EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondent
Mr R A Leslie		**Driver and Vehicle Standards Agency**

OPEN PRELIMINARY HEARING

HELD AT London South (by CVP) **ON** 11 January 2021

EMPLOYMENT JUDGE G Phillips

APPEARANCES:

For the Claimant: P Tapsell, of Counsel
For the Respondent: T Kirk, of Counsel

JUDGMENT

The Respondent's application to strike out various historic elements of the Claimant's complaint is allowed. Allegations 1-6 and 9 of the Claimant's Further Particulars of the Second claim are hereby struck out.

REASONS

1. I shall, for ease, refer to the parties as the Claimant and the Respondent. References to rule numbers below are to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as amended. References to page numbers **[xx]** are to the bundle of documents that the parties had prepared for the purposes of the Preliminary Hearing.

2. This hearing was listed, at a Telephone Case Management hearing on 14 October 2020, as an Open Preliminary Hearing, for today, at the Respondent's request, to consider an application by it as to whether any of the claims made by the Claimant should be struck out (for the reasons identified at paragraphs 7-12 of the ET3 Response). In brief, that application applies to three grounds of challenge, any one of which if successful could be sufficient to provide grounds to strike out that

allegation. Those three grounds of challenge are: (1) that here are a number of historic allegations that the Respondent says were included in a previous ET claim by the Claimant, which was subsequently withdrawn and dismissed by the Tribunal under Rule 52, and as such it says cannot be pursed because of issue estoppel; (2) a number of other matters either pleaded by the Claimant or referred to in Further Particulars, which the Respondent says are out of time under s123 of the Equality Act 2010, and which it says are not continuing acts, and for which the "just and equitable" discretion to extend time should not be exercised; and (3) a number of matters which have not been pleaded previously and for which no formal application to amend has been made.

3. This hearing was conducted remotely using CVP and was not objected to by the parties. A face to face hearing was not held because it was not practical due to the prevailing circumstances.

Procedural background

4. From 28 August 2015, the Claimant was employed by the Respondent, an Agency of the Department of Transport, as a driving examiner, until his dismissal on 9 May 2019. The Claimant has severe recurrent depression, Post Traumatic Stress Disorder and Anxiety. The Respondent has accepted that the Claimant was at all material times disabled as a result of these conditions.

5. On 21 August 2017, the Claimant issued an ET1 Claim (2303338/2017) ("the First Claim") [1-32]. In the First Claim, he brought complaints of disability discrimination (indirect, direct, discrimination arising from disability, and a failure to make reasonable adjustments). It was the Claimant's case that, although he was still employed by the Respondent, he had experienced poor treatment at the hands of the Respondent, and he felt obliged to present the First Claim in respect of that alleged poor treatment.

6. A detailed chronology of the events relied upon by the Claimant was included in the ET1. I have set out below a brief summary of some of the key events that are referred to in the Particulars attached to the First Claim, which are pertinent to this application. Where references have been added [#x], these are to the paragraph numbers in the Particulars attached to the First Claim.

    a. There was an incident on 20 October 2016, when the Claimant says he was subject to a verbal attack by two colleagues, about which he then complained to his line managers [#16].

    b. As a result of the Claimant complaining about the alleged assault, he said he was ostracised [#21]. The Claimant complained that the Respondent did nothing to stop him being bullied and ostracised [[#21, 29, 38, 48].

c. Both parties submitted grievances against each other (November 2016) [#33].

d. On 23 December 2016, an Occupation Health referral was made seeking advice on reasonable adjustments for the Claimant, and an OH assessment was made on 3 January 2017. Various recommendations were made by that OH assessment. The Claimant said the recommendations were not followed up [#67-69].

e. The Claimant returned to work at the end of March 2017. The Claimant complained that his line manager had attempted to "brow beat" him into moving to a new location in Hastings [#84-89, 97]

f. On 25 April, the Claimant requested disability adjustment leave. This was turned down [#93].

g. The Claimant returned to work in August and filed his ET1 shortly thereafter. At the time of submitting his ET1, he was waiting on a decision meeting on his grievance [#111].

7. An ET3 Response was filed in regard to this claim on 20 November 2017. One of the (many) Grounds of Resistance advanced in the ET3 was that complaints in respect of treatment which occurred before 22 April 2017 should not be entertained by the Tribunal, because they were out of time under section 123 of the Equality Act 2010. It was also denied that the matters complained of constituted a continuing act of discrimination. It was submitted that no good reason had been provided by the Claimant such as to amount to any "just and equitable" reason to extend the time limits [37].

8. On 20 November 2017, [49] the Claimant wrote to the Tribunal, by email in the following terms, withdrawing his Claim:

> "Managers acting for my employer, are now acting as to support me, in my efforts to regain remission from the symptoms of my disability, that I may hopefully again, attain the good health enjoyed before this matter arose. I am keen to work with them and do all I can to regain a fulfilled, useful life.
>
> The objective of my claim, was to remove the sense of worthlessness inflicted and prove to my employer and to myself, that I have a right to be treated with dignity and also, as a relevant human being. I believe that managers, acting for my employer, are now recognising that errors have been made and are making efforts to help my recovery.
>
> I therefore request, that I may be permitted to withdraw my claim against my employer and save both valuable time for the Tribunal and unnecessary time & cost for both parties.
> I believe I am now being acknowledged as a relevant human being, and that is all I have sought, from the start. Thank you for your assistance. It is not an overstatement, to say that making this claim, may have been the

> turning point which prevented my suicide. I truly thank you for being there."

9. On 15 December 2017, [50] a Judgment was issued by the Tribunal, dismissing the First Claim "following a withdrawal of the claim by the Claimant".

10. In regard to the Second Claim, early conciliation started on 6 June 2019 and ended on 6 July 2019. The ET1 claim form in the Second Claim was presented on 27 August 2019 [52-67]. The Claimant by his Second Claim complained of unfair dismissal, disability discrimination (indirect, direct, discrimination arising from disability, and a failure to make reasonable adjustments), victimisation and harassment.

11. The Claimant set out, at paragraph 6 of the Particulars [64], that, "it is impossible to set out in detail at this stage, just how poorly I have been treated over the last two and a half years, however what follows is a basic framework". He said that "following the incident referred to below, the Respondent continues to not sufficiently assist in drawing this matter to a conclusion. I raised the difficulties at various times and asked if the bulling could be dealt with". At paragraph 7 [65], he referred to the incident on 20 October 2016 when he said he had been verbally attacked by two colleagues. He said that what followed is "two and a half years of mismanagement and at times inactive and wilfully poor handling of my employment, and consequently my wellbeing. This ranges from the initial manner in which this incident was dealt with, through to the handling of various Grievances, in a woefully and inadequate manner, through ultimately to my premature dismissal." At paragraph 8, he refers to a" failure to stop this bulling", at paragraph 9 to the January 2017 OH Report and to being "browbeaten" into accepting an inappropriate relocation, He also referred (paragraph 10) to being denied access to disability adjustment leave in April 2017.

12. In the next paragraph, 11, he references to an event that occurred in December 2018, namely an alleged failure to comply with the medical advice following a December 2018 OH Report This is a gap of some 18 months after the April 2017 refusal of disability adjustment leave. Paragraph 12 refers to an alleged refusal in February 2019 to provide certain information in connection with a Grievance, both of which are said to be [paragraph 13] "examples of the poor treatment I have endured over the last two and a half years, and which will be explored in significantly more detail in my Witness Statement".

13. The ET3 Grounds of Resistance were served on 22 January 2020 [68- 87]. At paragraphs 7-12 thereof, the Respondent complained specifically of Abuse of Process – duplication of withdrawn claim no. 2302228/2017 and raised issues with Time Limits under s 123 Equality Act with regard to many of the claims made by the Claimant.

14. At paragraph 14 onwards, the Respondent set out what it described as the "Factual Background", which led to the Claimant's dismissal. This narrative starts from 11 December 2018, when the Claimant was said to be on sickness absence. As a result of this absence, it stated that the Claimant exceeded his 20 working day sickness absence trigger for a rolling 12 month period under the Respondent's Attendance Management Policy. An Occupational Health ('OH') referral was made in respect of this period of sickness absence on 17 December 2018, with a follow up requested on 5 March 2019. Previous OH referrals had been made in respect of anxiety/stress and sleep apnoea in August, September and October 2018. On 11 January 2019, an informal attendance review meeting was held, and a Formal Review meeting took place on 17 January 2019. Following the Formal Review meeting, the Claimant's absence was referred to a Decision Officer for a capability hearing. The capability hearing was held on 1 May 2019, and resulted in the Claimant's dismissal with effect from 9 May 2019. The Claimant appealed the decision on 9 May 2019 and an appeal hearing was held on 13 June 2019. The appeal was dismissed in a decision letter dated 26 June 2019. One of the matters found on the appeal was that issues from the 2016 grievance that the Claimant asserted remained unresolved had been conclusively resolved through the grievance procedure at the time.

15. The case was listed for a Case Management Hearing on 14 October 2020. The Respondent prepared a Skeleton Argument for that hearing [88-100] in which it made three applications (i) for a change of the Respondent's name from the Department of Transport to "Driver and Vehicle Standards Agency" (DVLA); (ii) for an extension of time for the late service of the ET3; and (iii) for the striking out of the 4 historic allegations made in the Second Claim by which replicated those in the First Claim under Rule 37(1) as being vexatious and/or an abuse of process; and /or for the striking out of all claims made before 7 March 2019 on the basis they had no reasonable prospect of success because there were out of time, there was no continuing act and it was not just and equitable to extend any time limits. These complaints were repeated in the Respondent's Case Management Agenda [101-105] and draft List of Issues [106-113]. The Respondent also asked for Further Particulars of a number of matters in the Claimant's Particulars of Claim.

16. At the Case Management Hearing on 14 October 2020, the "Driver and Vehicle Standards Agency" was added as the Respondent in the proceedings, in substitution for "Department of Transport" and the Respondent was granted leave to file its ET3 response out of time. Further Particulars were ordered to be provided by the Claimant of "which allegations in the particulars of claim relate to which statutory claims" and to respond to a number of matters set out in bold in the Draft List of Issues. The Claimant supplied an initial set of particulars, [#121-136], which was criticised by the Respondent, whereupon a more concise set of particulars, drafted by Counsel were supplied [141-146]. In response to that further information, the Respondent filed an amended ET3, on 23 December 2020 [#147-174]. Timetabled directions were given for the Full Merits Hearing

and the case was listed for 5 days, to determine liability, starting on 1 November 2021. A three-hour Preliminary Hearing was also listed, for today, at the Respondent's request, to consider its strike out application.

17. The purpose of the hearing today was to deal with the Respondent's application that certain of the matters relied upon by the Claimant should be struck out.

Evidence

18. I had before me an Agreed Bundle of some 202 pages. This included the ET1 (and further particulars thereof) and ET3 (as amended) for both claims, the email from the Claimant [49] withdrawing the First Claim and the Judgment from the Tribunal dismissing that claim [50], as well as the Case Management Order from the Hearing on 14 October 2020, the draft list of issues and some correspondence between the parties.

19. No witness evidence was put in from the Claimant.

The Respondent's application

20. Put briefly, the Respondent seeks to strike out under rule 37 (1)

> 1. as vexatious / an abuse of process, those parts of the Claimant's case in the Second Claim which repeat allegations raised by the Claimant in the First Claim, namely:
>
> a. An allegation that the Claimant was verbally attacked and publicly humiliated by two female colleagues on 20 October 2016 [**15, #16: para 7 Second Claim PoC**];
> b. An allegation that the Respondent failed to act to stop this "bullying [**17, #21: para 8 Second Claim PoC**]";
> c. An allegation that the Respondent failed to implement the recommendations of an Occupational Health Report in January 2017 and was "brow beaten" by Kelly Galton [**22 #67, 87-89: para 9 Second Claim PoC**];
> d. An allegation that the Respondent denied the Claimant access to disability adjustments leave in April 2017 to recover from alleged damage to the Claimant's wellbeing caused by Kelly Galton [**26 #93: para 10 Second Claim PoC**].
>
> 2. as having no reasonable prospect of success, in the alternative, those 4 historic matters, together with all and any allegations that predate 7 March 2019, on the basis they are out of time under s 123 Equality Act, are not continuing acts and it would not be "just and equitable" to extend time.

21. The Respondent also objected to what it said were a number of new allegations in the Further Particulars. Those Further Particulars are

helpfully summarised at paragraph 6 of the second set of Particulars, [142-143], where 15 specific allegations are set out, namely

> 1 20/10/16 Incident of alleged verbal abuse and subsequent failure to respond appropriately to Claimant's Grievance process culminating in the Claimant being transferred to Hastings Test Centre.
> 2 3/01/17 Failure to implement recommendations of OH Report dated 3rd January 2017
> 3 April 2017 Denial of disability adjustment leave
> 4 28/11/17 C Compelled to withdraw ET Claim 2302228/2017 (Claim formally dismissed 15th December 2017)
> 5 From 28/12/17 Failure to implement recommendations of OH Report dated 28/12/17, in particular as regards undertaking an effective, suitable and sufficient Stress Risk Assessment (SRA) and implementing the requirements of the same and concluding the Claimant's outstanding Grievance.
> 6 From 4/6/18 Respondent's refusal to accept the Claimant's GP's Unfit to Work certificate (following hospitalisation after fall injuring nose and wrist) and insisting the Claimant attended work to undertake administrative duties.
> 7 From 28/8/18 Failure to implement recommendations of OH Report dated 17/10/18 as regards the Claimant's stress as a result of the threat of dismissal for attendance-related issues, including for a suitable and sufficient SRA on that aspect of the Claimant's stress to be undertaken.
> 8 7/9/18 Respondent's management of the Return to Work process following the Claimant being certified fit to return to work by his GP including associated (repeated) OH referrals challenging his fitness to work and delaying his return to work.
> 9 From 5/10/18 Downgrading the Claimant's performance in his PMR to "Developing" and subsequently refusing to consider or determine the Claimant's complaint regarding the downgrading.
> 10 From 28/12/18 Failure to implement recommendations of OH Report dated 28/12/18, including the completion and effective implementation of a suitable and sufficient SRA and a "mutually agreed [Wellness] action plan"
> 11 From 6/2/19 Refusal to allow the Claimant to return to work following GP confirming the Claimant as fit to work (i.e. not certifying that he was unfit for work).
> 12 Feb '19 Refusal to provide Investigation Report in connection with Grievance process
> 13 From 27/3/19 Failure to implement recommendations of OH Report dated 27/3/19 including the completion of suitable and sufficient SRA, implementation of a phased return to work, creation of a "mutually agreed action plan" and resolving the identified work-related stressors.
> 14 9/5/19 Dismissal decision based on attendance Decision to reduce compensation for alleged "lack of cooperation" (reduction subsequently overturned on appeal dated 24th October 2019)
> 15 26/6/19 Refusal of Appeal against dismissal (decision based, in part, on Claimant's alleged failure to agree the Wellness Action Plan).

22. The Respondent says that a number of these were not in the initial Particulars of Claim, and that no application to amend had been made with regard to these. By reference to this list of allegations, the Respondent says allegations 1-3, are replicated from the First Claim; that allegations 4-

9, 13 and 15 are out of time and new, that these are not continuing acts, and time should not be extended. In essence the Respondent says that three matters should remain to be determined by the Tribunal, namely:

a. Failure to implement the recommendations of the December 2018 Occupational Health (OH) Report (paragraph 11 of Particulars of Second Claim / paragraph 6(10) of the Further Particulars);
b. Refusal to provide information as part of February 2019 grievance process (paragraph 12 of Particulars of Second Claim / paragraph 6(12) of the Further Particulars);
c. The Claimant's dismissal for unsatisfactory attendance on 9 May 2019 (paragraphs 15 – 20 of Particulars of Second Claim / paragraph 6(14) of the Further Particulars)

23. Mr Tapsell did not dispute that allegations 1-3 of paragraph 6 of the Further Particulars / Paragraphs 6 -10 of the Particulars of Second Claim did replicate matters set out in the First Claim. He submitted that many of these matters were continuing acts.

The relevant law and rules of procedure

Striking out

24. Rule 37 deals with striking out. So far as relevant, it states that

> **"**(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;
>
> …….
>
> (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.

Cause of action or issue estoppel

25. The doctrine of estoppel by res judicata was first formulated in *Henderson v Henderson* (1843) 3 Hare 100, and precludes a party from raising in subsequent proceedings matters which could and should have been raised in the earlier ones. It has two principles: issue estoppel and cause of action estoppel. Each is defined as per the explanation in *Arnold v National Westminster Bank plc:*

a. Issue estoppel – "…may arise when a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different

cause of action to which the same issue is relevant, one of the parties seeks to reopen the issues."

b. Cause of action estoppel – "…applies where a cause of action in a second action is identical to a cause of action in the first, the latter having been between the same parties or their privies and having involved the same subject matter."

26. Cause of action estoppel provides for a prohibition on the relitigating of a cause of action in earlier proceedings. In *Ako v Rothschild Asset Management Ltd* [2002] EWCA Civ 236, Ms Ako made a claim for unfair dismissal and racial discrimination to the employment tribunal. She wrote to the tribunal withdrawing her application. The tribunal made an order dismissing the application on withdrawal. When she brought a second claim raising the same allegations, Rothschild said that she was barred from doing so by the principle of cause of action estoppel. In the course of deciding that question, the tribunal found that Ms Ako did not intend to abandon her claim. The Court of Appeal held that she was entitled to bring her second claim, despite the dismissal of the first. At [34] Dyson LJ said:

> "The passage in the judgment of Buxton LJ is capable of being misunderstood. A person may withdraw a claim or (in litigation) consent to judgment for many different reasons. He may do so because he has accepted advice that his claim will fail; or because he cannot afford to continue; or because he wants to defer proceedings until some other avenue of resolving the matter has been explored; or because he has decided that he is not yet in a position to proceed; or that he ought to proceed before a different tribunal (as in Sajid) or add another party (as in the present case). In some cases, the reasons will indicate that the party has decided to abandon the claim. In others, not so. In relation to the question whether a dismissal following withdrawal (or a consent judgment) gives rise to a cause of action or issue estoppel, I consider that the reasons for the withdrawal or consent are not relevant, unless they shed light on the crucial issue of whether the person withdrawing the application or consenting to judgment intended thereby to abandon his claim or cause of action."

27. These principles of estoppel were considered by the Supreme Court in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 at [17] to [26]. Lord Sumption made clear in that case that the policy underlying these principles is a procedural rule against abusive proceedings [17]. In *Nayif v High Commission of Brunei Darussalam* [2014] EWCA Civ 1521, Mr Nayif issued a claim in the employment tribunal alleging race discrimination. The tribunal held that the claim was out of time. He then issued proceedings in the High Court alleging breach of contract and negligence, covering the same ground. The Court of Appeal held that Mr Naif was entitled to pursue the High Court action. Elias LJ applied the decision in *Virgin Atlantic* and noted [#14] that "The analysis of Lord Sumption presupposes that there will have been a formal adjudication by a court. That is indeed the typical situation in which the principles arise.

But it is well established that this need not be the case. There are circumstances where these principles will operate when the proceedings have been dismissed without any formal adjudication at all."

Rules 51 and 52

28. Prior to coming into force of the 2004 ET Rules, claims that were withdrawn were not formally dismissed by employment tribunals as a matter of course, and often claims were not dismissed at all unless and until a respondent made an application to dismiss. The question arose in those circumstances whether a withdrawal constituted a decision that could not be re-litigated even if proceedings had not been formally dismissed.

29. In *Mulvany v London Transport Executive* [1981] ICR 351, the EAT held that the correct approach is to ask the question "why was the first application withdrawn; is there a good reason for making a second application". Slynn J remarked (at 355B): "These cases are not easy. There may well be instances where a tribunal can say, on the face of the application and the reply, that a case is so misconceived that it ought not to be allowed to continue. Where there is, as is accepted here, room for argument or where there is … a possible explanation as to why the first application was withdrawn and the second started, it is a wrong exercise of the [employment] tribunal's discretion to strike it out as being frivolous merely because it is a second application".

30. In *Acrow (Engineers) Ltd v Hathaway* [1981] ICR 510, the EAT held that a procedure adopted by a Claimant of withdrawing his complaint of unfair dismissal but then making a fresh application (still within the time limit) was vexatious. Browne Wilkinson J held that it would not ordinarily be right to make a fresh application without first pursuing the remedy of review (at 514D-G). To do so was vexatious and the second complaint would be struck out.

31. The 2004 Rules, through r.25, introduced a more formal structure, and it is now well established that a withdrawal is the act of the party in question, whereas dismissal is the act of the tribunal and involves a judicial determination. (For example, in a note submitted by the Respondent from the IDS Employment Law Handbook, entitled "What is a decision" (Volume 5, Tribunal Practice and Procedure, Chapter 2, Tribunal's jurisdiction) paragraph 2.119 looks at the withdrawal of a claim, and at 2.190 it is noted, citing the Court of Appeal in *Barber v Staffordshire County Counci*l, [1996] ICR 379, that even though there has been no reasoned decision on the merits, a judgment given after withdrawal, can give rise to cause of action or issue estoppel. A declaration that a claim be dismissed is a judicial act.)

32. The purpose of dismissal under the 2004 Rules was discussed in a number of cases including *Drysdale v Department of Transport (Maritime and Coastguard Agency*) [2014] EWCA Civ 1083, who referred to the Court of Appeal in *Verdin v Harrods Limited* [2006] ICR 396 (#35-40) (a passage approved by the Court of Appeal in *Khan v Heywood & Middleton Primary*

Care Trust [2006] EWCA Civ 1087 #44 and 72). Many of these cases relied upon *Ako v Rothschild Asset Management Ltd* [2002] ICR 899. The cases on the 2004 rules focused on the significance of withdrawal and what was meant by it. Rules 50 and 51 of the 2013 Rules were intended to clarify the approach that existed under the 2004 Rules.

33. Rules 51 and 52 of Employment Tribunal Rules of Procedure 2013 now provide as follows:

> End of claim
> 51. Where a claimant informs the Tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.
> Dismissal following withdrawal
> 52. Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—
> 1. the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
> 2. the Tribunal believes that to issue such a judgment would not be in the interests of justice.

34. Rule 52(a) requires the claimant to reserve his or her right to bring a further claim "*at the time of withdrawal*" so that a claimant who fails to do so will not be able to rely on r.52(a) subsequently and may find that the tribunal has automatically dismissed the claim as r.52 states that a tribunal must issue a dismissal judgment unless one of the two exceptions apply.

35. In *Campbell v OCS Group UK Ltd & Ors* UKEAT/0188/16/, it was noted that no time limits are provided in r.52 within which the tribunal is required to act. Rule 52(a) requires the claimant to reserve his or her right to bring a further claim "*at the time of withdrawal*" so that a claimant who fails to do so will not be able to rely on r.52(a) subsequently and may find that the tribunal has automatically dismissed the claim, as r.52 states that a tribunal must issue a dismissal judgment unless one of the two exceptions apply. In *Campbell*, Mrs Justice Simler held that tribunals are not under a mandatory obligation to invite representations from parties before dismissing a claim, but may do so.

36. In *Segor v Goodrich Actuation Systems Ltd* [2012] UKEAT/0145/11, the EAT made clear that tribunals should always take steps to ensure that litigants, particularly those who are self-represented or have lay representation, who seek to concede a point or abandon it, do so on a clear, unambiguous and unequivocal basis before accepting the concession or abandonment indicated. Langstaff P held [#11]:

> "What we should say, however, is this. A tribunal will always want to take care where a litigant, particularly one who is self-represented or who has a lay representative, seeks to concede a point or to abandon it. It may be a matter of great significance.

> Though it is always for the parties to shape their cases and for a tribunal to rule upon the cases as put before it, and not as the tribunal might think it would have been better expressed by either party, it must take the greatest of care to ensure that if a party during the course of a hearing seeks to abandon a central and important point that that is precisely what the individual wishes to do, that they understand the significance of what is being said, that there is clarity about it, and if they are unrepresented, that they understand some of the consequences that may flow. As a matter of principle, we consider that a concession or withdrawal cannot properly be accepted as such unless it is clear, unequivocal and unambiguous."

37. Simler J said of *Segor* and *Drysdale* in *Campbell* [#19,] that the approach in those two cases seemed to her to apply in the context of withdrawal and dismissal under rr. 51 and 52. So far as withdrawal is concerned, she said *Segor* established that where there is an application to withdraw a Tribunal must consider if it amounts to a clear, unambiguous and unequivocal withdrawal. Though there is no obligation to intervene whether by reason of the principles of natural justice or the overriding objective, tribunals can make inquiries as appear fit. If the circumstances of the withdrawal give rise to reasonable concern on the tribunal's part, it can make further inquiries. However, the Court of Appeal in *Drysdale* made clear that there was no obligation to do this. Mrs Justice Simler held that although the principles of natural justice and the overriding objective both apply to r.52, there is nothing in its wording that requires tribunals as matter of course to invite representations before dismissing the proceedings. She said it was a matter for the judgment of the Tribunal to decide whether to make further inquiries, which will depend on the facts and the relevant context.

38. In the most recent case of *Biktasheva v University of Liverpool* EAT 0253/19, the EAT considered the effect of rule 52, in the context of an equal pay claim. There, B, a grade 8 university lecturer, presented an equal pay claim that was presented in June 2015 but it was later withdrawn, in February 2016, by B's solicitors. There was no reservation of any right to bring a further claim and the tribunal subsequently dismissed the claim under rule 52. In June 2018, B sought to present a new 'like work' claim, with four comparators. An employment judge found that the tribunal had no jurisdiction to hear claims based on three of the comparators, since they could have been relied upon in earlier proceedings but that the claim could proceed in relation to the fourth comparator, who had been employed in a grade 9 role only since 2016. B appealed and the university cross-appealed, arguing that the claims based on all four comparators should have been struck out on the basis that they were precluded by cause of action estoppel. The EAT allowed the cross-appeal. It held that the cause of action in the 2015 and 2018 claims was identical, relying on the same allegation of difference in pay for the same 'like work', even though the 2018 claim relied on different comparators. The EAT therefore concluded that estoppel applied. As for rule 52, the EAT questioned whether the rule itself precludes a further claim being brought or whether it merely refers to the common law rule. The EAT noted that the distinction was possibly of

some significance because the wording of rule 52 is arguably rather wider than the concept of cause of action estoppel. It took the view that, in setting out the circumstances in which a future claim is precluded, rule 52 merely explains the gist of the common law and is not itself the source of law in this situation. Thus, the law which determines whether further proceedings can be brought remains that of res judicata, including cause of action estoppel. However, the EAT went on to hold that, even if rule 52 were the source of the law on precluding further proceedings in this type of situation, the 2018 claim would have been precluded on the facts because it was the same, or substantially the same, complaint as the 2015 claim.

Section 123 Equality Act 2010

39. Under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable. Section 123 (1) says 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.

40. A useful overview of the principles that need to be considered in regard to the exercise of the "just and equitable" discretion is given in *Miller v The Ministry of Justice* [2016] UKEAT/0003/15:

> "10. There are five points which are relevant to the issues in these appeals. i. The discretion to extend time is a wide one: *Robertson v Bexley Community Centre* [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24. ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In *Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in Robertson, but did not, in my judgment, overrule it. ..... iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition. iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (*DCA v Jones* [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44). v. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 ("the 1980 Act") helpful (*British Coal Corporation v Keeble* [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits

> something significant: *Afolabi v Southwark London Borough Council* [2003] ICR 800; [2003] EWCA Civ 15, at paragraph 33.
> 11. *DCA v Jones* was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this: "The guidelines expressed in *Keeble* are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."
> 12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. ....
> 13. ..... It is clear from paragraph 50 of Pill LJ's judgment in *DCA v Jones* that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. *DCA v Jones* also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. .....

41. In *British Coal Corporation v Keeble*, the EAT advised that tribunals deciding whether or not to extend the time for presentation of a claim under what is now the EQA should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.

42. Where a number of discriminatory acts occur over a period of time, s123 Equality Act 2010 (EqA) also provides that these acts can be treated as one 'continuing act'. This means that the time limit for presenting a claim,

in respect of the entire course of discriminatory conduct, will not start to run until the date of the last act of discrimination. Section 123(3) says (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

43. The approach to time limits in discrimination cases has been the subject of extensive consideration in the appellate courts. The starting point is the guidance provided by Mummery LJ in the case of *Hendricks v The Commissioner of Police for the Metropolis* [2003] IRLR 96:

> "48. On the evidential material before it, the Tribunal was entitled to make a preliminary decision that it has jurisdiction to consider the allegations of discrimination made by Miss Hendricks. The fact that she was off sick from March 1999 and was absent from the working environment does not necessarily rule out the possibility of continuing discrimination against her, for which the Commissioner may be held legally responsible. Miss Hendricks has not resigned nor has she been dismissed from the Service. She remains a serving officer entitled to the protection of Part II of the Discriminations Acts. Her complaints are not confined to less favourable treatment of her in the working environment from which she was absent after March 1999. They extend to less favourable treatment of Miss Hendricks in the contact made with her by those in the Service (and also in the lack of contact made with her) in the course of her continuing relationship with the Metropolitan Police Service: she is still a serving officer, despite her physical absence from the workplace. She is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'. I regard this as a legally more precise way of characterising her case than the use of expressions such as 'institutionalised racism,' 'a prevailing way of life,' a 'generalised policy of discrimination', or 'climate' or 'culture' of unlawful discrimination.
>
> 49. At the end of the day Miss Hendricks may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Commissioner can be held legally responsible as a result of what he has done, or omitted to do, in the direction and control of the Service in matters of race and sex discrimination. It is, however, too soon to say that the complaints have been brought too late.
>
> 50. I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that he ground of the less favourable treatment is race or sex.

> 51. In my judgment, the approach of both the Employment Tribunal and the Appeal Tribunal to the language of the authorities on 'continuing acts' was too literal. They concentrated on whether the concepts of a policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken, fitted the facts of this case: see *Owusu v London Fire & Civil Defence Authority* [1995] IRLR 574 at paragraphs 21-23; *Rovenska v General Medical Council* [1998] ICR 85 at p.96; *Cast v Croydon College* [1998] ICR 500 at p.509 (cf the approach of the Appeal Tribunal in *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833 at p.841 where there was an 'accumulation of events over a period of time' and a finding of a 'climate of racial abuse' of which the employers were aware, but had done nothing. That was treated as 'continuing conduct' and a 'continuing failure' on the part of the UKEAT/0517/13/SM -8- employers to prevent racial abuse and discrimination, and as amounting to 'other detriment' within section 4(2)(c) of the 1976 Act).
>
> 52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a 'policy' could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

44. Mummery LJ had occasion to revisit this issue in the case of *Arthur v London Eastern Railway Limited* [2007] IRLR 58, a case involving the analogous time provisions in whistleblowing cases:

> 30. The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the 3 month period. There must be an act (or failure) within the 3 month period, but the complaint is not confined to that act (or failure). The last act (or failure) within the 3 month may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.
>
> 31. The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3 month period and some outside it. The acts occurring in the 3 month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there

> may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3 month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a 'series' and (b) being acts which are 'similar' to one another. […] UKEAT/0517/13/SM -9- 35. In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the 3 month period and the acts outside the 3 month period.

45. The way in which an Employment Tribunal is to approach its task in this regard came before the Court of Appeal in *Lyfar v Brighton and Sussex University Hospitals Trust* [2006] EWCA Civ 1548. The Claimant gave oral evidence in that case. Having heard the Claimant's evidence, the ET allowed five of the Claimant's complaints to proceed but dismissed the other 12 complaints as being out of time. The EAT and the Court of Appeal both upheld that decision. Hooper LJ gave the leading judgment, with which Hughes LJ and Thorpe LJ agreed. Hooper LJ stated that the test to be applied at the Pre-Hearing Review was to consider whether the Claimant had established a prima facie case. Hooper LJ accepted counsel's submission that the ET must ask itself whether the complaints were capable of being part of an act extending over a period. Another way of formulating the test to be applied at the Pre-Hearing Review is that the Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs: see *Ma v Merck Sharp and Dohme Ltd* [2008] EWCA Civ 1426 at paragraph 17." In Lyfar, the Court of Appeal said:

> "10. I turn to the first issue: the test to be applied by the ET. In *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686 Mummery LJ (with whom the other members of the Court agreed) set out the test to be applied at a Preliminary Hearing [now a Pre-Trial Review] when the Claimant, otherwise out of time, seeks to establish that a complaint is part of an act extending over a period. The Claimant must show a prima facie case. Miss Monaghan submitted that the ET must ask itself whether the complaints were capable of being part of an act extending over a period. I, for my part, see no meaningful difference between this test and the prima facie test.
>
> 11. To resolve that issue it may be advisable for oral evidence to be called, see e.g. *Arthur v London Eastern Railway Limited (trading as One Stansted Express)* [2006] EWCA Civ 1358. […]

46. Further guidance was provided by the Court of Appeal in *Aziz v FDA* [2010] EWCA Civ 304:

> "33. In considering whether separate incidents form part of 'an act extending over a period' within section 68(7)(b) of the 1976 Act, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British*

Medical Association v Chaudhary, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02/DA) at paragraph 208. 34.

47. More recently, the EAT in *South Western Ambulance Service NHS Foundation Trust v King*, UKEAT/0056/19/ noted that there are generally two ways that conduct might be said to form a continuing act. The first is where there are a series of separate discriminatory acts which are somehow linked (as opposed to being isolated or unconnected). The second is where there is a discriminatory policy or practice, the application of which causes a continuing act of discrimination.

48. Following *Hendricks*, it is for the employee to show an arguable or a prima facie case that the alleged discriminatory acts were part of a continuing act.

49. Put briefly therefore, the appropriate test for a "continuing act" is (following on from *Hendricks)* is whether the employer is responsible for "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents; or put another way ,that the alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

Amendments

50. The Tribunal has the power to grant permission to amend a Particulars of Claim under its r.29 power (to make case management orders) combined with its r.41 power (to regulate its own procedure in the manner it considers fair and having regard to the principles contained in the overriding objective in r.2). When considering whether to allow an amendment to be made, Mummery J, in *Selkent Bus Co Ltd v Moore* 1996 ICR 836 (at p.843 and p.844) set out some general principles and guidelines as to how an employment tribunal should approach an application to amend. This approach was approved by the Court of Appeal in *Ali v Office of National Statistics*, [2005] IRLR 201.

51. The EAT in *Selkent* said a Tribunal needed to carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J said it was impossible and undesirable to attempt to list every relevant circumstance exhaustively but that the following circumstances were certainly relevant:

    a. the nature of the amendment: Mummery J observed: "applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal [has] to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action." In Abercrombie

and ors v Aga Rangemaster Ltd 2014 ICR 209, the Court of Appeal said, (at [47]) that the decision of Mummery J in Selkent, taken as a whole, did not advocate an approach under which the introduction of a new cause of action should necessarily weigh heavily against permission being granted. It was held in that case that Mummery J's reference to the "substitution of other labels for facts already pleaded" (i.e. a relabelling exercise) is an example of the kind of case where there is the introduction of a new cause of action but - other things being equal - amendment should readily be permitted. This is to be contrasted with the introduction of a new cause of action by "the making of entirely new factual allegations which change the basis of the existing claim". The Court of Appeal in Abercrombie made clear (at [48]) that "the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted." A distinction can therefore be drawn between amendments which add or substitute a new claim arising out of the same facts as the original claim and those which add a new claim which is unconnected with the original claim and therefore would extend the issues and the evidence.

b. the applicability of time limits: Mummery J observed: "If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions". If the amendment is purely a relabelling exercise, time limits are not a relevant factor (Hammersmith and Fulham London Borough Council v Jesuthasan 1998 ICR 640). Even if the amendment is more than a relabelling exercise, the time limit is just one (and not necessarily a decisive) factor. In Transport and General Workers' Union v Safeway Stores Ltd, Underhill J made clear (at [10]) that Mummery J's observations in Selkent "might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P. meant." Underhill J went on to refer to the following remarks (of Waller LJ in Ali v Office of National Statistics 2005 IRLR 201 at [40]) as being the orthodox position on the authorities in relation to time limits: "There are, as Mummery J said in Selkent, many different circumstances in which applications for leave to amend are made. One can conceive of circumstances in which, although no new claim is being brought, it would, in the circumstances, be contrary to the interests of justice to allow an amendment because the delay in asserting facts which have been known for many months makes it unjust to do so. There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time."

c. the timing and manner of the application: Mummery J observed: "An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for

> the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor." It is relevant to consider for example, why an application was not made earlier and why it is now being made, for example whether it was because of the discovery of new facts or information appearing from documents disclosed on discovery. Questions of delay, as a result of adjournment, and additional costs, particularly if they are unlikely to be recovered by the successful party, are also relevant in reaching a decision, but delay in itself should not be the sole reason for refusing an application.

52. It was emphasised by the EAT in *Selkent* that whenever taking any factors into account, "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment" and that "the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

53. The Presidential Guidance on Case Management (Amendments) states that "Regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it".

Respondent's submissions

54. Mr Kirk submitted that:

    a. As set out above, a number of the issues set out by the Claimant [at paragraphs 6 – 10 of Second Claim and paragraph 6(1)-(3), (4) of the Further Particulars] "replicate exactly matters that were already pleaded by the Claimant in respect of" the First Claim, in paragraphs 6-10 of the Particulars of Second Claim [64]:

        1. An allegation that "on 20th October 2016, I was unfoundedly verbally attacked and publicly humiliating, by two female colleagues" (at para 16, First Claim, PoC [15])
        2. An allegation that "my employer via Mark Nicholls, applied the provision, criterion or practice ("PCP") of permitting the passive bullying of me by ostracism to occur" (at para 21, First claim, PoC [17]);
        3. An allegation that "on 3rd January 2017, a report was received from DVSA's Occupational Health service" and that "in failing to act, as advised in the OH report, my employer failed to comply with their duty to remove the disadvantage" (at paras 67-68, First Claim, PoC). He also made a similar allegation of Kelly Galton browbeating her (at para 87/9 First Claim, PoC [22]);
        4. an allegation that on 25th April 2017 "I also submitted a request for disability adjustment leave to Mark Nicolls…my request was refused" (at para 93, First Claim, PoC, [26]).

b. unlike in *Mulvany*, no proper explanation has been offered by the Claimant as to why he has now sought to re-litigate claims which were withdrawn and dismissed long ago;

c. it can be readily inferred from frank wording of the Claimant's original email withdrawing the First Claim, that he acknowledged at the time that to litigate these issues would have been to waste "unnecessary time & cost for both parties". This demands a particularly cogent explanation from the Claimant as to why it is necessary to re-litigate these claims now, which has not been provided;

d. the withdrawal of that First Claim by the Claimant was "unequivocal and made without any reservation of rights". The Respondent asserted that it would be an abuse of process to allow the Claimant to re-litigate these matters following the dismissal judgment; the Respondent referred to rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and to the EAT's Judgment in *Biktasheva v University of Liverpool* UKEAT/0253/19;

e. in any event, these events, as well as a number of other matters relied upon by the Claimant in the Second Claim, were "considerably out of time"; indeed a number were out of time before the making of the First Claim, let alone the Second; the fact that these allegations were out of time when the First Claim was submitted (and were even further out of time when brought by way of the Second Claim) is a further aggravating factor;

f. in order to comply with section 123 of the Equality Act 2010, the Respondent points out that the Claimant ought to have presented his complaints of discrimination within 3 months of the acts complained of. On the face of it, three out of the four allegations summarised above are plainly well out of time. The ACAS certificate was dated 11 July 2017, therefore any acts before 12 April 2017 were out of time. (The latest of these allegations is a complaint that the Respondent refused a request for disability adjustment leave on 25th April 2017).

g. the Second Claim was not presented until around September 2019. These claims are therefore over 2 years out of time.

h. the four allegations summarised above in the Second Claim are, in any event, "so hopelessly out of time that they should be struck out as disclosing no reasonable prospects of success";

i. in the Second Claim, the Claimant did not contact ACAS until 6 June 2019. It follows that any act complained of that pre-dates the period of 3 months prior to the Claimant contacting ACAS (i.e. any act before 7 March 2019) is out of time. Any continuing act would need to extend to a date beyond 7 March 2019.

j. the withdrawal of the First Claim in 2017, in any event broke any chain of causation: the Claimant's email makes clear he has now got the "management support" he felt he needed;

k. the minutes of the grievance hearing on 12 February 2019 [175-201] make clear the verbal attack relied upon was a one-off historic act;

l. the Claimant's own Particulars have a gap of 18 months between April 2017 and December 2018, when nothing is relied upon; this again suggests these were not continuing acts;

m. Litigating issues that are, in some instances, some four years old would plainly not be in the interests of justice: they offend against the finality of litigation; no cogent evidence is advanced by the Claimant as to why there were delays, no explanation has been offered; Defending allegations of this age would likely cause any Respondent undue prejudice; the balance favours not extending the time limits;

n. none of the events which the Respondent sought to strike out were continuing events;

o. further, a number of the matters set out by the Claimant in his Further Particulars, had not been pleaded in the ET1, and no application to add them or amend the claim had been made.

p. In regard to the Claimant's challenge on the name of the Respondent, Mr Kirk said this was simply not relevant – both the claims were originally issued against the Department of Transport; DVLA is an executive agency of the DoT; all the same individuals and incidents are relied upon;

He said the 4 key allegations identified should therefore be struck out as vexatious and /or an abuse of process under rule 37(1) (a). The Respondent submitted that in the present circumstances, it is clear that the Claimant's unearthing of these historic allegation in his Second Claim when these had been previously withdrawn is a "vexatious" way to conduct this litigation, within the meaning of rule 37(1)(a). Further, they and the additional allegations prior to December 2018, should be struck out under rule 37 (1) (a) as having no reasonable prospect of success as they were not continuing and were all so seriously out of time. If the claims were not struck out, a deposit order should be made.

55. The Respondent does not accept that this is a case where the Claimant can rely on a continuing act tying these allegations with each other or with the later allegations made by the Claimant. Following *Hendricks*, the Claimant has the burden of proving that there was a continuing discriminatory state of affairs. The Respondent submits that the pertinent question to consider will be whether the acts described by the Claimant describe a continuing state of affairs rather than a succession of unconnected or isolated acts (*Hendricks*).

56. The four historic allegations arguably describe matters which were either "one off events" or which the Claimant has not shown continued beyond 7 March 2019. Any argument that they did, is likely to be misconceived given the Claimant's frank admission in his email withdrawing the First Claim that as at November 2017 "managers, acting for my employer, are now recognising that errors have been made and are making efforts to help my recovery". Any continuing act was therefore interrupted by the Respondent's later compliance, even on the Claimant's own case.

Claimant's submissions

57. Mr Tapsell made a number of oral submissions, as summarised below.

58. Mr Tapsell raised a technical point that there could be no issue estoppel as the First Claim was brought against the Department of Transport, whereas while the Second Claim was originally brought against the Department of Transport, the Respondent had had that changed to the DVLA. Therefore, there were different Respondents.

59. Mr Tapsell accepts that allegations 1, 2, 3 do reflect the allegations in the First Claim that Mr Kirk objects to. Item 4 is a new allegation, not previously advanced. Mr Tapsell said the Claimant would give evidence about this in due course. Item 6 is a single self-contained incident on 4 June 2018, after the Claimant had fallen and broken his nose. Items 7, 8, and 9 are, he submitted, all related to OH reports. These will all be relevant in considering whether the dismissal was unfair – particularly with regard to the Claimant's attendance record, which goes back to the Occupation Health reports. He said that the August 2018 OH report is specifically referred to in the dismissal letter. It is not possible to consider the December 2018 OH without considering the earlier ones.

60. He sought to demonstrate that the Claimant complained of multiple acts of discrimination which extended over a period, all of which "stemmed from" the alleged act on 20 October 2016. All the problems stemmed from that incident – all the OH reports occurred because of what happened. Overall, the Claimant had an on-going issue with the outcome of the original grievance that he brought over the October 2016 incident and he never got closure over it. In the notes of the February 2019 Grievance meeting, which Mr Kirk had referred to, at 188, he said it was very clear that the Claimant had rejected the Respondent's "let it go" refrain.

61. He did not dispute that the withdrawal email [49] was clear and unequivocal but said it was important to bear in mind the context, especially the Claimant's state of mind. The delicate state of the Claimant's mental health meant he was very sensitive and alert to what had happened.

62. On balance, Mr Tapsell said his primary contention was that these matters were all continuing acts, but at the very least these matters need to be before the Tribunal as background.

Discussion

1. Rule 52/estoppel argument

63. The rules at 50-52 Tribunal Rules of Procedure 2013 set out a statutory scheme, they make clear that once a claim is withdrawn, dismissal will be a consequence of withdrawal, unless a claimant expressly says they do not want the withdrawal to become a dismissal or the tribunal believes it would not be in the interest of justice to dismiss the claim. Neither of those conditions apply here. It is now well established that a dismissal is the act of the tribunal and involves a judicial determination. Therefore, a judgment on withdrawal under rule 52 has effect as a judgment determining the claim, with the same consequence that cause of action and issue estoppel can apply. As rule 52 makes clear, where a claim, or part of it, has been withdrawn under rule 51, the subsequent issuing of a judgment by the Tribunal dismissing the claim, means that "the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint". As made clear by the Court of Appeal in *Barber v Staffordshire County Council,* even where there has been no reasoned decision on the merits, a judgment given after withdrawal, can give rise to cause of action or issue estoppel.

64. In regard to the Claimant's challenge on the name of the Respondent, in my judgement, nothing turns on this: both claims were originally issued against the Department of Transport; and the DVLA is an executive agency of the DoT; further the same individuals and incidents are relied upon in both claims.

65. There is no dispute that the Claimant's email of 28 November 2017 was clear, unambiguous and unequivocal. No attempt has been made to adduce evidence about the Claimant's state of mind.

66. In my judgment, the issuing of the dismissal judgment prevents the Claimant from raising the allegations made in the First Claim again, notwithstanding there has never having been any substantive adjudication on it. In my judgment, it is clear that the four allegations referred to by the Respondent are either identical or in very similar terms to those contained in the First Claim. That means, using the numbering in paragraph 6 of the second set of Further Particulars, that allegations 1, 2, 3 should be struck out. Because there is no exact correlation between the way maters are put in the First Claim/Second claim or Further Particulars, and for the avoidance of any doubt, all of the factual matters which are referenced in the First Claim are struck out. I accept Mr Kirk's submission here that the Claimant's revival of these historic allegation in his Second Claim, when these had been previously withdrawn, is a "vexatious" way to conduct this litigation, and/or an abuse of process within the meaning of rule 37(1)(a). I

accept that, in terms of any narrative, the Claimant may well reference these events, but they should not form part of any claim against the Respondent.

2. Time limits

67. Under s 123(1) Equality Act 2010, any complaints of discrimination must be brought within three months, starting with the date the act or actions complained of took place, or such other period as the tribunal considers just and equitable. However, where a number of discriminatory acts occur over a period of time, s123 also provides that these acts can be treated as one 'continuing act'. This means that the time limit for presenting a claim, in respect of the entire course of discriminatory conduct, will not start to run until the date of the last act of discrimination.

68. In the first instance on the face of it, allegations 1-10 in paragraph 6 of the second set of Further Particulars, are all out of time – in the case of items 1-5, they occurred some two and half years before the Second Claim was issued, and complaint was made about the timeliness of items 1-3 at the time of the First Claim. Even in regard to allegations 6-9, 10 and 11, these date back to mid 2018 and are on any interpretation of s 123 out of time. Mr Tapsell made no submissions and put forward no evidence with regard to the “just and equitable” discretion to extend time in regard to any of these. His main focus was that these were continuing acts and that is where I have focused my attention. The Respondent has accepted, as I understand it, that irrespective of their dates, allegations 10 [failure to implement an OH report from 28/12/2018], 12 [Feb 2019: Refusal to provide Investigation Report in connection with Grievance process] and 14 [9/5/19 Dismissal decision based on attendance] should be allowed to go forward for determination at the full merits hearing. That therefore leaves allegations 1-9, 11, 13 and 15 for me to consider under this head. All of these allegations apart from 13 and 15 predate the 7 March date [see paragraph 71].

69. Following *Hendricks*, it is for the employee to show an arguable or a prima facie case that the alleged discriminatory acts were part of a continuing act. The appropriate test for a "continuing act" is set out in *Hendricks,* namely whether there is an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents. Mr Tapsell submits that there is a thread running through almost all the allegations which has its genesis in the October 2016 incident. He also says that with regard to the unfair dismissal claim, many of the OH reports are relevant and will need to be looked at.

70. Given the date of the Early Conciliation Certificate in the Second Claim, 6 June 2019, the key date under s 123 Equality Act, is 7 March 2019. Anything before 7 March 2019 that is relied upon is on the face it out of time unless there is a continuing act that can be said to link to an act or omission that is within the time limit.

71. With regard to the allegations that are challenged under this head, no argument has been advanced that it would be just and equitable to extend time for them, the sole argument advanced, as I understand it to be put by Mr Tapsell, is that these are all continuing acts. I have given careful consideration as to whether any of these could be said to be continuing acts. Although, I have already struck out allegations 1 to 3 on the basis that they are vexatious and an abuse of process as an attempt to relitigate historic matters. Nonetheless, in the event that I erred in regard to that finding, I have also looked at these allegations in terms of the time limit/continuing act arguments.

72. I have carefully looked at the matters set out in the Particulars of the First and Second Claims and the Further Claim as well as matters pleaded by the Respondent in its various ET3s. I noted for example that at the Grievance meeting discussion in February 2019, [188-200], while the Claimant says of this [182] "it is done. It's history" he also said "the impact on me remains .. I will not improve" and later on in the context of needing to let go of that incident, [187] he says it is "faded history" and "it has gone". I also noted that on a number of occasions he referred to the withdrawal of "effective support" since May 2018. In his email of withdrawal [49], the Claimant says that "Managers acting for my employer, are now acting as to support me, in my efforts to regain remission from the symptoms of my disability …. I believe that managers, acting for my employer, are now recognising that errors have been made and are making efforts to help my recovery. … I believe I am now being acknowledged as a relevant human being, and that is all I have sought, from the start."

73. I also noted that in the Amended ET3, with reference to the Claimant's appeal against dismissal one of the matters found on the appeal was that "issues from the 2016 grievance that the Claimant asserted remained unresolved had been conclusively resolved through the grievance procedure at the time". Details are also given at paragraph 71 of the Amended Response [165] with regard to the Claimant's initial grievance from November 2016: in an appeal outcome letter dated 20 June 2017, it was agreed, after reviewing the investigation and appeal, that the initial grievance decision should be re-decided. A further decision meeting with the Claimant was held on 8 September 2017 and a decision outcome letter was sent on 11 October 2017. This was appealed and an appeal meeting was held 30 November 2017. An appeal outcome letter was sent to the Claimant on 13 December 2017. Further, at paragraph 74, it is pleaded that there was a four-hour meeting, in April 2018, where the Respondent tried to find a way in which the Claimant could return to work by resolving outstanding issues from 2016, but this did not prove possible.

74. Finally, I noted that in the Particulars of the Second Claim, there is in fact a long factual gap of some 18 months between the incident relied upon in April 2017 and the next incident relied upon – the OH Report of December 2018.

75. Looking at the allegations listed by the Claimant in the second set of Further Particulars, all the items from 1- 9, and 11 are plainly out of time. The only thing that can rescue them, absent an application to extend the time, is that they amount to a “continuous act”. I have asked myself with regard to each of the allegations that are challenged under this head, whether there is an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents. Taking into account in particular the factual matters I have set out above, I accept that from the Claimant‘s perspective, the issues arising October 2016 incident were not resolved, but that is in my judgment a very different matter from asking whether there was a continuing state of affairs or an on-going situation. In my judgment, "an ongoing situation or a continuing state of affairs" must be more that a lack of satisfaction in the eye of the Claimant. In process terms, the Respondent heard and determined the Claimant’s grievance.

76. It is plain in my judgment from the decisions of various appellate courts that it is not enough for the Claimant simply to assert that acts are continuing acts or that they evidence a state of affairs extending over a period. The complainant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs. In my assessment, other than for allegations 7-8, I was not satisfied that the allegations that the Claimant seeks to reply on were continuing acts.

77. The backstop point here is 7 March 2019. Judging from the ET1 and ET3 in the Second Claim, in my assessment, bearing in mind this is both an unfair dismissal as well as a disability discrimination claim, the allegations complained of that fall within the 3 month time limit, relate principally to events arising out of the Claimant’s absences and his attendance record, which ultimately results in his dismissal. In my judgment, matters pertinent to this are arguably so linked as to be continuous or linked acts.

78. Allegations 1-5, all appear to be linked to each other and to arise out of the October 2016 incident. In my judgment there is nothing sufficient here to be said to amount to a continuing act or state of affairs. I accept that there is a discussion in the February 2019 meeting about the events of October 2016, and that to the Claimant’s mind, matters were still unresolved, but that is not sufficient, in my judgment, to find that any of the allegations listed at 1-5 were continuous, or amounted to an ongoing situation or a continuing state of affairs" such as to fall within section 123 (3). Allegation 5 relates to an alleged failure to implement the recommendations of an OH Report dated 28/12/17, ``in particular as regards undertaking an effective, suitable and sufficient Stress Risk Assessment (SRA) and implementing the requirements of the same and concluding the Claimant’s outstanding Grievance”. This again on its face appears to date back to the October 2016 incident, rather than be linked to what happened in the lead up to dismissal. I note the 18-month gap in the Claimant’s own pleading. I do not accept that any of these allegations are a continuing or on-going state of affairs that links to acts or omissions that are within time. I therefore strike

them out. Further, item 1-3 were out of time when the First Claim was made and were the subject of the same complaint at that time. Given that there is no just and equitable case advanced, in my judgment, allegations 1-5 should be struck out.

79. The allegation at 6/15, ("from 4/6/18 Respondent's refusal to accept the Claimant's GP's Unfit to Work certificate (following hospitalisation after fall injuring nose and wrist) and insisting the Claimant attended work to undertake administrative duties") is on the face of it, a completely isolated and unconnected incident, arising out of an accident that the Claimant had. No attempt was made to argue to the contrary. That allegation is seriously out of time and is plainly not a continuing act. No argument has been advanced that it would be just and equitable to allow it to remain, and therefore in my judgment, it should be struck out.

80. Allegation 7, as put, is an allegation that from 28/8/18 there was a "Failure to implement recommendations of OH Report dated 17/10/18 as regards the Claimant's stress as a result of the threat of dismissal for attendance-related issues, including for a suitable and sufficient SRA on that aspect of the Claimant's stress to be undertaken". As I have noted, the reason given for the Claimant's dismissal relates to absence/attendances. On the face of it, this OH report would appear to have some relevance to that and be a link in the process leading to the ultimate reason for dismissal. I also note that in its ET3, the Respondent refers to "Previous OH referrals had been made in respect of anxiety/stress and sleep apnoea in August, September and October 2018". The ET 3 as part of the "Factual Background" narrative, which led to the Claimant's dismissal, starts at 11 December 2018, when the Claimant was said to be on sickness absence. I also note that the notes of the Grievance meeting starting at 175 refer [**184,190**] to the August OH referral and to the Claimant's concerns that a decision that he was not fit to drive could impact on absence and trigger points. Mr Tapsell told me the dismissal letter referred to the August OH report. On balance, I am of the view that this is arguably part of a series of acts that is connected to the ultimate dismissal. I do not therefore strike this allegation out under this head of challenge, as it does in my judgment appear on its face to be a continuous act.

81. Allegation 8 is that "7/9/18 Respondent's management of the Return to Work process following the Claimant being certified fit to return to work by his GP including associated (repeated) OH referrals challenging his fitness to work and delaying his return to work." For the reasons given with regard to allegation 7, at 81 above, on balance, I again believe this may be part of part of a series of acts is connected to the ultimate dismissal and I do not therefore strike this allegation out.

82. Allegation 9 is put as "From 5/10/18 Downgrading the Claimant's performance in his PMR to "Developing" and subsequently refusing to consider or determine the Claimant's complaint regarding the downgrading." This appears to be a single unconnected allegation arising out of a performance management hearing. This appears in my judgment

to be a self-contained matter. It does not appear to relate to pleaded maters within the time limit. There appears to have been a follow up meeting on 14 November 2018 [**175**] and a Grievance meeting relating to it on 12 February [**175 onwards**] and a letter send with regard to it on 18 February. All pf these events pre-date 7 March 2019. Mr Tapsell did not suggest to me by that this was connected with or linked to the absence/ attendance issues that led to dismissal or the other allegations that are pleaded within the time limit. I do not believe this is falls within the section 123(3) definition and I therefore strike it out.

83. Allegation 10 is not challenged by the Respondent.

84. Allegation 11 is stated to be that "From 6/2/19 Refusal to allow the Claimant to return to work following GP confirming the Claimant as fit to work (i.e. not certifying that he was unfit for work)". This does appear to me to pick up on the underlying theme that culminates in the Claimant's dismissal, namely his attendance record /absences. I note that I the ET3, the Respondent refers to various matters around this time – namely that "On 11 January 2019, an informal attendance review meeting was held, and a Formal Review meeting took place on 17 January 2019. Following the Formal Review meeting, the Claimant's absence was referred to a Decision Officer for a capability hearing". I also note that the Respondent accepts that allegation 10, which states that "From 28/12/18 Failure to implement recommendations of OH Report dated 28/12/18, including the completion and effective implementation of a suitable and sufficient SRA and a "mutually agreed [Wellness] action plan") is not challenged and has been accepted by the Respondent as a matter that should go forward. On the face of it, this allegation does seem to me to be arguably part of a continuing act that continues past 7 March 2019. On that basis, I am minded to find that this is part of a linked series of events, that should be allowed to be raised as specific allegations.

85. Allegation 12 (Feb '19 Refusal to provide Investigation Report in connection with Grievance process) is not challenged by the Respondent.

86. Allegation 13 is stated to be that "From 27/3/19 Failure to implement recommendations of OH Report dated 27/3/19 including the completion of suitable and sufficient SRA, implementation of a phased return to work, creation of a "mutually agreed action plan" and resolving the identified work-related stressors." This allegation is within the three-month time limit.

87. Allegation 14 is not challenged by the Respondent.

88. Allegation 15 relates to the Appeal and is not out of time.

New claims

89. The Order made on 14 October 2020 required the Claimant to identify which allegations *in the original particulars of the Second Claim* (my emphasis added) related to which statutory claims (paragraph 8.1). The

Respondent asserts that in providing the Further Particulars, the Claimant, has in fact gone beyond the original scope of that claim and has added a number of new matters. The Respondent contends that none of the matters set out as allegations (4)-(10), (13) and (15) of the Further Particulars had any basis in the Claimant's original particulars of the Second Claim. The Respondent's primary case here is that an amendment application would be required before the Tribunal could hear any such matters.

90. Tribunals do have a wide degree of flexibility when it comes to case management. Were an application to add claims have been made, the EAT in *Selkent* said a Tribunal needs to carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing an amendment. Mummery J noted that the following circumstances were relevant (but not exhaustive or determinative:

    a. the nature of the amendment
    b. the applicability of time limits
    c. the timing and manner of the application

91. It was emphasised by the EAT in *Selkent* that whenever taking any factors into account, "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment" and that "the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

92. Looking at allegations 4-9, 13 and 15 purely under this head of challenge, as far as I can ascertain, and again Mr Tapsell did not take me to anything to counter this assertion, it does indeed appear to be correct that they were not previously pleaded and appear for the first time in the Further Particulars. No application has made to amend with regard to any of them. A number of these matters are also out of time.

93. As far as items 4-6 and 9 are concerned, these appear to me to involve different and new areas of inquiry to those raised in the Second Claim Particulars. These items are not instances where it could be said in my judgment to be simply a question of labelling or adding more factual details to facts which are already pleaded. These allegations are in effect in my judgment attempting to add new claims, which are unconnected with the original pleaded claims and which would in my judgment both extend the issues and the necessary evidence. Some of them relate to matters over 4 years ago now. I can see no good reason to allow allegations 4-6, and 9 to be allowed to go forward. These are new historic matters, they are considerably out of time, and do not appear to have any direct relevance to the events leading to dismissal. It would in my judgment impose an unfair burden on the Respondent to allow these to go forward.

94. However, with regard to items 7 and 8, which relate to OH Reports, I have already found these are arguably continuing acts. I do not consider those two items would in reality involve consideration of matters likely to involve different and new areas of inquiry. These have also been mentioned by the Respondent in its factual background. I do not believe that it would cause undue prejudice to the Respondent for these allegations to be allowed to go forward as they are in event as Mr Tapsell submitted, likely to be considered under the unfair dismissal claim. On balance, I do not believe that these allegations should be blocked.

95. Likewise, with regard to allegations 13 and 15, although not initially pleaded, they seem to me to be intricately bound up with the factual narrative leading up to the dismissal and the dismissal process. An appeal is part and parcel of the overall dismissal process.

Conclusion

96. Taking all these various findings into account, in my judgment, for the reasons set out above, allegations 1-6 and 9 should be struck out under Rule 37 on the basis that they are vexatious / and / or an abuse and / or have no reasonable prospect of success under rule 37.

97. Therefore, the Second Claim should be limited to the following allegations, (using the numbering set out by the Claimant in his second set of Further Particulars):

> 7 From 28/8/18 Failure to implement recommendations of OH Report dated 17/10/18 as regards the Claimant's stress as a result of the threat of dismissal for attendance-related issues, including for a suitable and sufficient SRA on that aspect of the Claimant's stress to be undertaken.
>
> 8 7/9/18 Respondent's management of the Return to Work process following the Claimant being certified fit to return to work by his GP including associated (repeated) OH referrals challenging his fitness to work and delaying his return to work.
>
> 10 From 28/12/18 Failure to implement recommendations of OH Report dated 28/12/18, including the completion and effective implementation of a suitable and sufficient SRA and a "mutually agreed [Wellness] action plan"
>
> 11 From 6/2/19 Refusal to allow the Claimant to return to work following GP confirming the Claimant as fit to work (i.e. not certifying that he was unfit for work).
>
> 12 Feb '19 Refusal to provide Investigation Report in connection with Grievance process
>
> 13 From 27/3/19 Failure to implement recommendations of OH Report dated 27/3/19 including the completion of suitable and sufficient SRA, implementation of a phased return to work, creation of a "mutually agreed action plan" and resolving the identified work-related stressors.
>
> 14 9/5/19 Dismissal decision based on attendance Decision to reduce compensation for alleged "lack of cooperation" (reduction subsequently overturned on appeal dated 24th October 2019)
>
> 15 26/6/19 Refusal of Appeal against dismissal (decision based, in part, on Claimant's alleged failure to agree the Wellness Action Plan).

Employment Judge Phillips
Dated: 11 January 2021
London South