Michaels in the dismissal meeting below.

160. It is true that paragraph 108 has been identified as a new paragraph. In that paragraph the claimant alleges that Urban Renaissance was and still is a dormant company. However, the allegation that Urban Renaissance was dormant and that the company had misled EJ Bedeau in this respect was part of the 2017 claim (compare A: 6 page 363). I take paragraph 113 (the complaint that an unclear copy of his payslip was inserted into the bundle for the 6 January 2017 preliminary hearing) to be particularisation of this allegation.

161. It is clear from paragraph 17 of the Judgment of Kerr J in 2017 Claim that this was relied upon before him as an allegation of race discrimination and as being the reason why he had brought the 2017 claim. Furthermore, this is recorded as being one of his arguments before the EAT (paragraph 35 of the judgment of Kerr J). The new information that came to light in November 2017 (there must be a typographical error in the judgment) was "that research into the Respondents' corporate structure had revealed to him that [Urban Renaissance] was dormant and not trading". The claimant took issue with Kerr J's statement (paragraph 59 of the judgment) that the claimant could have found out sooner whether Urban Renaissance was dormant – that was how I understood his argument that actually focused upon a passage in the SEH response to his application for leave to appeal to the Court of Appeal against the judgment of Kerr J. That question is closed, the application to the Court of Appeal having been unsuccessful. However, it demonstrates that the claimant was aware at the time of presenting the 2017 Claim that Urban Renaissance was a dormant company and relied upon it as the reason why he had presented that claim.

162. In reality, the discovery of the invoice from AKSL and disclosure of the email from SEH (page 510) added nothing to his knowledge about the respondent's actions insofar as they were relevant for a Tribunal claim. They would probably, had the claim gone to hearing, have been evidence relevant to the issue of who the employer was. Even if the claimant has a viable claim based upon the fact of his titular employer being dormant – something which seems to me to highly unlikely - that was clearly within scope of the decision of Kerr J who decided that it should be

struck out as an abuse of process. Furthermore, I do not think that it can be said that the structural arrangements of the group are targeted towards the claimant in any way such that it could amount to a detriment.

163. I am therefore of the view that, to the extent that paragraph 108 of the First 2018 Claim seeks to raise a particular allegation, it is a claim that was struck out by the EAT as an abuse of process and that finding is binding upon me. Even were it not, the discovery by the claimant of one email which adds to the mix about which company paid for his training and which might be evidence about the identity of his employer cannot sensibly be regarded as a new act of which he was previously unaware when he relied upon the discovery of the use of the dormant company to distinguish the 2017 claim.

164. For the reasons set out in paragraphs 149 to 160 above, to the extent that the First 2018 Claim is not merely duplication of the 2016 Claim (and therefore *res judicata*), it is an abuse of process because it seeks to complain of matters which could and should have been litigated, if at all, in the 2016 Claim or because there are no reasonable prospects of success.

165. The claims in the Second 2018 Claim against Mr Edgar and Mr Michael are clearly, and are accepted to be, novel to the litigation in the sense that they were not previously respondents to any claim. The allegation that notes made by Mr Michaels at the meeting at which the claimant was told he was being dismissed is made within the First 2018 Claim. I accept that the question for me is whether the claims against them are an abuse of process and that it is for them to show that it is. I note to comments of Clarke LJ that "it is one thing to say that A should bring all his claims against B in one action, whereas it is quite another thing to say that he should bring all his claims against B and C (let alone against B, C D, E F and G) in one action. There may be many entirely legitimate reasons for a claimant deciding to bring an action against B first and, only later (and if necessary) against others." Vlieland-Boddy paragraph 50. I need to adopt a broad merits-based approach and remind myself that the most important question is likely to be whether Mr Edgar and Mr Michael can persuade me that the action against them is oppressive.

166. So far as SEH is concerned, it was noted by Kerr J in paragraph 21 (A: 6 page 389) that the 2017 claim was brought against the same two respondents as in the 2016 claim until a different respondent was substituted.

167. The Berkeley respondents' argument here is that the claimant appears to complain about an ongoing failure to disclose an email dated 9 September 2014 from Mr Edgar to the claimant (at his personal email address) copied to Mr Michaels (page 637B); the minutes of a meeting said to have been referred to in that email, an email dated 24 November 2014 (actually 26 November 2014 at page 512) and the minutes said to have been made by Mr Michaels at the dismissal meeting. They argue that the claimant has already raised a complaint of persistent refusal to release personal data several times over, that the issue of whether SEH has been guilty of persistent default has been decided by EJ Bedeau and Kerr J.

168. Dealing specifically with the notes said to have been taken at the dismissal meeting, on 22 September 2015, the claimant wrote to Joanna McClelland requesting those notes (see EJ Bedeau paragraph 40 at A: 5 page 303). The

respondent's position at the time is set out in paragraph 52 of EJ Bedeau's strike out judgment. The claimant appears to be alleging that, Mr Michaels having had a second opportunity to disclose the notes, did not do so. He included an allegation in relation to the notes in paragraph 127 of the First 2018 Claim.

169. This argument seems to me to be misconceived. It is quite clear that the claimant take issue with the way the respondent and a number of personnel working for them have handled his DSAR but, of itself, that does not provide grounds for compliant justiciable at the Employment Tribunal. The essence of his complaint is that Mr Edgar and Mr Michaels are deliberately withholding documents one of which he has always had and the others he had no reasonable prospects of proving exist but which he first requested before the 2016 Claim was presented.

170. The 2nd DSAR was not directed towards Mr Michaels or Mr Edgar personally and I conclude that the prospects of the claimant showing that they are personally responsible for a deliberate deficiency in response are vanishingly small. The claimant was told on 9 October 2015 that Mr Michaels did not recall making any notes. He was told on 8 August 2018 that they had not been provided to him in 2015 because they were not found and further enquiries since 11 July 2018 led Berkeley to confirm that minutes had not been found. In the case of the allege minutes of a meeting at which the prospect of a job opportunity for the claimant was discussed it was confirmed to him on 8 August 2018 that this was a discussion rather than a formal meeting such as would generate notes or minutes (page 637C).

171. Furthermore, I am of the view that an argument that the claimant was subjected to a detriment by a persistent failure to disclose Mr Michaels' minutes dating 9 October 2015 would be contrary to the finding of EJ Bedeau and Kerr J. The claimant argues that there was no binding finding by EJ Bedeau that the notes were not in existence because it was based upon a presumption. The finding is that the claimant did not suffer a detriment by reason of a persistent failure which is not the same thing.

172. Even so, it cannot sensibly be said that a repeat of the same denial that documents presently can be found (even assuming that the claimant would establish that they had been created) is a new and distinct detrimental act which founds a separate cause of action in these circumstances. As such, as part of the Second 2018 Claim, it would probably be out of time.

173. If I'm wrong about that, for example because there appears to have been a new search in 2018, then I am of the view that there is no reasonable prospect that the claimant will succeed in showing that he has been subjected to a detriment by reason of a persistent and deliberate failure to disclose the documents by Mr Michaels. The email of 9 September 2014 has always been in the claimant's possession since it was sent to his home email address. The email dated 26 November 2014 (page 512) is dealt with above. There is no reasonable prospect of the claimant showing that there has been a persistent failure to disclose documents which are known to be in existence, namely a formal minutes meeting which led to the email of 9 September 2014 being sent or that minutes of the dismissal meeting have been retained.

174. In oral submissions on 1 December 2020, the claimant argued that the email from Goodman Derrick of 4 September 2018 at page 367F - G caused him to think that the documents he had specifically requested would not be provided and that was why he brought the second 2018 Claim. There is nothing in that letter which could be interpreted as a notification that SEH, Mr Edgar or Mr Michaels were deliberately failing to provide to the claimant something to which they knew he was entitled or intended to do so; it is a holding response to his second DSAR. Also, in the claimant's email of 9 August 2018 at SEH page 637DD he says "I simply do not believe Alan Edgar and Alan Michaels. I could have to name them in my next claim."

175. I reject the claimant's explanation that the email of 4 September 2018 was the trigger to present the Second 2018 claim and to include Mr Edgar and Mr Michaels in that. It is inconsistent with his email of 9 August 2018. Further, the timing is inconsistent since the 2nd 2018 Claim was presented on 5 September 2018 and there must have been early conciliation before that.

176. There is no satisfactory explanation as to why Mr Edgar and Mr Michaels were not included as named respondents in the First 2018 Claim. There is no satisfactory explanation as to why they were not included in the 2016 Claim if the claimant believes that they should bear individual liability. The claimant knew as much then as he knows now about the Berkeley respondent's position in relation to the notes of the termination meeting, the email offering employment or the notes allegedly taken at a discussion at which offering the claimant a paid job was discussed.

177. The claimant argues that presenting the claims against Mr Edgar and Mr Michaels in the Second 2018 Claim rather than the 2016 Claim was not oppressive and relies upon Chandra v Brooke North to say that it was not an abuse to bring the second claim but was done protect his position. The analogy is not an apt one. He had not applied to amend the First 2018 claim (or, indeed either of the previous claims) to seek to add Mr Edgar and Mr Michaels as individual respondents and then brought the Second 2018 Claim to preserve his position in relation to limitation. It is clear from the chronology that, contrary to the claimant's position, he knew the same information about the respondent's position on the existence and availability of these documents when presenting his 2016 Claim as he did when presenting the Second 2018 Claim. That of 26 November 2014 has no connection with either Mr Edgar or Mr Michaels which can be seen on the face of the redacted letter. The allegation that there was individual liability presumes that there was an obligation on them personally at the relevant time to make the disclosure and that the documents exist.

178. The respondent argues that I can infer that the Second 2018 Claim is oppressive as against Mr Edgar and Mr Michael because of the fact of the claim being brought following three previous claims essentially covering the same facts. I agree that there is no good reason why the allegations against Mr Edgar and Mr Michael, if they had any merit, could not have been brought in the 2016 Claim. Taking all of the above circumstances into account, I am satisfied that the proceedings against Mr Edgar and Mr Michael are oppressive and an abuse of process. Alternatively, there are no reasonable prospects of the claimant showing that there was a post-employment detriment towards him by reason of the acts alleged against them. I am therefore of the view that the whole of the Second 2018 Claim should be struck

out on the basis that it is res judicata or an abuse of process or that there are no reasonable prospects of success.

179. The claim of breach of contract must be presumed to be an alleged unspecified breach of the contract of employment since there is no other potentially relevant contract between the parties. In order to bring a claim within Art.3 of the Employment Tribunal Extension of Jurisdiction (England & Wales) Order 1994, it would have to have arisen or been outstanding on the termination of the claimant's employment. However, any claim that did would have had to be presented within 3 months of the date of termination of employment, subject to the effects of early conciliation, unless it was not reasonably practicable to do so and it was presented within a reasonable further period: Art.7 of the Extension of Jurisdiction Order. Any claim for breach of contract is now, therefore, out of time and I dismiss the same as the Employment Tribunal has no jurisdiction to hear it.

180. I am of the view that it is just & equitable to strike out the whole of the First and Second 2018 claims on the basis that they are *res judicata*, an abuse of process and/or there are no reasonable prospects of success. The claimant argues that there was no abuse because of specific circumstances in his personal life which mean that he is more acutely aware of the importance of disclosure and particularly affected by failings in disclosure. I take at face value the claimant's account of his life events and his emotions and experiences. I am sympathetic to all those suffering the effects of poor mental health. The claimant has disclosed the diagnosis of a particular mental health condition in a 2017 document. It may be that the claimant's world view is affected by a particular health condition and by serious adverse life events. That is only one factor in the matters which I should take into account in deciding whether or not to strike out the claims, given my above findings. I must give considerable weight to the fact that there is no sufficient explanation for the failure to bring the claims at the same time as those presented in 2016. SEH has the benefit of judgment in respect of the vast majority of matters set out in these claims and is entitled to be able to rely on those judgments and not to have to keep relitigating matters which should have been brought at the same time. To issue two additional claims covering almost exactly the same ground as two which have been dismissed by the Tribunal is oppressive. To the extent that the decision is based upon a conclusion that the contentions have no reasonable prospects of success, it is not proportionate that the Tribunal or the respondents should have to spend time and resources litigating claims which are so likely to fail.

181. The Berkeley respondents make an alternative submission that the claim should be struck out pursuant to rule 37(1)(b) on the basis that the claimant's conduct of the proceedings is scandalous, unreasonable or vexatious and strike out proportionate. The same question is one of the bases for the application for costs. As the claimant argued, it is the conduct of these proceedings that should be considered. Much of what is relied upon by Mr Williams occurred during the 2016 or 2017 proceedings. If I am persuaded that the claimant's conduct of these proceedings was unreasonable or vexatious, then it seems to me that the conduct of other proceedings is capable of being relevant to the question of whether a costs order should be made.

182. In relation to the question of whether the claims were vexatious, I repeat what I said in relation to the claims against the PCR respondents in paragraphs 86 above about the multiplicity of claims and the practice of presenting in different tribunals. It seems to me that the claimant's purpose is to obtain disclosure which he believes exists about matters about which he believes he has been told untruths. However, the scale of the SEH claims, the blatant inclusion of matters which have previously been struck out, the disproportionately trivial nature of some of the allegations which are sought to be introduced, relative to the scale of the claims as a whole cause me to conclude that these claims are vexatious.

183. I have discounted the correspondence relied upon which is not in the present proceedings. Even so, it is alleged that there have been elements of unreasonable conduct of these proceedings by the claimant in relation to some of his correspondence and his requests for sworn statements (when none of the claims have reached the stage that any case management orders have been made or orders for preparation of witness statements have been made).

    a. On 6 August 2018 (SEH: 10 page 634) the claimant wrote to the Tribunal and SEH when reading the ET3 in the First 2018 Claim to allege "the Respondent (staff and/or agent) has forced the Training Provider to lie also about who paid for my training. I will be bringing another Claim in respect of that. This is pure concealment!"

    b. I note that on the 9 August 2018 (SEH: page 637DD) he wrote saying that Mr Michaels could provide a sworn affidavit so he would have no other choice but to believe them.

    c. On 15 June 2018 (SEH 10 page 622) the claimant objected to SEH's application for a stay of the First 2018 Claim in which he accused the respondent of lying and misleading the Tribunal in the 2016 claim. "The respondent have persistently lied at almost every opportunity they have." And "The Tribunal shouldn't allow itself to be used to bully and frustrate the claimant".

    d. On 27 December 2018 (SEH 4 page 218) the claimant wrote to the Tribunal in relation to the Second 2018 Claim accusing SEH of providing false information and telling lies.

    e. On 12 February 2019 (SEH 4 page 245) SEH's solicitors applied for the Second 2018 Claim to be transferred to Watford ET to be managed alongside the claimant's other claims. The claimant's objection (SEH 4 page 246) – which is relied upon by Mr Williams as evidence of unreasonable conduct – appears to object on the basis that it would cost him more to have to travel to Watford. However, in making that point, the claimant also accuses Goodman Derrick of bullying and harassment in respect of the request.

    f. On 14 November 2020 (SEH page 905) the claimant wrote to the in house solicitor with the Berkeley group (despite knowing that they are represented by external solicitors), copied to Goodman Derrick and to Ms Oldbury-Davies, alleging that Ms Oldbury-Davies is trying to mislead the Tribunal

because she cannot be said to have complied with her obligation under the DPA when she (allegedly) provide a fake document; that Ms McClelland knows "the truth" and that if Ms Oldbury-Davies does not tell the Tribunal "the truth" within 14 days and the truth comes out eventually "I will report you to the SRA and show then this email".

184. It should be born in mind when considering whether this correspondence shows that the claimant has been guilty of unreasonable conduct of the proceedings that the claimant is acting in person. One cannot expect the same objectivity and dispassionate assessment of prospects from a self-representing party as one can from a represented one. Claims of whistleblowing detriment, discrimination and victimisation are keenly felt and it is not unusual for parties to express themselves in heightened terms. The nature of the proceedings is adversarial and that can lead to conflict being played out in correspondence. Professional representatives are use to having to make allowances for an understandable tendency on the part of self-representing parties to view them with some suspicion. The claimant has explained to me reasons why he is particularly affected by what he sees as inadequate disclosure.

185. Even making every allowance for that, the language which the claimant has seen fit to use in correspondence such as that highlighted above cannot be justified. The correspondence referred to in paragraph 183 a. and f. are particular examples of that. The claimant sought to excuse the direct correspondence to Ms McClelland making accusations against her and Ms Oldbury-Davies and threatening to report her to the SRA by saying that it could not be unreasonable conduct of the proceedings to point out that someone was breaking the law. In this he is completely overstating what could reasonably be alleged in relation to the invoice and the question of which company paid for his training and what, if anything, that shows about the identity of his former employer. This aggressive tone and choice of words was unreasonable conduct of the proceedings.

186. In the light of my decision on rule 37(1)(a), I do not have to consider whether or not I would have struck the claims out under rule 37(1)(b). However, having been persuaded by the Berkeley respondents that rules 76(1)(a) and (b) are satisfied, I am required to go on to consider whether or not to make a costs order. I am satisfied that the claimant had a reasonable opportunity to make representations in relation to whether or not the tests set out in rule 76(1) were satisfied. However, the claimant has not had a reasonable opportunity to make representations in relation to the exercise of my discretion as to whether or not to make a costs order or as to the amount and on 1 December 2020 there was a consensus that that second stage of the costs application should be dealt with, if necessary, subsequently. Furthermore, I should prefer to be in a position to take the claimant's means into account, if he chooses to provide that information. I shall therefore make case management orders for the further conduct of the Berkeley respondents' costs application. Subject to the parties' representations, it seems to me to be desirable that all outstanding applications for costs and preparation time order should be considered together so that the claimant's means can be considered in the round.

187. **The allegations as against AKSL and Ms Oldbury-Davies** were put in the second 2018 claim as follows. AKSL is said to have provided training to the claimant in October and November 2014 during his employment by Berkeley/SEH. On 19 April 2018, the claimant contacted AKSR to inquire who had paid for his training and, on the following day, Ms Oldbury-Davies told him that Berkeley Homes (Central London) Ltd had done so. The claimant formed the view that, since Berkeley Homes (Central London) Ltd was a dormant company, it should not have paid an invoice and alleges that, motivated by a religious obligation to report wrongdoing, he contacted AKSL again to ask for a copy of the invoice and was ignored (first AKSL detriment - paragraph 166 of SEH A: 2 p.89).

188. A chasing enquiring led to him being told orally by Mr Knight that his message requesting the invoice had been sent to the Berkeley Group plc which he regarded as being an unauthorised use of his personal data (second AKSL detriment - A: 2 p.89 paragraph 170). He alleges that ignoring his request for the invoice and forwarding the message to the Berkeley Group plc were unlawful acts. He also alleges that, following a DSAR on 28 April 2018 he received his data piecemeal (third AKSL detriment), did not receive all of his data (fourth AKSL detriment) and that the invoice which was sent to him did not appear authentic (fifth AKSL detriment – SEH A: 2 page 73 paragraphs 15 to 18). He alleges that AKSL and Ms Oldbury Davies provided him with false and misleading information because the invoice was in the name of a company which, as an allegedly dormant company, could not have paid for his training. These are made as allegations of religious discrimination by AKSL and Ms Oldbury-Davies on the basis that the claimant informed them in his email of 22 April 2018 that, as a Christian he was required to follow an injunction in the Bible (citing particular verses) to report wrongdoing.

189. Ms Oldbury-Davies defended the claims by an ET3 presented on 20 October 2018.

190. Ms Oldbury-Davies applied for an order striking out the claims under rule 37(1)(a) of the ET Rules of Procedure 2013 on the basis that the claim was vexatious and had no reasonable prospects of success (SEH A: 11 page 676) or, alternatively, for a deposit order under rule 39. She explained that AKSL was placed into Liquidation in October 2018. She also applied for a preparation time order. The basis of her application was:

    a. There was no evidence to support any instance of religious discrimination. There was no delay outside of normal response periods which, putting that in the terms of the EQA, there was no detriment to the claimant. Neither was there concealment and the connection with religion was tangential.

    b. There was no evidence of any detriment suffered by the claimant in relation to the alleged GDPR breach. As a matter of fact, the GDPR had come into force on 25 May 2018, the only personal information shared with Berkeley was the claimant's name and email address which would have been known by them already.

    c. The DSAR was made on 28 April 2018. By 4 May 2018 the claimant was told that the information would be sent early the following week. Due to Ms Oldbury-Davies suffering a bereavement, it was in fact sent on 14 May 2018, the claimant having been informed of the delay and the reasons for it.

She acknowledged in oral submissions that the claimant believes that the company which paid the invoice for his training fees was not the correct company. However, she said that AKSL was a training provider to the Berkeley group and was paid by various parts of the group whether or not the payee is the part of the business that te trainee works for.

d. The victimisation claim she described as bewildering.

191. She referred to the correspondence of the claimant as "harassment and bullying of me by email correspondence". So far as the invoice was concerned, she and AKSL would not have known what part of the Berkeley Group the claimant worked for. The claimant had been a delegate on a training course. She had told the claimant that payment had come from the name at the top. The exchange of correspondence prior to the presentation of the claim is attached to Ms Oldbury-Davies' ET3 (SEH A: 2 pages 156 to 169) I have read and taken them into account in full.

192. In her application of 13 May 2020, Ms Oldbury-Davies also said that a civil claim by the claimant against her and Mr Knight had been compromised. This had been based upon the same allegations. Then, on 18 November 2020, the claimant had brought another claim for religious discrimination. The claim forms in the settled County Court claims are at Tab B pages 2 and 3. It can be seen from Tab B page 7 that the particulars of claim are in essentially identical to those in the Employment Tribunal proceedings terms save that it is explicit in the County Court proceedings (paragraphs 15 20) that the claimant alleges victimisation whereas in the 2nd 2018 claim the word victimisation does not appear at all. The other difference is that in paragraphs 23 to 32 of the particulars of claim in the County Court the claimant complains of actions in relation to a new company having been formed in the place of ASKL: the claimant alleges that he has suffered a detriment in relation to that which he refers to as Phoenixing. It is not clear from the available documents under which part of the EQA the claimant sought to sue in the County Court. Presumably, they were brought under Part 3 (service provider), or possibly Part 6 education. Neither party addressed me on whether the settlement (and I have not seen a settlement agreement) had the effect of ousting my jurisdiction about complaints brought under Part 5. Given the conclusion which I have come to on the merits of the application to strike out the claims, that is not something which I need to consider.

193. Some of the claimant's submissions on 15 July 2020 were directed to the way that the Second 2018 Claim was put against ASKL and Ms Oldbury-Davies. He explained the chronology of his approach to AKSL "because of the issue of who was his employer" and asked how had paid for his training. From oral conversations with Mr Knight he had understood that Berkeley Group "were controlling him" and he had submitted the second DSAR (page 637D). He had received an invoice which didn't seem authentic. Berkeley Homes wasn't an active company which aroused his suspicions.

194. In his oral submissions on 1 December 2020, I asked the claimant why he had continued with the present claims following settlement of the county court claims and he explained that the county court claim had mainly centred on the issue of

phoenixing. He argued that it would have been victimisation if they had been his employer and they had assisted the phoenixing of the company.

195. The claimant countered Ms Oldbury-Davies's argument that it was no detriment to not be given information which was already in his knowledge but this was not an exception to the DPA 1998. Were it already in his control that would be an excuse but that was not what Ms Oldbury-Davies was arguing. He argued that as a result of a protected disclosure made to SEH, AKSL (Mr Knight) gave personal data without permission to the Berkeley group and AKSL had give personal data without his permission to the Berkeley Group then had given him a bogus invoice. I asked him which disclosure he said that they were aware of and had did not give an answer to that question.

196. He argued that AKSL were a training provider acting with knowledge of his employer as agent for his employer. The victimisation that he referred to was that he had told AKSL about his religion and had been ignored – that was what amounted to victimisation and religious discrimination because the invoice was inauthentic. It may be the case that not all of the data disclosed to the claimant was sent at the same time but it is clear that by 22 May 2018 Ms Oldbury-Davies (and AKSL) believed that everything that they had from the claimant had been disclosed and he has not identified any particular matters which he plausibly avers is in existence which contains his data and which has not yet been disclosed. The whole period covered by the relevant correspondence is just over one month.

Decision on the applications under r.37 and r.39 by Ms Oldbury-Davies

197. It seemed reasonably clear that the claimant complained of 5 alleged detriments against AKSL, not all of which would involve actions by Ms Oldbury-Davies. I take him to argue that all five were acts of detriment and less favourable treatment on grounds of his religion, victimisation and whistleblowing detriment. He had raised religion in the email of 22 April 2018 (when he said "I hope you take into consideration my religion and provide me with the invoice") and 28 April 2018 when he said "If you fail to release REDACTED copy of the Invoice then I will be forced to believe that you wish to impede and/or hinder me from fulfilling my religious obligation."

198. When considering the prospects of the claimant succeeding at a final hearing in relation to the claims against AKSL and Ms Oldbury-Davies I start with the statutory provision under which he is claiming and what I know about the nature of the relationship between the claimant, on the one hand and AKSL on the other. The claimant's case is that AKSL provided him with training in about October and November 2014 as agents for his employer (that was his oral submission and it is consistent with paragraph 21 of the Particulars of Claim in the County Court). He is complaining about acts dating in April and May 2018. He is therefore complaining about act post-employment (with Berkeley/SEH) discrimination and victimisation under s.108 of the EQA (relationships which have come to an end) and under s.110 against AKSL and Ms Oldbury-Davies (personal liability of the agent or employee). Alternatively, he argued that they were training providers but in that alternative, I do not see that the relationship between AKSL and the claimant falls within part 5 of the EQA at all. The point was taken by the Berkeley respondents in para.11(b) of their Grounds of Resistance to the Second 2018 Claim (SEH A: 2 page 138).

199. So the religious discrimination argument by the claimant is that Berkeley appointed AKSL as agents for the delivery of training and, some three years after his dismissal an exchange of correspondence between him and AKSL amounts to a breach of s.108 of the EQA for which AKSL and Ms Oldbury-Davies are liable under s.110. At a final hearing the claimant would, therefore, have to show (subject to the proper application of the s.136 burden of proof provisions)

    a. That the act occurred as alleged;
    b. That it was a detriment;
    c. That it was less favourable treatment of him than was or would have been given to someone who was not a Christian by AKSL or Ms Oldbury-Davies;
    d. That the grounds for the treatment were that he is a Christian;
    e. That in delaying or ignoring or forwarding the claimant's email to Berkeley or responding in piecemeal or incomplete fashion AKSL were acting as Berkeley's agent;
    f. That those actions arose out of and were closely connected to a relationship which used to exist between the claimant and Berkeley and the conduct complained of would have contravened the EQA had it happened during the claimant's employment.

200. I have significant doubts that the claimant would succeed in showing any of those elements to the required standard, bearing in mind that, once a claimant proves that an act occurred and that it was detrimental, then he or she has only to show facts from which it might in the absence of any other explanation that discrimination occurred. However, I have concluded that the arguments of religious discrimination have no reasonable prospects of success because of these particular matters:

    a. When considering the timescale over which this occurred, it is not realistic that the claimant would show that he suffered detrimental treatment by his request for the invoice being ignored. He had made a DSAR within 6 days of requesting the invoice. I am very doubtful that a reasonable employee would think that they were put to a disadvantage by the email being forwarded to Berkeley. The whole exchange of correspondence took place in just over a month. I have been given copies of much of it and details of all it such that I am in a good position to judge whether the claimant is likely to be able to show that the speed of response was a detriment to him. In terms of the allegedly piecemeal response, the email at SEH A: 2 page 161 suggests that ASKL initially thought that what was required was disclosure of documents connected with the 2014 training and then the claimant requested the contemporaneous email exchange which was provided by 22 May 2018 (SEH A: 2 page 158). I find that there are no reasonable prospects of him succeeding in proving that any of the acts complained of were detriments.

    b. It is true that the claimant notified AKSL of his religion and that, because of his religion, he considers himself to be obliged to report the perceived wrongdoing of paying a training invoice from a dormant company. When considering whether the actions of AKSL and/or Ms Oldbury-Davies are less favourable treatment the Tribunal would have to consider the characteristics of a suitable comparator. It would be insufficient for the claimant to be able

to show that he is a Christian, the respondent knew that, and that he was put to a detriment. There would need to be something more in order to transfer the burden of disproving discrimination to the respondent: Madarassy. As Ms Oldbury-Davies put it, the connection with religion is tangential. In addition, the claimant is really, it seems to me, arguing that he was motivated by his religious code and wanted Ms Oldbury-Davies and AKSL to support him in that. Even if true, this would not provide facts from which an inference could be drawn that any act of AKSL and Ms Oldbury-Davies was done on grounds of the claimant's religion. If person A is motivated by their religious principles to request something of person B it does not follow without more that any delay in person B complying with the request was on grounds of person A's religion. Furthermore, taking the first alleged detriment as an example, the characteristics of a suitable non-Christian comparator would have to include that the comparator had written to request a copy of an invoice paid by his former employer (and AKSL's then client) for training delivered some three years previously because they considered themselves bound by some moral code (other than the Christian one relied upon by the claimant) that required them to report their former employer to the appropriate authorities. There is no evidence that the claimant is going to be able to point to to suggest that, in that situation, the invoice would have been provided immediately without checking with Berkeley.

c. AKSL may have been acting as Berkeley's agent in relation to delivering the original training (although that remains to be shown). I think there are no reasonable prospects of the claimant showing that, in responding to correspondence of which Berkeley was, initially unaware, AKSL was acting as their agent. As I say, I have been shown the correspondence and Berkeley are holding themselves at arms length and directing Mr Knight and Ms Oldbury-Davies to the Information Commissioners Office. Absent AKSL having the status of Berkeley's agent, the complaint against them is not one which falls within Part 5 of the EQA.

201. I am doubtful, given the passage of time, that the claimant would have better than no reasonable prospects of showing that the acts complained of (which are entirely to do with the response of AKSL and Ms Oldbury-Davies to requests for information) arose out of or were closely connected with the employment which previously existed between the claimant and SEH (or another company in the group). However, that was not argued by Ms Oldbury-Davies and I do not base may decision upon that.

202. I do not think that, on a true and fair reading of the ET1 in its entirety that a claim for victimisation under s.27 of the EQA is made against AKSL and Ms Oldbury-Davies (in contrast to the County Court claim). However, I recognise that all affected parties have proceeded as though it does. Alternatively, I come to the same conclusions in relation to detriment as I did in relation to the religious discrimination case.

203. Furthermore, the claimant relies as protected acts upon his emails of 22 April 2018 (in which he said that he follows the instruction given in the Bible and asks AKSL

and Ms Oldbury-Davies to take into consideration his religion) and 28 April 2018 in which he repeats that his religion forbids him for being complicit in illegal activities. But they do not, in my view, amount to protected acts under s.27 of the EQA. They are in writing and therefore I am in a position to judge the prospects of them being found to satisfy the statutory test. They do not, in my view, fulfil any of the subsections of s.27(2), including the relatively broadly expressed s.27(2)(c) "doing any other thing for the purposes of or in connection with this Act." The claimant simply asserts his own religion and asks AKSL and Ms Oldbury-Davies to provide him with information. He does not complain about discrimination. The most he says that if they do not provide him with the invoice they will be impeding him in fulfilling his religious obligation. This is not, in my view, a protected act.

204. As to the whistleblowing detriment claim, there is no evidence that AKSL or Ms Oldbury-Davies knew about the alleged protected disclosures. The claimant did not explain which alleged protected disclosure he relied on in relation to AKSL or Ms Oldbury-Davies or how they would have known about them. There is therefore no reasonable prospect of the claimant showing that a reason for the acts complained of (which date from April and May 2018) was any disclosure of information which he had made to Berkeley during his employment which ended in February 2015. There is no reasonable prospect of the claimant establishing that he suffered a detriment within the meaning of s.47B(1) ERA or that, in responding to his requests, ASKL were acting as an agent with Berkeley's authority within s.47B (1A)(b).

205. Since I have decided that the claim against AKSL and Mrs Oldbury-Davies has no reasonable prospects of success, I go on to consider whether to strike it out. I see no likelihood of the claimant succeeding in improving his protects of succeeding in these claims and there is no reason why further Employment Tribunal resources should be allocated to them or why Mrs Oldbury-Davies should have to continue to defend them. I do not lightly take the decision to strike out a claim but, in this case, it is proportionate.

206. Mrs Oldbury-Davies has also made an application for a preparation time order. I remind myself of what I said at paragraphs 183 to 185 above in relation to the claimant's conduct of the Berkeley/ASKL claims. Those comments are equally apposite to Mrs Oldbury-Davies's situation. In her application for a preparation time order, she has detailed emails (SEH pages 686 to 688) in which the claimant has frequently demanded action, set a time limit and threatened further action. I also note SEH page 691 in which the claimant that the lateness of Ms Oldbury-Davies's application (which she apologised for and suggested the claimant might have more time to respond to) prejudiced him and if she did not provide medical evidence of her ill health "I will be forced to amend the existing claim and/or bring a new claim against you". See also page 699. The claimant is perfectly at liberty to point out the lack of medical evidence to support an application for extension of time. He is perfectly at liberty to ask the tribunal to refuse to accept the application because it is late. What he does is to set time scales within which he demands particular actions by the parties in default of which, he threatens to bring further, unspecified claims. This is, in my view, an excessively confrontational way to conduct litigation and, generally, counter-productive. Where it crosses into unreasonable conduct, in my view, is where allegations of dishonesty are made without proper justification. Some of the claimant's correspondence to Ms Oldbury-Davies crosses that line.

207. She refers to his request for the postponement of a hearing because it was a few days before Easter. This is something which the SEH respondents also referred to but I do not consider such a request to be unreasonable conduct of the proceedings. The Tribunal may or may not regard it as good grounds for a postponement, but it is not unreasonable conduct of the proceedings.

The NES claims - Case No: 2300054/2019 and 2205013/2019: Discussion and decision

208. Two of the present claims involve the NES respondents (the 8th and 9th respondents): Case No: 2300054/2019 (hereafter the First 2019 NES Claim) and 2205013/2019 (hereafter the Second 2019 NES Claim). However, those claims arise out of an earlier complaint (Case No: 2300504/2018 – or the 2018 NES claim) of age discrimination which the claimant had brought against the 8th respondent (NES Ltd). The claimant claimed to have been employed for one day on 9 October 2017 (employment as a Driver(Labourer) ending on 10 October 2017) although NES Ltd said that it was one day because they had requested the temporary agency (PCR) that they should send an alternative worker. That claim was dismissed following the claimant's decision not to pay a deposit which he had been ordered to pay as a condition of continuing with the claim.

209. As the claimant put it in Case No: 2300054/2019 (NES bundle Tab 1.7 – hereafter referred to as the first NES 2019 claim) "during the course of the Preliminary Hearing, Mr Burcow revealed that he knew about my "other" tribunal claims". He alleges that the actions of Mr Burcow "have led me to believe that he accessed a Blacklist in order to know about the Berkeley Claim" and complains that the accessing of a blacklist is a detrimental act done because of his protected act of bringing an age discrimination claim, contrary to s.27 of the EQA.

210. He also complains that the respondents refused to disclose who is in control of or maintains the allege Blacklist and seeks an order from the Tribunal requiring them to do so (see box 9.2 of ET1 in the first NES 2019 claim).

211. The first NES 2019 claim was defended by the 8th and 9th respondents on the basis that they had honestly answered the claimants questions and "repeated Subject Access Request questions" about the search that Mr Burcow had carried out which led him to find out about the claimant's claim against Berkeley Homes; the claim was not something "that should be brought before an Employment Tribunal" because it was vexatious and mischievous and a personal vendetta because the claimant objected to his previous claims being brought up in the preliminary hearing at which the deposit order was made. The NES respondents denied accessing a Blacklist, or even of knowing of the existence of such a list and alleged that the information had been obtained lawfully.

212. In their outline submissions, the NES respondents argue that the acts complained of did not arise out of and were not closely connected with the employment relationship which had existed between the parties: s.108 of the EQA and Aston v The Martlett Group Ltd (UKEAT/0274/18) relied upon. It was further argued that anything said during the preliminary hearing attracted judicial immunity from suit and was not within the jurisdiction of the ET.

213. The second NES 2019 claim (Case No: 2205013/2019) was presented on 22 November 2019. The claimant complained that on 15 July 2019 he had written to NES asking them how they wished to be served with the notice of appeal in his appeal to the Court of Appeal against the imposition of a deposit as a condition of continuing with his age discrimination claim. "I was ignored and that behaviour is contrary to the duties owed by the parties to the Courts". He alleged that that was an act of victimisation contrary to s.27 of the EQA and complained that he was forced to serve the document via email and Royal Mail post, having "informed them that I preferred sending via email due to my philosophical belief".

214. He also complained that the NES respondents had falsely informed the Court of Appeal "that I have not served them the document despite receiving it" on more than 2 occasions and that that was also an act of victimisation.

215. In their response to the 2nd 2019 NES claim, the respondents cited from the 17 July 2019 as follows:

> "Dear NIBLOCK
>
> Please can you confirm how and to whom you wish I serve documents to
>
> I prefer emails as that is better for the environment
>
> Emails also reduce the burden on everyone
>
> Regards
>
> Donald Akhigbe" (a copy is at NES Bundle Tab2:3)

216. I see from the email at Tab 2:4 that the claimant sent the Grounds of Appeal and Skeleton Argument by email on 23 July 2019.

217. The respondents defence is that they did not reply because they regarded the email as "fatuous and mischievous" since the claimant knew to whom to serve documents and had no good or valid reason to ask. They denied unfair treatment or disadvantage. They continued that they were unaware that the claimant was appealing a decision and needed confirmation of the service address and had never previously been asked about a service address despite the history of litigation between the parties.

218. They denied making false allegations and alleged that on 23 July 2019, and 16 September 2019 (Tab 2:5) the claimant had sent emails to the respondents with a number of attachments but had not included the Bundle Index for his application for leave to appeal. Therefore, argued the respondent, their request for the appeal to be dismissed by default with costs for failure to supply all of the relevant documents was factually accurate (Tab2:7) . The respondents say that the Bundle Index in that matter was served on 27 September 2019 (Tab2:9).

219. An abbreviated chronology of relevant events is as follows:

> 3 April 2018 (The C presents ET1 in 2018 NES Claim by

claimant states in Case No: 2205013/2019 that this was on 9 February 2018 – the exact date is immaterial for present purposes).	which he alleged age discrimination against	
20 September 2018	Deposit order in 2018 NES Claim	
5 December 2018	EC Day A in First 2019 NES Claim	
12 December 2018	EC Day B	
10 January 2019	2018 NES Claim struck out for non-payment of deposit	
21 February 2019	ET1 in 1st 2019 NES Claim	
18 March 2019	ET3 in 1st 2019 NES Claim	
17 July 2019	C emails R to ask for service address	
23 July 2019	C serves R with grounds of appeal and skeleton argument attached	Tab 2:4
15 October 2019	EC Day A in 2nd 2019 NES Claim	
24 October 2019	EC Day B	
22 November 2019	ET 1 in 2nd 2019 NES Claim	

220. On 22 January 2020, the claimant applied to amend his 2nd 2019 claim in order to include an alleged act of victimisation based upon the alleged detriment of referring to his 15 July 2019 email request for confirmation of to whom to serve the documents as fatuous and mischievous – apparently in the response. In his oral submissions before me, the claimant confirmed that he did not complain within the present proceedings that the statement made at the preliminary hearing itself was a detrimental act.

221. In support of their applications for strike out or deposit orders, the NES respondents relied upon a witness statement of Mr Burcow dated 21 January 2020. In it, he explained that the conduct of the claimant at a first PH on 11 May 2018 had caused him to believe that the claimant was a "seasoned litigant". Receipt of detailed correspondence, a discrimination questionnaire and a skeleton argument citing 13 authorities confirmed Mr Burcow's belief (para.5 of his statement at NES bundle Tab 1.11). He describes his searches at the Employment Tribunal Service website: first using the claimant's surname – which bore no results; then using a filter by date and "Mr D" which he claims led to the discovery of a case between "D Akhibigbe v Berkeley Homes" (paragraph 8 of his statement) and the judgment of EJ Bedeau in 2017. He explained in the witness statement that he then contacted Berkeley Homes who provided a limited amount of information which he states led him to conclude that the claimant had brought both claims. He went on to explain how a search in the claimant's correctly spelled name on "CourtServe" led to the discovery of other joined cases. I note the similarity between this account and the answer provided in the email of 30 October 2018 at Tab1:4.

222. In his written submissions, Mr Burcow argued that the claims are fanciful and totally without merit. In particular:

a. Mr Burcow argued that the act did not arise out of and was not closely connected to the claimants employment with NES but was a "fresh and distinct content made during pleadings": Aston v The Martlet Group Ltd [2019] I.C.R. 1417 EAT.

b. He argued that the claimant had no or little reasonable prospect of proving that he himself had accessed a blacklist or even that such a list existed and that it was for the claimant to prove his claim: Laing v Manchester City Council (UKEAT/0128/06).

c. It was fanciful for the claimant to claim that he suffered a detriment because NES had not replied to an email and asking on whom to serve documents was a mischievous act.

d. The claimant's reliance upon CPR Part 6 (in order submissions he referred to para.6.8) was misconceived because it merely required him to serve a claim on a company registered in England or Wales at the "Principal office of the company or any place of business of the company within the jurisdiction which has a real connection with the claim". The claimant, he alleged, knew where the principal office was and had no need to request an address for service.

e. He repeated the factual account of the way in which the Bundle Index was served upon the NES respondent and denied that a false statement had been made to the Court of Appeal.

223. In his oral submissions, Mr Burcow relied upon the above points and additionally argued that, following the preliminary hearing on 20 September 2018, NES received a number of Data Subject Access Requests (Tab1: 3, 4, 5, 6). Mr Burcow, on request by the claimant, provided screenshots showing how he carried out the searches (which I take from their dates to be recreations of the searches) and repeatedly stated that he was answering truthfully and had not accessed a blacklist. He explained that the way that his historic internet search history is stored on his work computer is sporadic which he claimed to be an anomaly with Apple computers and that he had not yet been ordered to provide an itemised phone bill (Tab1:17 a letter of 1 June 2020 sent in the run up to the PH on 14 July 2020). He stated that if the claim goes to a hearing he would produce what was ordered to be produced although he subsequently provided an itemised phone bill. Following the claimant's request for a computer expert's report, Mr Burcow sent the claimant on 17 June 2020, an email forwarding an email from Christopher Fenwick of Gregory Micallef Associates Ltd who stated that Mr Burcow's Macintosh (WMiblock42) was configured to automatically clear the browser history after 12 months, there was no explanation for the gaps within his browser history, logs extracted from the Mac computer manually did not contain the "missing browser history"; the firewall did not contain any relevant logs.

224. Essentially, he argued that he was being required by the claimant to prove a negative, that he wasn't lying when he said that he had not accessed a blacklist when in the substantive claim it was for the claimant to prove that the act of which he complained had occurred.

225. Mr Burcow argued that the letter of 13 December 2019 by which the claimant objected to the transfer of Case No: 2205013/019 to Watford ET to be consolidated with the other claim is noteworthy for his comment that "This Claim is part of a pilot scheme that would be of benefit to the legal system in particular and the society in general." He argued that this showed that the claimant was not genuine in his litigation but bringing the claim to make NES a guinea pig for a pilot scheme.

226. In relation to the application for preparation time order, Mr Burcow relied upon his arguments that the claimant had brought claims which had no reasonable prospects of success, his argument that the claim was part of a pilot scheme and the manner in which the claimant has conducted litigation by the repeated requests for further information.

227. Looking at the C's emails to NES, I understand that the source of the claimant's rejection of Mr Burcow's account and the matters which he relies upon as tending to show that he would satisfy the burden of proving victimisation are as follows:

    a. His family name was not correctly spelled in the Berkeley Homes (Urban Renaissance) case and a search on the government website would not reveal his name;

    b. His job title had been wrongly stated as an Apprentice Site Manager and therefore Mr Burcow's claim that he was able to deuce that the present claimant and the claimant in the Berkeley Homes case were one and the same from his statement that he was a "Site Manager" was "very astonishing".

228. He deduced that his name had been put on "some blacklist" to which NES and Mr Burcow had access. In his request of 5 November 2018 he said that he was only interested in who had put his name there and asked NES to disclose this information "I simply don't believe the explanation given by Mr Burcow. … The way I'm treated now would determine how I behave when the table is turned. You can't conceal a lie forever and the truth will soon come out."

229. I take into account a letter from the claimant dated 22 January 2020 to the London Central ET in which he said that the CPR Rule 6 makes it mandatory that he serves the document in the right way and to the right person. On 7 June 2020, the claimant wrote to the Tribunal requesting an itemised phone bill and computer expert report from Mr Burcow. He argued that it was an error of law to strike out a case where there is a crucial dispute of fact: Anyanwu (paras 24 & 37); Ezsias v N Glamorgan (paras 29 to 32) and Tayside Public Transport Co Ltd v Reilly [2012] CSIH 46 para.30). It was not for the judge on a strike out application to conduct an impromptu trial of the facts. He argued that there was no recorded case of anomaly with Apple computers

230. In a further letter from the claimant he argued that there were still discrepancies in Mr Burcow's account because the search history performed (appendix 2 to the claimant's letter of 22 June 2020) showed a search on 11 September 2018 when the calls to Berkeley Homes were on 4 and 5 September 2018; he pointed to an apparent discrepancy between Mr Burcow's ET3 where he states the claimant's

statement "He now claimed that he searched using my initials (Mr D)" to be untrue and the witness statement paragraph where he states he did make such a search.

231. The explanation given in correspondence by Mr Burcow (TAB1:22) is that there are gaps in his computer's internet search history and the record of the 11 September 2018 was the only one then available for September 2018.

232. In addition to those matters which can be gleaned from the file, the claimant made detailed oral submissions – apparently from recollection and without reference to the correspondence which, in fact, covered all the points which Mr Burcow made orally. He argued that he had taken the NES respondents to the Tribunal for age discrimination and Mr Burcow had brought up other claims. The name recorded in the Berkeley Homes case was not just 2 letters added, it had been changed completely in name and meaning. Then Mr Burcow had insinuated that he had referenced the job title, but the job title in the judgment had been wrong. The explanations had changed, alleged the claimant: then saying he had used Mr D. The search history provided included no search for "Mr D". The search post-dated the days on which telephone calls to Berkeley had been made. The claimant's conclusion was that Mr Burcow had not been telling the truth about how he had found out about the other claims and that was why he had brought the first NES 2019 claim – on the basis that Mr Burcow had searched a blacklist. As he put it "it didn't add up to me". The report from the computer expert had claimed to extract everything but not to have been able to find the "missing item". In the claimant's words "there needs to be evidence it exists for it to be missing".

233. To the argument that he was unable to prove the act upon which he relies and Mr Burcow's reliance upon Laing , the claimant argued that the burden of proof in EQA cases requires him to provide facts from which inferences could be drawn and that he had done, in his submission.

234. As to the 2nd 2019 NES claim, the claimant argued that the respondent had deliberately chosen not to reply to his request for a service address. There is no obligation on litigants in the ET or EAT to ask for a service address but, he argued, there was in the CPR for appeals to the CA.

235. It had been untrue that he had not sent the Bundles Index: in the printed copy he had sent everything – he had had to send everything through 2 mediums because of the respondents' silence in response to his request for a service address. This, he argued, was NES playing technical games by deliberately ignoring his email.

236. The claimed acts arose out of the relationship which previously existed between them because the relationship cannot be said to have come to an end as there is an ongoing age discrimination case which was under appeal and the victimisation claim arose out of that.

237. I asked the claimant what he relied upon to show that the acts complained of were "because of" the alleged protected act. He responded that the respondents statement to the Court of Appeal that they had not received all the documents was trying to get a technical advantage (I took that to be a reference to the application for the appeal to be dismissed for default). That was, he argued, clearly because of the litigation.

Conclusion on the r.37 & r.39 applications

238. The claimant alleges that NES/Mr Burcow did the following acts:

    a. Accessed an alleged blacklist (presumably of employees who have brought an Employment Tribunal claim);

    b. Refused to disclose who is in control of or maintains the alleged blacklist

    c. Failed to reply to his request for address on which to service the notice of appeal to the Court of Appeal;

    d. Falsely informed the Court of Appeal that he had not served documents on them.

239. In order to succeed in his victimisation claim at final hearing, the claimant would have to show that NES/Mr Burcow behaved in that way and that it was a detriment to him arising out of an closely connect with his former employment by NES. He would then have to show facts from which it could be inferred in the absence of any other explanation that the reason for the acts complained of was that he had previously brought an age discrimination claim against NES.

240. I consider the application to strike the claim out first, without taking into account any explanation proffered by Mr Burcow. Dealing with the first 2019 claim, it seems to me that although the claimant says that he does not allege that it was a detriment to state in the preliminary hearing that the claimant had brought other claims (or to refer to it in the pleadings), it is essential to his claim that he should be able to rely upon what was said at it. The act complained of may be accessing the alleged blacklist, but to prove that he will have to rely upon what was said. However, Mr Burcow has not argued that the first 2019 claim offends against the principle that there is absolute judicial immunity from suit in respect of anything done (SEH page 656). I therefore do not consider that question further. He does argue that the act complained of did not arise out of and was not closely connected to the claimant's employment.

241. There are similarities to the facts of the Aston case. Were it not for the fact that the claimant had been, for one day, engaged by NES, he would not have brought a claim for age discrimination against them and it was in defence of that claim that NES relied upon the fact that the claimant had brought other employment tribunal claims against different respondents as relevant to the employment judge's exercise of discretion as to whether or not to make a deposit order. In that sense, the acts alleged in the First 2019 claim arise out of the employment. Similarly, the acts complained of in the second 2019 claim would not have happened had the claimant not pursued his rights to appeal to the Court of Appeal against the EAT rejection of his appeal against the deposit order. There is also a connection between the employment and the acts complained of.

242. Simply setting that analysis against the wording of s.108, I conclude that the connection cannot reasonably be described as a close one. This does not require me to consider any disputed questions of fact because I presume for these purposes that the claimant can show on the balance of probabilities that the acts set out in paragraph 238.a. to d. occurred as he alleges. There are too many different steps between the claimant's employment and the acts within the litigation with his former employer on the facts as alleged for it to be said that they arise out of and are closely connected with that employment. Since the claim would of necessity fail against NES, the claim against Mr Burcow must also fail by reason of s.110(1)(c) of the EQA. For that reason I am satisfied that the 2019 NES claims have no reasonable prospects of success.

243. In any event, I go on to consider the application for deposit orders which are made on different grounds. Mr Burcow has produced a witness statement and a statement from a computer specialist (although not in the form prescribed for formal expert's reports to be admissible to the Tribunal). He has produced evidence of searches on his computer history and phone bill to back up his account. The claimant has tried to challenge Mr Burcow's account and, beyond simply not believing him, there is no evidence in front of me from which to infer that the blacklist even exists. This is a disputed area of fact and for that reason I did not take it into consideration when deciding whether there are no reasonable prospects of the claimant proving that Mr Burcow accessed a blacklist to find out about the claimant's other claims. However, in my view, given the evidence that has been presented to me at this preliminary stage there seem to be little reasonable prospects that a Tribunal at final hearing would find that detriments (a) and (b) from paragraph 238 above occurred as a matter of fact. Given the timescale, it seems to me that there are also little reasonable prospects of the claimant showing that there was a failure to reply to his request for addresses which was an act of detriment. An analysis of the correspondence between the parties and the Court of Appeal suggests that what NES said about when certain documents arrived with them is consistent with the correspondence. On that basis there are little reasonable prospects of showing that NES gave a false account to the Court of Appeal. Given my decision on the application under r.37 I do not make an order under r.39.

244. However, my observations on the application for deposit orders are relevant to the question of whether or not to strike the claims out because they have no reasonable prospects of success. For the above reasons, I have concluded that neither the Tribunal nor these respondents should be required to commit further resources to the two 2019 NES claims and they will be struck out.

245. In the case of the NES claims, I am therefore also satisfied that rule 76(1)(b) of the Rules of Procedure 2013 is satisfied. NES and Mr Burcow also argue that the claimant's conduct of the proceedings has been unreasonable. He refers to a letter dated 13 December 2019 in which the claimant reserved his position to add a detriment if NES fails to copy him into correspondence and dated 22 January 2020 in which he asserts that referring to his claim as fatuous was a detriment. Mr Burcow has also been the recipient of the claimant's repeated demands for particular evidence despite EJ Lewis directing the tribunal to write to say that he would not order witness statements before the preliminary hearing. In this case, my view is that, taking into account the language used by NES – which is brusque if not

rude in the dismissive response to the claimant's claim (including the use of the word "fatuous") – my view is that the claimant's demanding and somewhat aggressive approach did not amount to unreasonable conduct of the proceedings.

Totally without merit

246. I have been asked also to consider whether any of the claims before me are totally without merit. This is something which Employment Tribunals have been asked to consider and make a finding on: see Laing J in in NMC v Harrold (No.2) and also Stacey J in London Underground Ltd v Mighton [2020] EWHC 3099 para.79. A court may only certify a claim or application as being totally without merit if it is bound to fail in the sense that there is no rational basis on which it could succeed. It need not be abusive, made in bad faith, or supported by false evidence or documents in order to be totally without merit: Sartipy v Tigris Industries Inc [2019] EWCA Civ 225 CA. This question only arises in relation to those claims which I have found have no reasonable prospects of success.

247. It seems to me that to the extent that the claimant presented claims against SEH which were bound to be struck out on the basis that exactly the same allegations against the same parties were presented within the 2016 Claim (and struck out as having no reasonable prospects of success) those complaints were bound to fail in the above sense. At the time the 2018 claims were presented, appeals to the EAT in the 2016 claim and 2017 claim were pending. However, the route to challenge the decision of EJ Bedeau was clearly within the those appeals. Viewed from the date of presentation of the two 2018 claims, had the appeal been successful, the allegations could have been litigated; if the appeal were not successful, the allegations would be *res judicata*. Presenting a new claim to re-litigate the same matters was bound to fail.

248. However, I do not consider that the claims as a whole were totally without merit. The complaints which I have concluded to be an abuse of process because they fall within the rule in *Henderson v Henderson* I do not consider to be totally without merit: it is for the party who relies upon the plea of abuse of process to prove it and although I have accepted the Berkeley respondent's arguments I do not regard the claimant's argument as being totally without merit. There are some aspects of the 2018 claims against the Berkeley respondents which I consider have no reasonable prospects of success but that would not mean that those complaints were bound to fail.

249. I have decided that, since I do not consider that the claims as a whole were bound to fail, I should not certify them as totally without merit. It is not at all unusual for a litigant to bring claims comprising complaints with a combination no, poor and stronger merits. Given that the reason for a Tribunal to consider whether or not to certify that a claim was totally without merit is in case there is future consideration by the High Court of whether or not to make a civil restraint order, it does not seem to me to be right that a litigant should be put at that risk by having part of a claim certified as totally without merit.

250. So far as the Second 2018 SEH claim concerns the alleged acts of ASKL and Ms Oldbury-Davies these come quite close to being totally without merit because the

argument that they were acting as agent for Berkeley in respect of the communications complained of which took place so long after the training course is particularly difficult to see being successful. On balance, my view is that the test is not met. The two 2019 NES claims also come quite close to being totally without merit but the question of whether there was no reasonable prospect of the claimant showing that the acts complained of arose out of and had a close connection with his employment with NES was not, on balance, one of which it could be said there was no rational basis upon which it could succeed.

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Employment Judge George

Date: …11 February 2021……..

Sent to the parties on: ...

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For the Tribunal Office