EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102763/2020 and 4104907/2020

Preliminary hearing held by Cloud Video Platform on 13th and 14th May 2021

Employment Judge A Jones

A	**Claimant** **Represented by:** **Mr Oliver, Counsel instructed by Hann and Co, solicitors**
David Lloyd Leisure Ltd	**Respondent** **Represented by:** **Mr Webster, Counsel instructed by DAC Beachcroft, solicitors**

JUDGMENT

It is the judgment of the Tribunal that:

1. The ACAS certificate relied upon by the claimant in relation to claim 4104907/20 was not a valid certificate for the purposes of section 18A Employment Tribunals Act, and therefore the Tribunal does not have jurisdiction to consider that claim.

2. The application by the claimant to amend claim number 4102763/20 to include a claim of unfair dismissal is granted.

Introduction

3. A preliminary hearing took place on the Cloud Video Platform to determine a number of preliminary issues in these conjoined claims.

4. At the commencement of the hearing, the respondent confirmed that it now concedes that the claimant was a disabled person for the purposes of the Equality Act 2010 by virtue of suffering from PTSD and Adjustment disorder in addition to a previous concession that the claimant was a disabled person as a result of suffering from anxiety and depression.

5. Therefore, the Tribunal was required to address two issues. An oral judgment was given at the conclusion of the hearing. Both parties requested that written reasons be provided.

6. Skeleton arguments had been submitted by both parties in advance of the hearing. There was a joint bundle of documents and both parties provided a list of authorities to which they referred during their submissions. The written submissions, which were adopted by both Counsel are attached to this decision as appendices.

7. At the conclusion of the hearing, there was a discussion on case management and the following directions were made:

Case management orders

8. The case will be referred to as **A v David Lloyd Leisure Limited.**

9. The claimant will specify the exact nature of the amendment she seeks to make to her claim to include a claim of victimisation by 11 June 2021.

10. The respondent will have a further 28 days to make any consequential amendments to its response to the claimant's claims and provide further particulars in relation to its position on the material factual disputes which exist between the parties.

11. A final hearing is to be listed to take place before a full Tribunal by way of the Cloud Video Platform for 10 days from 21st September 2021.

12. A preliminary hearing for the purposes of case management is to be listed for an hour at 10am on 7th September 2021.

13. Written witness statements which will form the evidence in chief of the witnesses should be exchanged 14 days prior to the commencement of the final hearing.

14. The claimant will provide the respondent and copied to the Tribunal a schedule of loss by 11th June 2021.

15. Parties should exchange all documents on which they intend to rely at the final hearing 42 days prior to the commencement of the hearing, that is by 10 August.

16. A final agreed bundle of documents, which will be prepared by the respondent's representative, will be provided to the claimant and the Tribunal. The bundle should be provided in PDF searchable format to the claimant and the Tribunal. Three hard copies of the bundle should be provided to the Tribunal for its use and if requested, a copy be provided to the claimant.

17. The Tribunal also noted that it was accepted by both parties that all claims which were to be made by the claimant had been set out in the current Scott Schedule document which had been produced before the Employment Tribunal. The respondent also accepted that they had sufficient notice of the detail of all claims.

18. The claimant confirmed that she does not seek to bring a claim of personal injury before the Tribunal, although she will seek to recover compensation for psychiatric damage should her claims be successful.

19. The Tribunal will issue separate directions and Orders in relation to applications made by the parties under Rule 50.

Reasons

20. The Tribunal was required to determine two preliminary issues. The claimant had lodged two claims which had been conjoined. However, the respondent argued that the Tribunal did not have jurisdiction to consider the second claim which was lodged by the claimant as the claim form included an ACAS conciliation certificate number which was different from the ACAS conciliation number provided by the claimant in relation to her original claim. The

respondent argued that the matters raised in the second claim were the same 'matter' as the first claim and that therefore reference should have been made to the first certificate.

21. The claimant, while not conceding the respondent's point in relation to the ACAS certificate, made an application to amend the claimant's original claim to incorporate the content of the second claim. This application was made on 20 November 2020.

22. It was not helpful that the second claim form reiterated the content of the first claim form and then simply added some brief additional material. It was therefore not entirely clear from that second claim form exactly what amendments were sought by the claimant.

23. The Tribunal therefore clarified at the commencement of the hearing that the claimant was seeking to add a claim of unfair dismissal to her original claim. Parties accepted that on the face of it, this application to amend had been brought out of time, as it was brought more than three months after the termination of the claimant's employment. Counsel confirmed that it was not being alleged that the dismissal of the claimant was a breach of the provisions of the Equality Act 2010. However, that position was subsequently altered as is explained further below.

Issues to determine

24. Therefore, the Tribunal was required to determine two issues:

    - Was the ACAS certificate to which the claimant referred in her second claim a valid certificate? This was referred to during the proceedings as 'the ACAS point'
    - If it was not a valid certificate, should the Tribunal grant the application to amend the claimant's claim? This was referred to during the proceedings as 'the Amendment point'.

ACAS point

25. In determining the ACAS point, it was necessary for the Tribunal to determine whether a valid ACAS certificate had been relied upon to comply with the requirements of Section 18A of the Employment Tribunals Act 1996 in submitting her second claim form.

26. Section 18A provides as follows:

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation office.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If –

a. During the prescribed period the conciliation officer concludes that a settlement is not possible, or

b. The prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

27. Rules 10 and 12 of the Employment Tribunal Rules of Procedure 2013 provide as follows:

Rule 10 (1) The Tribunal shall reject a claim if— (c) it does not contain one of the following— (i) an early conciliation number; (ii) confirmation that the claim does not institute any relevant proceedings; or (iii) confirmation that one of the early conciliation exemptions applies.

Rule 12 (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—...

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one

of the early conciliation exemptions applies; ... (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).

28. Therefore, it is necessary to consider whether the second claim lodged by the claimant ought to have rejected when it was presented.

29. The claimant sought to argue that the Tribunal did not have standing to consider this matter and that any challenge to the validity of an ACAS certificate lay only with the Court of Session in Scotland and could only be challenged by way of judicial review.

30. The argument, which is set out in more detail in the submissions which are attached, was understood by the Tribunal to be essentially that a ACAS officer was a public servant and acting in a public administrative capacity in issuing a certificate and therefore the question of whether a certificate was valid or not could only be challenged by way of Judicial Review in the Court of Session.

31. I had no hesitation in rejecting that argument. Were that argument to have substance, it would deny a Tribunal the ability to determine whether it had jurisdiction to consider claims where an ACAS certificate had been issued by an ACAS officer. It would render otiose consideration of section 18A(1) by an Employment Tribunal. That cannot be right.

32. The Tribunal was of the view that there is a difference between

- the issuing of a valid ACAS certificate, in considering whether an ACAS officer has acted within his or her statutory authority in issuing that certificate, and
- determining whether a certificate which is relied upon gives an Employment Tribunal jurisdiction to consider any subsequent claim made.

33. When the Tribunal determines the question of its jurisdiction to consider a claim, in relation to determining whether a certificate is valid for the purposes of section 18A, it is not calling into question the vires of the ACAS officer to issue a certificate, it is determining whether that certificate provides the Tribunal with a statutory jurisdiction to consider any claim which is lodged where the claim

relies on that certificate to meet the requirements of section 18A of ETA. These are two entirely separate matters.

34. Therefore, I have no hesitation in concluding that the Tribunal has jurisdiction to consider whether an ACAS certificate is valid for the purposes of a claim meeting the requirements of section 18A.

35. While the rules envisage that exercise being carried out at the point at which a claim is presented rather than during the course of proceedings, it is in my view clear that as soon as an Employment Judge either ex proprio motu or having had the issue brought to their attention, becomes aware that there is a question as to whether the requirements of section 18A have been met, they are bound to address that issue. It is a question of whether or not the Employment Tribunal has jurisdiction to consider the claim at all.

36. Therefore, the question to be determined is whether the certificate relied upon by the claimant in relation to her second claim is a valid certificate or not.

37. I conclude that I am bound to find that it was not. The essential question to be considered is whether or not the second certificate related to the same matter for the purposes of section 18A(1) the first certificate.

38. I am bound to follow the line of authorities culminating in **Revenue and Customs Commissioners v Serra Garau** [2017] ICR 1121 as to whether the certificate relates to the same matter as the original certificate obtained by the claimant.

39. The reasoning of Mr Justice Kerr is summarised in the following paragraphs of the judgment.

> 20. I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.
>
> 21. It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4) . The certificate referred to in section 18A(4) is the one that a prospective claimant must obtain by complying with the

notification requirements and the Rules of procedure scheduled to the 2014 Regulations .

40. While I am of the view that the provisions regarding ACAS conciliation were not intended to result in making it more complicated for claimants to present claims to the Employment Tribunal, I am bound by the terms of the legislation and the relevant authorities. It seems to me that the approach of the Employment Appeal Tribunal in interpreting what is 'a matter' for the purposes of section 18A(1) of ETA, has been to interpret it widely in order to make it more straightforward for claimants to present claims to the Employment Tribunal without having to go through what may be no more than an administrative process by being required to obtain a certificate in relation to every potential dispute between the parties.

41. However, the inevitable consequence of that is although there may be circumstances in which it is in a claimant's interests to define 'matter' in a narrow way, such an argument is unlikely to be successful.

42. What amounts to a 'matter' will be a question for a Tribunal to determine. It cannot be, as the claimant seems to suggest, for an ACAS conciliation officer to determine whether to issue a further certificate if a certificate has already been issued between the same parties. That would be likely, in my view, to go beyond the statutory powers provided to ACAS conciliation officers in the relevant legislation.

43. In the present circumstances I have little hesitation in concluding that the terms of the second claim relate to the same matter as the first claim. The claimant is claiming that she resigned in response to the position adopted by the respondent to the allegations she had made in her first claim. As narrated above, the second claim form is almost identical to the first claim form with some additional paragraphs. That second claim clearly relates to the same matter as the first matter.

44. I then went on to consider the impact of the amendments to the early conciliation rules and in particular the amendment which was made to rule 12 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1 allowing an Employment Judge to accept a claim form where

an error had been made in relation to the number of the ACAS conciliation form where it would be in the interests of justice to do so.

45. By virtue of Reg 7, Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020, Rule 12 was amended to include the provisions of Rule 12 (2ZA) which provides:

> The claim shall be rejected if the Judge considers that the claim is of a kind described in sub-paragraph (da) of paragraph (1) unless the Judge considers that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

46. I formed the view that this would have allowed me the discretion to consider whether there was an error in the number of the ACAS certificate referred to and whether the interest of justice could be taken into account in considering whether or not, nonetheless it could be accepted. I took into account the content of the explanatory note to the amendments which states 'The primary impact of these changes is to reduce unnecessary bureaucracy in providing access to justice through the employment tribunal system'.

47. However, I concluded that these amendments were not of benefit to the claimant on the basis that they were not in place at the time the requirement for early conciliation arose in this case. These amendments came into force on 8 October 2020 after the claimant's second claim had been lodged.

48. In all of these circumstances, I concluded, that the claimant could not rely on the second certificate she obtained to meet the requirements of section 18A of ETA. I would however express that I reached that conclusion with regret and that should similar circumstances such as this arise in the future, then a Tribunal would be able to consider whether any error in the inclusion of an ACAS certificate number did not require a Tribunal to reject a claim, standing the terms of Rule 12(2ZA).

Amendment point

49. I then went on to consider the question of the application to amend the claimant's claim by incorporating the terms of her second application into her

first application. As indicated above, this was not a helpful way in which to approach matters. It caused some confusion during the hearing as to the exact nature of the amendment sought. It would have been far preferable if the claimant had simply set out in writing what additional claims she was seeking to include in her original claim form.

50. During the course of argument at the hearing, claimant's counsel indicated that the only claim which was sought to be added to the claimant's original claim was that of unfair dismissal. He indicated that it was not being argued that the dismissal was a discriminatory act. However, an email was received by the Tribunal the morning after hearing, but before oral reasons were provided, indicating that the claimant's Counsel had erred and that it **was** being argued that dismissal was an act of victimisation in terms of the Equality Act. Given the confusion in this regard, I indicated that I would only determine the claimant's application to amend her claim to include a claim of unfair dismissal. The claimant was required to set out the specific amendment sought in relation to the addition of a claim of victimisation, and the respondent was given an opportunity to set out its position in that regard. That application would therefore be dealt with separately.

51. It was said on behalf of the claimant that the amendment which was sought did not seek to introduce a new claim, but arose out of the same set of facts and that therefore the issue of time limits did not have to be considered.

52. I could not accept this argument. The amendment sought related to the claimant's dismissal. It was an entirely new head of claim and while it may have arisen out of the facts of the claimant's original claim, it was a new claim. Therefore, it was necessary to consider the relevant time limits.

53. I considered the guidance in **Selkent Bus Co Ltd v Moore [1996] IRLR 661** which outlined the matters to be considered by a Tribunal when determining whether an application for amendment ought to be granted. These were briefly:

- the nature of the amendment,
- any applicable time limits, and

- the timing and manner of the application.

54. It is accepted that on the face of it, the claim of unfair dismissal (whether an 'ordinary' unfair dismissal or an allegation that the dismissal was discriminatory) was out of time. The claimant's date of dismissal was 15 August 2020. The application to amend was made on 20 November 2020.

55. However, the time limit which is applicable should not be determinative of the Tribunal's judgment in the issue. It is also necessary to consider the balance of injustice. Justice Underhill, as he then was, considered this issue in **TGWU v Safeway Stores Limited** UKEAT/92/7 where he found that a Tribunal which had refused to allow an amendment because it was out of time erred in law. This case concerned a claim lodged by a trade union on behalf of its members for unfair dismissal and other claims. An application was then made to amend the claim to include a claim of a failure to inform and consult. That claim is subject to the same limitation period and same reasonably practicable test as unfair dismissal. The application to amend was refused.

56. At paragraph 15, Underhill J stated

> That reasoning is in my judgment deficient. There is no attempt to apply the *Cocking* test, as endorsed in *Kelly* (to which, indeed, there is no reference). Specifically, there is no review of all the circumstances including the relative balance of injustice. I think it likely that the Chairman in fact regarded the only issue requiring to be decided as being whether the claim for breach of the statutory consultation obligations was more than a "re-labelling" of a claim based on facts already pleaded. That was the approach being urged on her by Mr Stafford, whose submissions focused squarely on the issue of "jurisdiction"; and it is likely to have appeared to be supported by the passage in *Harvey* to which she referred

57. The EAT then went on to substitute its own judgment that the amendment should be allowed.

58. In the present case I am satisfied that the amendment application would be rejected were consideration to be limited only to the statutory time limit and whether it was reasonably practicable to have lodged the claim in time.

However, I am of the view that when the balance of injustice is considered, the application should be allowed. I say this for the following reasons.

59. There is little further inquiry required by the Tribunal of the facts of the case. The claimant's resignation was in response to the respondent's response to the initial claim she had raised. Therefore, on a practical basis, the only additional evidence which requires to be considered if whether the claimant was entitled to resign in those circumstances. That is more likely to be a matter for submissions. The Tribunal will be required to hear evidence of the facts and circumstances which led to the claimant's resignation whether it accepts the amendment application or not. While there is an issue in relation to whether claimant can rely on the respondent's response to her claim as stated in the ET3, because it is argued that this is part of a litigation immunity, I am of the view that this is also a matter for submissions. While these factors will no doubt extend the length of time of the submissions which are to made, they are unlikely to significantly impact on the evidence to be heard by the Tribunal.

60. The circumstances of this case are very unusual. They concern the proper interpretation of the rules regarding ACAS conciliation, which are complex and have been subject to a number of amendments. It would appear that an error was made by the claimant's agents in seeking to rely on a second ACAS certificate in order to give the Tribunal jurisdiction to consider the claimant's claim of unfair dismissal. There is no dispute that a claim of unfair dismissal was lodged timeously. However, the Tribunal does not have jurisdiction to consider that claim because the ACAS certificate on which it relied was not valid. I am mindful of the judgment in *Serrau Garu* to which reference is made above, which although found that a second certificate is not a valid certificate if it relates to the same matter, made reference to the relevance of continued involvement of ACAS by parties to an Employment Tribunal in exercising its discretion. In particular, at paragraph 26 Mr Justice Kerr stated:

> "That does not mean, of course, that continuing voluntary conciliation under the auspices of ACAS is other than useful and to be encouraged. Voluntary conciliation through ACAS has been available for decades, since long before the mandatory element was introduced in 2014. Such

> voluntary conciliation does not, of itself, modify time limits; though it may influence tribunals which have to decide whether to allow amendments, grant extensions of time, or make other case management decisions."

61. Once the claimant's agents became aware that the respondent was seeking to argue that the Tribunal did not have jurisdiction to consider the claim of unfair dismissal, they took steps to address that issue by seeking to amend the claim. Although the amendment application was more than three months after the termination of the claimant's employment, it was only six days after the limitation period. Moreover, the respondent was aware a month after the termination of the claimant's employment that she was seeking to bring an unfair dismissal claim. Her claim was lodged on 17th September and the respondent's agents received a copy of that claim form on 24th September, although they were alerted to it prior to that date.

62. The injustice to the claimant in refusing to grant the amendment application outweighs that which would be suffered by the respondent in granting it. While it does appear that it was an error on the part of the claimant's solicitors, and that is a factor which I have taken into account, to refuse the application would deprive the claimant of the opportunity to advance a claim of unfair dismissal before the Tribunal, in respect of which efforts had been made to lodge in good time but could not be accepted because of an error in the ACAS certificate number. Further, this is a matter which the Tribunal would, had the amendment regulations in relation to early conciliation been in force at the time, may have been able to address.

63. Therefore, although the claimant's claim of unfair dismissal is out of time, in these exceptional circumstances, the Tribunal grants the application to amend the original claim form to include a claim of unfair dismissal.

Employment Judge: Amanda Jones
Date of Judgment: 27 May 2021
Entered in register: 23 June 2021
and copied to parties

Claim No's: 4104907/2020 & 4102763/2020

IN THE EDINBURGH EMPLOYMENT TRIBUNAL

BETWEEN:

Ms A

Claimant

-and-

DAVID LLOYD LEISURE LIMITED

Respondent

SKELETON ARGUMENT ON BEHALF OF THE RESPONDENT
FOR THE PRELIMINARY HEARING ON 13-14 MAY 2021

[**bundle page numbers**]

1. The following issues fall to be determined at this Preliminary Hearing [**112**]:

    a. Whether there is a valid ACAS conciliation certificate in relation to the second tribunal claim lodged by C.

    b. If not, whether the application to amend the first tribunal claim to incorporate the claims made in the second tribunal claim should be accepted.

2. Whereas this PH was also previously also listed to determine whether C is a disabled person by reason of PTSD and an Adjustment Disorder, R has conceded the same.

3. R respectfully suggests that, if time permits, once the above issues have been determined, the tribunal should go on to (a) review the table of claims and (b) consider C's applications for an RRO and for special measures. However, this skeleton argument pertains only to the ACAS and amendment points. In the event that it is possible to consider the additional matters, R proposes to make oral submissions.

Outline Material Chronology

- 9 October 2011: Employment commenced
- 24 March 2020: First ACAS EC notification [**3**]
- 24 April 2020: First ACAS EC certificate issued [**3**]
- 23 May 2020: First ET claim lodged [**4**]
- 3 September 2020: Second ACAS EC notification [**43**]
- 15 September 2020: Second ACAS EC certificate issued [**43**]
- 17 September 2020: Second ET claim lodged [**44**]
- 15 July 2020: C resigned (giving 1 month's notice)
- 15 August 2020: EDT [**47**]

ACAS Certificate

4. C's second tribunal claim relies upon her second EC certificate.

5. Section 18A of the Employment Tribunals Act 1996 materially provides as follows:

[(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

6. Rules 10 and 12 of the Employment Tribunal Rules of Procedure 2013 materially provide as follows:

10

(1) The Tribunal shall reject a claim if—

(c) it does not contain one of the following—

(i) an early conciliation number;

(ii) confirmation that the claim does not institute any relevant proceedings; or

(iii) confirmation that one of the early conciliation exemptions applies].

12

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—

...

[(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;

...

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a)[, (b), (c) or (d)] of paragraph (1).

7. In **Science Warehouse Ltd v Mills [2016] ICR 252** the claimant resigned whilst on maternity leave and obtained an early conciliation certificate. She then lodged a claim in the tribunal complaining that she had been subjected to discrimination because of pregnancy or maternity. In its response to the claim, the employer set out an allegation of misconduct and asserted that, had the claimant not resigned, she would have been subject to an investigation resulting in possible disciplinary action. In response, the claimant made an application to amend to add a complaint of victimisation in relation to the same. The respondent opposed the amendment on the basis that the claimant had not obtained a second early conciliation certificate. The employment tribunal granted the application to amend. The employer appealed. Judge Eady QC held as follows:

> ***24*** *I start by considering what early conciliation requires. Section 18A uses the broad terminology of "matter" rather than "cause of action" or "claim"...*
>
> ***25*** *The employer contends "any matter" for the purposes of section 18A must be read as referring to the claim in question, relying on the reference to "claim" in the explanatory notes. I disagree. I am not persuaded the reference to "the claim" in the explanatory notes is to be understood as using that term in a formal sense, to refer to a claim based on a particular cause of action. Parliament chose to use the broader terminology of "matter"—"any matter ", "the matter "—and to read the reference to "claim" in the explanatory notes as requiring a narrower construction would, in my judgment, not provide an accurate explanation of section 18A.*

> ***26*** *That broader interpretation is not only suggested by the fact that section 18A does not use the term "claim" (which might have suggested something more specific), it is, further, consistent with the way in which early conciliation is to operate, in particular as indicated by the EC Rules. The employer's reading of section 18A would suggest the information given to Acas had to formally set out each such cause of action, each "claim", but that is not required by the Rules; no doubt with the hope of avoiding disputes and satellite litigation as to whether proper notification had been given of each and every possible claim subsequently made to the employment tribunal....*

8. In **Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445** Langstaff J (P) held that:

> ***17*** *In company with Judge Eady QC, I consider that the starting point is section 18A. The word "matter" is deliberately chosen. It is not "claim" as it might have been. A "matter" may involve an event or events, different times and dates, and different people. All may be sufficiently linked to come within the scope of "that matter"...*

9. In **Compass Group UK & Ireland v Morgan [2017] ICR 73**, the claimant suffered from an acute anxiety disorder which she contended amounted to a disability. Her employer instructed her to work at a different location. She raised a grievance and obtained an early conciliation certificate from ACAS. Two months after the certificate was issued, the claimant resigned and lodged a claim for, inter alia, constructive unfair dismissal, alleging a breach of the implied term of mutual trust and confidence. Her employer contended that the claimant had not complied with the early conciliation procedure as her resignation occurred after the issue of the certificate. The employment tribunal held that, since the proceedings related to a sequence of events that were in issue between the parties at the time of the early conciliation process, the early conciliation requirements had been satisfied. The employer appealed. Simler J (P) held that:

18 We, like the appeal tribunal in Science Warehouse Ltd v Mills [2016] ICR 252 and Drake International Systems Ltd v Blue Arrow Ltd [2016] ICR 445, consider it significant that Parliament used the word "matter" in section 18A(1) rather than "cause of action" or "claim" and that the prescribed information required to be provided by a prospective claimant to Acas to fulfil the obligations under the scheme is so very limited. The word "matter" is broad and, as Langstaff J observed, may encompass not just the precise facts of a claim that bring it within a cause of action but also other events at different times and/or dates and/or involving different people. There is no obligation, as we have already indicated, when notifying Acas to identify the matter itself nor the nature of any actual or prospective dispute, still less to provide the factual details or any background to that dispute. The only information required to be provided by a prospective claimant consists of names and addresses of the prospective parties...

20 Against that background, the question of construction raised by Mr Milsom is whether there is any temporal or other limit on the applicability of an early conciliation certificate in the context of "relevant proceedings relating to any matter" that are commenced in relation to a cause of action that only crystallises after the early conciliation process is complete. The question, accordingly, is: what is meant by "relating to any matter"? In our judgment, these are ordinary English words that have their ordinary meaning. Parliament has deliberately used flexible language capable of a broad meaning both by reference to the necessary link between the proceedings and the matter and by reference to the word "matter" itself. We do not consider it useful to provide synonyms for the words used by Parliament. Provided that there are or were matters between the parties whose names and addresses were notified in the prescribed manner and they are related to the proceedings instituted, that is sufficient to fulfil the requirements of section 18A(1).

21 Section 18A could have been enacted so as to require the matters complained of in subsequent proceedings to pre-date any relevant early conciliation certificate, but Parliament chose not to do so. Equally, Parliament could have provided for a time limit on the validity of an early conciliation certificate but did not do that either. Nor does the legislation provide that a certificate cannot pre-date causes of action complained about subsequently as, again, Parliament could have done. Indeed, there is nothing express in the legislation that provides any temporal or other limitation on the use of an early conciliation certificate in relation to relevant proceedings, causes of actions or claims. Rather, the legislation is, as we have said, deliberately defined by reference to a broader term than "cause of action" or "claim". We see nothing in the operation of the legislation that requires or entails a conclusion that the process and certificate only apply to events and allegations pre-dating the commencement of the process or the issue of the certificate or that requires any matter to be defined by reference only to the actual or alleged state of affairs or facts as at the date when early conciliation commenced or the certificate is issued...

22 The employers' shifting case, which now accepts that if a matter is in contemplation but has not occurred prior to the issue of the certificate it can be encompassed within the certificate provided it does not result in dismissal, has no underlying logic to it, in our judgment, and does not obviously emerge from the legislation itself. We do not consider that there is a difference in kind between a cause of action involving dismissal and other causes of action that do not result in dismissal and agree with Mr Moore that this is a red herring. In practice, it is easy to imagine a situation in which an individual contacts Acas complaining about a poor relationship that is deteriorating or developing in a particular and unacceptable way. The individual might have in his or her contemplation a belief that he is about to be dismissed, or that possibility might not yet have registered. Circumstances might exist where an individual's relationship with his or her employer is breaking down but has not reached the point at which

he or she feels bound to resign. We cannot see why it makes all the difference in such a situation that the relationship has come to an end. In either case (whether a case involving continuing employment or one involving a resignation) the underlying deteriorating employment relationship based on bullying, discrimination, victimisation or whatever other cause can constitute matters between the parties whose names have been notified to Acas, and the fact of employment subsequently terminating is simply an additional factual matter that either is or is not related to those earlier matters...

Application to the facts of this case

26 Having dealt with the proper construction of the section in question, we turn to consider whether in this case the proceedings for unfair dismissal instituted by the claimant in respect of a resignation that occurred after early conciliation had been completed are proceedings relating to matters in respect of which she had provided Acas with the prescribed information in the prescribed manner. Employment Judge Hyde approached this case on the basis that whatever the limits of a tribunal's jurisdiction in relation to section 18A(1) the facts of this case fall clearly within the parameters of that section. The claimant's claim form relies on all matters raised as breaches of the implied term of mutual trust and confidence that formed part of the matters notified to Acas as part of early conciliation. In addition, she complains about the failure to deal with her grievance appropriately and ultimately about dismissal. The failure to deal with her grievance appropriately and her constructive dismissal are the only matters that do not pre-date the institution of the early conciliation process. In the circumstances, and in light of the particular facts, the judge was satisfied that there was a connection between the factual matters complained about in the claim form and matters that were in dispute at the time of the process. The fact that the claimant's resignation occurred afterwards did not

undermine that conclusion in circumstances where there was, the judge held, no requirement to notify a claim or cause of action.

27 Those conclusions were conclusions to which the employment tribunal was entitled to come in all the circumstances and, moreover, they are conclusions with which we agree. We can detect no error of law in relation to her decision, and, in those circumstances, this appeal fails and is dismissed.

10. Per Kerr J in **Revenue and Customs Commissioners v Serra Garau [2017] ICR 1121** at paras 20-21:

18 ... Only one mandatory process is enacted by the statutory provisions. The effect of the provision is to prevent the bringing of a claim without first obtaining an early conciliation certificate. Once that has been done, the prohibition against bringing a claim enacted by section 18A(8) of the Employment Tribunals Act 1996 is lifted.

19 The quid pro quo for the prohibition against issuing a claim until a certificate is obtained, is that the limitation regime is modified so that the certification process does not prejudice the claimant. That is how section 207B of the Employment Rights Act 1996 and its counterpart section 104B of the Equality Act 2010 operate.

20 I agree with Mr Northall that the scheme of the legislation is that only one certificate is required for "proceedings relating to any matter" (in section 18A(1)). A second certificate is unnecessary and does not impact on the prohibition against bringing a claim that has already been lifted.

21 It follows, in my judgment, that a second certificate is not a "certificate" falling within section 18A(4). The certificate referred to in

section 18A(4) is the one that a prospective claimant must obtain by complying with the notification requirements and the Rules of Procedure scheduled to the 2014 Regulations...

25 [A] second certificate does not trigger the modified limitation regime in section 207B or its counterpart in section 140B of the Equality Act 2010. Such a second voluntary certificate is not required under the mandatory early conciliation provisions and does not generate the quid pro quo of a slightly relaxed limitation regime...

27 I reach these conclusions without regret. It is a well-known feature of litigation in many jurisdictions that settlement has to be considered alongside time limits and the running of time, and the obligation to litigate in a manner that is fair to the opposing party and to other users of the court or tribunal. Under procedural rules, defendants and respondents are entitled to benefit from the expiry of limitation periods. The entitlement to that benefit is only diluted to a limited extent in return for the obligation on a claimant, in this particular jurisdiction, to comply with the mandatory early conciliation provisions.

11. Per Kerr J in **Akhigbe v St Edwards Home Ltd & Others UKEAT/0110/18**:

[47] *I have considered, first, the language of the provisions. There is no express provision stating that a single "matter" within the meaning of s 18A(1) is necessarily limited to a single claim. It is clear from the authorities that a single matter may comprise a variety of assertions, allegations and causes of action. Mr Williams is right to accept this. It is also clear that a fresh EC certificate is not required merely because events relied on as part of claim postdate the EC certificate: Simler J (P) in Compass Group at [21].*

[48] *The approach of Simler J in that case was that a "matter" is an ordinary English word and there is no reason why it should be given an artificially restricted meaning...*

[49] *A number of commonplace examples may help to illustrate the point. Claimants quite often bring a discrimination claim followed a little later by a victimisation claim; the latter claim founded on the protected act of bringing proceedings in the former claim. Does the victimisation claim relate to the same matter as the original discrimination claim? It is a question of fact and degree but the probable answer is yes; the "matter" is the dispute arising out of the employment relationship and the alleged discrimination and subsequent alleged victimisation.*

[50] *The same reasoning is likely to apply where, for example, a disability discrimination claim is brought relying on alleged detriments during employment; and then a few months later a further disability discrimination claim is brought relying on dismissal for reasons connected with the disability. In both examples, it should not in principle make any difference whether the second claim is made by amending the ET 1 presented in the first claim or by presenting a second claim in a separate ET 1.*

[51] *Cases that fall the other side of the line would be those where the connection between the first and second claims is merely that the parties happen to be the same: such as, in Mr Akhigbe's example, a whistleblowing claim followed up with a claim for unpaid wages where the withholding of wages is put forward as a separate issue and not a connected issue such as a further detriment suffered as a result of the whistleblowing. In such a case, there is merit in a further conciliation opportunity that may help settle the unpaid wages claim.*

...

[53] *In my judgment, the true principle is that identified by Simler J (P) in Compass Group at [23]:*

> *"… it will be a question of fact and degree in every case where there is a challenge … to be determined by the good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided the requisite information to Acas…."*

...

[56] *I do not think it could sensibly be said that the second claim introduced a new and different "matter" because of the introduction of the new race discrimination claim. That claim was grounded in the same disputed factual matrix as the first. It was not based on different and subsequent unconnected events involving the same parties.*

12. Per Judge Eady QC in **E.ON Control Solutions v Caspall UKEAT/0003/19**:

[51] In the present case, the Claimant had provided the requisite information to ACAS for the purpose of the EC process and had obtained an EC certificate pursuant to s 18A(4) Employment Tribunals Act 1996. That should have enabled him to launch his ET claim against the Respondent but, in order to be able to do so, he still needed to comply with the relevant employment tribunal procedure regulations. Specifically, the Claimant needed to present his claim on the prescribed form and to include the accurate EC certificate number.

Whether he sought to rely on the first or the fourth claim (or, indeed, either of the other claims also before the ET at the Preliminary Hearing), he had failed to do so. The first claim gave an inaccurate EC certificate number, which related to a different Claimant and a different claim; the fourth claim gave a number for an EC certificate that was simply invalid (the second certificate having no validity for s 18A purposes, see Serra Garau).

[52] Having set out the relevant legal framework, however, it is apparent what should then have happened: in each instance, the ET was bound to reject the Claimant's claim and to return the claim form to him with a notice explaining why it had been rejected and providing him with information about how to apply for a reconsideration. The obligation to reject the claim could have arisen under r 10(1)(c)(i) or under r 12(1)(c) ET Rules. If rejected under r 12, the decision would have been taken by a Judge under r 12(2).

[53] It is apparent, however, that, in both instances, the ET neither rejected the claim under r 10 nor did any staff member refer the claim to an Employment Judge under r 12(1). It was left to the Respondent to take up this point and object that both claims should have been rejected by the ET. This was the point that was thus before the ET at the Preliminary Hearing on 19 September 2018. Although the matter had not been referred to him under r 12(1) ET Rules, I cannot see that the obligation arising under r 12(2) had ceased to apply: at that stage the Employment Judge ought properly to have considered that both claims were of a kind described in r 12(1)(c) - both claim forms failed to contain an accurate EC number.

[54] The consequence of a failure to include the correct EC number is made clear under rr 10 and 12: the claim in question shall be rejected

and the form returned to the would-be Claimant. That being so, when it became apparent to the Employment Judge that the Claimant's claim forms were of a kind described by r 12(1)(c), he was mandated by r 12(2) to reject the claims and return the forms to the Claimant.

13. On the basis of the above, R submits as follows:

a. The words '*any matter*' in s.18A(1) require to be construed broadly (**Science Warehouse**, **Drake** and **Compass Group**).

b. '*Matter*' can include causes of action that crystallise after early conciliation is completed (**Compass Group**).

c. The circumstances in **Compass Group** and the example given in **Akhigbe** are directly analogous to the present case.

d. Whether complaints relate to the same '*matter*' for the purposes of s.18A is a question of fact and degree (**Compass Group** and **Akhigbe**)

e. In this case, there can be no doubt that the first and second proceedings relate to the same '*matter*' for the purposes of s.18A (which it can be seen that C's representatives have all but conceded):

i. In the second ET1 C's solicitor stated [**55**]:

1. "*This claim follows on Disability Discrimination and Victimisation Claim no. 4102763/2020 Miss K Macaj v David Lloyd Leisure Limited which is the same facts, but our client has resigned over a loss of trust over averments in the ET3 of the Respondent*."

ii. On 17 September 2020 C's solicitor stated [**161**]:

1. "*This new head of claim is on the exact same facts, and is only adding detail of emails and medical records already in possession of the Respondent. Our client has simply resigned in response to the ET3, on top of all the other fats (sic) already pled in the ET1*."

2. "*There is nothing new in my client's resignation and constructive dismissal claim that warrants further delay*."

3. "*... [N]othing new of substance is added by the new claim...*"

iii. On 21 September 2020 C's solicitor stated [**159**]:

1. "*Our client has rushed to submit the ET1 to demonstrate that there are no new facts in her Constructive Dismissal Claim...*"

iv. On 23 September 2020 C's solicitor stated [**164**]:

1. "*There are no facts in this claim not already contained in the previous ET1 and ET3 other than the addition of medical notes proving the disability... and the Claimant resigning following the allegations in the ET3*."

v. On 23 September 2020 C's solicitor stated [**166**]:

1. "*The constructive dismissal/victimisation claim relies on the ET3 lodged in July as a trigger for resignation and a fresh act of victimisation. Those are the only new facts in the new ET1 claim. The claim is therefore in time*."

f. A second early conciliation certificate in relation to the same '*matter*' is not a certificate falling within s.18A (**Serra Garau**).

g. It follows from (e) and (f) that C was not entitled to rely upon her second early conciliation certificate when issuing her second claim and that the ET was obliged to reject the second claim pursuant to Rules 10(1)(c) and/or 12(2) and, not having done so to date, should do so now (**Caspall**).

Application to Amend

14. C made an application to amend on 20 November 2020 in which she sought to add claims of constructive unfair dismissal and victimisation (the alleged detriment being the constructive dismissal) [**182**]. Given that the EDT was 15 August 2020, the new claims are (uncontroversially it is understood) out of time.

15. In his *Outline Submission for the Claimant Preliminary Hearing (Closed) – 20th November 2020* of 20 November 2020, Counsel for the Claimant stated [**170** and **182**]:

1.5 As a threshold matter, it will be seen from these submissions that the Claimant seeks to amend the Pre-Resignation claim by inserting those claims that had been presented in the Post-Registration Claim. This would appear to address the Respondent's jurisdiction points in the Post-Resignation Claim based on the alleged invalidity of the EC Certificate. That

application is addressed further on in these submissions. The purpose of highlighting the matter at the outset is to allow Counsel to tender his apologies for intimating the matter so close to the Preliminary Hearing. Counsel had originally considered seeking leave to amend the Pre-Registration Claim if the Respondent were successful in its jurisdictional challenge. Having considered matters further, Counsel came to the conclusion late during the evening of 19th November 2020 that such an application should be made now in accordance with the aims of the overriding objective to avoid delay and save expense.

8. ***APPLICATION TO AMEND***

8.1. The Claimant seeks to amend the Pre-Resignation Claim by inserting

those claims stated in the Post-Resignation Claim.

8.2. It is well established that causes of action arising after the date of the presentation of a claim can be made by way of amendment to that claim: Prakash v Wolverhampton City Council (23 June 2006 EAT) and Okugade v Shaw Trust (11 August 2005).

8.3. The amendment would be to add a new cause of action in the Pre-Resignation Claim that is linked to or arises out of the same set of facts as the original claim. Therefore, amendment can be made notwithstanding the time limits that would otherwise apply: Home Office v Bose [1979] ICR 481, Jesuthasan v Hammersmith and Fulham LBC [1998] IRLR 372, and Abercrombie v Aga Rangemaster Ltd [2014] ICR 209.

8.4. This would resolve the technical "jurisdiction" issue raised by the Respondent in connection with the validity of the EC certificate.

16. It is trite law that an ET faced with an application to amend 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 (**Selkent Bus Co Ltd v Moore [1996] IRLR 661** at paras 22-24). Per Mummery P:

22

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions 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 have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

23

(b) The applicability of time limits

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, eg, in the case of unfair dismissal, s.67 of the 1978 Act.

24

(c) The timing and manner of the application

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 Rules 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 why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

17. There is a distinction to be drawn between: (i) amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

    a. Category (i) might include adding a new basis as to why a dismissal is unfair.

b. Category (ii) might include adding a new label, such as unfair dismissal to an existing redundancy payment case.
c. Category (iii) might include adding a claim of indirect discrimination to an existing claim of direct discrimination (**Ali v Office of National Statistics [2004] EWCA Civ 1363**), adding a complaint of a failure to make reasonable adjustments to an existing complaint of less favourable treatment (**Skinner v Leisure Connection plc UKEAT/0059/04**), or adding a complaint of direct discrimination to a claim of disability-related discrimination (**Reuters Ltd v Cole UKEAT/0258/17**).

18. Per Underhill LJ in **Abercrombie and Others v Aga Rangemaster Ltd [2014] ICR 209**:

> ***48*** *Consistently with that way of putting it, 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 ...*
>
> ***50*** *... Mummery J says in his guidance in Selkent Bus Co Ltd v Moore [1996] ICR 836 that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in employment tribunal proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded the claimant should not, absent perhaps some very*

special circumstances, be permitted to circumvent the statutory time limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded—and a fortiori in a re-labelling case—justice does not require the same approach...

19. Whilst it is acknowledged that causes of action arising after the date of presentation of a claim can, in principle, be added by way of an amendment and without the need for fresh proceedings, the **Selkent** principles (including as to limitation) still apply: **Okugade v Shaw Trust UKEAT/0172/05**.

Limitation: Not Reasonably Practicable

20. Section 111 Employment Rights Act 1996 materially provides as follows:

(1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.

(2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

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

21. According to the editors of *Harvey* at Division P1 Practice and Procedure para 216:

...[W]here a claimant has, in advance of the expiry of the primary time limit, instructed a professional adviser to act for him or her, and the reason for the failure to lodge the originating application within that time limit is reliance on erroneous advice or conduct by that adviser, the general rule is that it will be held that it was reasonably practicable to present the claim in time. However diligent the claimant's selection of a professional adviser and however reasonable the decision to rely on professional advice, if the adviser was unreasonably ignorant or mistaken, the claimant's only remedy will be an action for professional negligence against the adviser...

22. Per Lord Denning in **Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379**:

If a man engages skilled advisers to act for him — and they mistake the time limit and present it too late — he is out. His remedy is against them.

23. Per Lord Denning in **Wall's Meat Co Ltd v Khan [1979] ICR 52** at 56:

...Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences...

Limitation: Just and Equitable

24. Pursuant to s.123 of the Equality Act 2010:

(1) [Subject to [[section] 140B],] 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.

25. Per Langstaff J in **Abertawe Bro Morgannwg University v Local Health Board UKEAT/0305/13** at para 52:

[52] *Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298 at para 25, [2010] IRLR 327, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in Robertson v Bexley Community Centre [2003] EWCA Civ 576, [2003] IRLR 434 (CA)). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was…*

26. Per Elias J (P) in **Virdi v Commissioner of Police for the Metropolis and another [2017] IRLR 24**:

It is well established, and common ground, that the claimant cannot be held responsible for the failings of his solicitors: see Steeds v Perverill Management Services Ltd [2001] EWCA Civ 419 paragraph 27. For that reason it is not legitimate for a Court to refuse to extend time merely on the basis that the solicitor has been negligent and that the claimant will have a legal action against the solicitor. Mr Sethi went so far as to submit that the existence of a potential claim against a legal adviser was a factor which should not be taken into account at all. He contends that this was the view of the EAT in Chohan v Derby Law Centre [2004] IRLR 685.

36

I am not satisfied that this was what the EAT was saying in that case, but if they were then the observation cannot sit with the views of the Court of Appeal in the Steeds case when it accepted that it would be a factor, and sometimes a highly relevant factor, in the exercise of the discretion...

40

... When assessing whether time should be extended the fault of the claimant is plainly relevant, as it is under s.33. So if the failings are those of the solicitor and not the claimant that is highly material. But the errors of his solicitors should not be visited on his head, as the Steeds case and the authorities to which it refers, make abundantly clear. So whatever the reason why the solicitors failed in their duty would be immaterial when assessing the claimant's culpability, save perhaps for the possibility, which I consider to be wholly fanciful, that they were acting on his instructions and that therefore that he was indeed personally to blame for the late submission. The relevance of the explanation here is that it indicates that the blame for the late claim cannot be laid at Sergeant Virdi's door. That is an important consideration in the exercise of discretion.

27. On the basis of the foregoing, R submits as follows:

a. C's representatives were instructed long before the second claim was issued and contemplated issuing the application to amend at an earlier stage but chose not to do so until after the primary time limit expired.

b. At first blush (i.e. without knowing what C says) (a) suggests that C's representatives have been negligent. R does not know whether their professional indemnity insurers have been notified.

c. Whilst C has lodged a witness statement as she was ordered to do for the purposes of this PH [**113**], it relates almost exclusively to the question of disability and advances no reason as to why the application to amend should be granted.

d. C's application to amend seeks to introduce a new cause of action (unfair dismissal) and a further complaint of victimisation which relates to a new event (dismissal) and a new protected act (lodging the first claim). It is submitted that this is a category (iii) amendment which will necessitate the employment tribunal looking at significantly different factual and legal issues in an **Abercrombie** sense.

e. In view of (d), it is submitted that the tribunal must have regard to time limits when considering C's application to amend.

f. If (as is assumed given the absence of another reason being given in C's statement) the basis for extending time in relation to the unfair dismissal amendment is negligence on the part of C's representatives, the application to amend to add an out of time unfair dismissal complaint should be refused (**Dedman** and **Wall's Meat**).

g. Insofar as the victimisation amendment is concerned, whilst it is acknowledged that the tribunal has greater discretion and that the fact that C's representatives may be at fault is only a factor (**Virdi**), it remains for C to persuade the tribunal that it is just and equitable for

the amendment to be granted and the exercise of discretion is the exception rather than the rule (**Abertawe**).

h. R submits that in the present circumstances (not least C's representatives' apparent errors and the paucity of C's statement in relation to the application to amend), the application to add a victimisation complaint in relation to the dismissal should also be refused.

Summary

28. The ET is respectfully invited to:

a. Reject C's second claim.
b. Refuse C's application to amend.

ANDREW WEBSTER

4 May 2021

Parklane Plowden

Newcastle upon Tyne

IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH
CASE REFS:

4102763/20
4104907/20

BETWEEN:

Ms A
CLAIMANT

and

DAVID LLOYD LEISURE LIMITED
RESPONDENT

CLAIMANT'S SKELETON ARGUMENT

1. INTRODUCTION

1.1. This matter comes on as a Preliminary Hearing (Open) to address three matters set out in Employment Judge Jones' Note dated 18th February 2021, to wit:

1.1.1. the Claimant's disability status

1.1.2. whether there is a valid Early Conciliation Certificate in relation to Claim 4104907/20 (the **"Post-Resignation Claim"**) (the **"ACAS Point"**); and

1.1.3. if not, whether the Claimant should be permitted to amend claim 4102763/20 (the **"Pre-Resignation Claim"**) to include those elements that are currently pled in the Post-Resignation Claim (the **"Amendment Point"**).

1.2. Whilst the Claim has been set out in a Scott Schedule and Table of Claims, it is useful to set out the broad heads of claim being pursued. The Pre-Resignation Claim largely relates to acts of disability discrimination and victimisation. The Post-Resignation Claim largely relates to unfair dismissal. There are incidental claims relating to a failure to provide written particulars, non-compliance with ACAS procedure, etc.

1.3. Disability status is no longer in dispute. However, in the meantime, parties' agents have engaged each other and the Tribunal in a deluge of correspondence and it is apparent that each seeks to enlarge the scope of this Preliminary Hearing. Therefore, whilst submissions are made in outline terms as to matters which the Claimant's representatives consider can usefully be set out in advance, by the very way that matters have developed it should be appreciated that these cannot be comprehensive of all matters that will be advanced on behalf of the Claimant.

2. **DISABILITY STATUS**

2.1. The Respondent has intimated that it concedes that the Claimant's PTSD is a disability.

2.2. After extensive correspondence (including an application for a deposit order), the Respondent has now stated that it no longer disputes that the Claimant's Adjustment Disorder is a disability.

2.3. Accordingly, the Claimant simply seeks a formal finding that she is a disabled person in terms of section 6 of the *Equality Act 2010* by virtue of each of her conditions of (a) PTSD and (b) adjustment disorder.

3. **THE "ACAS" POINT**

3.1. The Respondent has taken a point to the Competency of the Post-Resignation Claim on the basis of the validity of the number of the EC Certificate stated on the ET1.

3.2. The Respondent's argument is set out at paras 4 to 12 of its Grounds of Resistance. Given the complexity of the ACAS Point against the relative simplicity of the Amendment Point, the Tribunal may wish to consider the issue of amendment first. The so-called ACAS Point is a lawyer's petri dish of legal argument. Notwithstanding the interesting legal questions that arise from this issue, it would be a more efficient use of the Tribunal's time to consider the Amendment point first. If Amendment of the Pre-Resignation Claim is allowed, then the ACAS Point becomes moot. The, relatively short submissions anent Amendment, are set out in the next section of these Submissions.

3.3. In any event, the gravamen of the Respondent's plea appears to be that the ACAS EC Certificate, the number of which has been entered into the ET1 for the Post-Resignation Claim (the **"Second EC Certificate"**) is invalid because it is claimed it relates to the same *"matter"* as that stated in the ACAS EC Certificate that has been entered on the ET1 for the Pre-Resignation Claim (the **"First EC Certificate"**). As a result, so the argument goes there was no valid EC Certificate number entered on the ET1 relative the Post-Resignation Claim and (despite the Tribunal not rejecting this claim under Rule 10 or Rule 12 earlier), the Tribunal is now obliged to reject that Claim by virtue of Rule 12(2).

3.4. As a threshold matter, it should be noted that the Claimant does not accept that the authorities referred to by the Respondent in its Grounds of Resistance are authority of the propositions set out in said Grounds of Resistance.

3.5. The Claimant's position can be summarised as follows:

3.5.1. Firstly, the Tribunal does not have jurisdiction to determine whether the ACAS EC Certificate is valid. Accordingly, the Tribunal ought to proceed on the presumption of regularity (*omnia praesumuntur rite esse acta*) to the effect that the Second EC Certificate is valid.

3.5.2. Secondly, the EC Certificate is valid and as such the Respondent's argument fails on the merits.

3.5.3. Thirdly, even if the EC Certificate is not valid, the Tribunal is to apply its procedure rules as they currently stand and should proceed in terms of Rule 12(2ZA) and allow the claim to proceed on the basis that the Claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim.

3.5.4. Fourthly, the Claimant takes points to preserve her appellate position so that certain arguments do not be barred by virtue of *Kumchyk* and accordingly advances the following arguments which **this** Tribunal is obliged to reject due to contrary binding authority: (a) the Employment Judge is not required to reject a claim in term of Rule 12(2) or any other provision of that Rule unless it was referred to him/her prior to acceptance by the Tribunal staff in terms of Rule 12(1); and (b) Rule 10 and 12 have no application after a claim has been accepted. Since the Claimant accepts that these arguments will necessarily fail before this Tribunal no further submissions are made as to them.

Jurisdiction

3.6. The Respondent says that the Second EC Certificate is invalid. However, that certificate was issued by an ACAS Conciliation officer appointed in terms of s.211 of the *Trade Union and Labour Relations (Consolidation) Act 1992*.

3.7. The Tribunal does not have jurisdiction to review the validity of acts of public officers. Therefore, it does not have jurisdiction to determine the validity of the ACAS Certificate and, as such, the Tribunal ought to decline to go behind the ACAS Certificate as the Respondent invites it to do here.

3.8. The burden of establishing that the Tribunal has jurisdiction to determine the validity of the EC certificate lies on the Respondent as the party asserting that jurisdiction.

3.9. Nevertheless, the Claimant's position on jurisdiction can be summarised as follows. Firstly, the Tribunal's jurisdiction is circumscribed to that which is conferred on it by statute. That does not include reviewing the acts of public officers or

indeed reducing the terms of an *ex facie* valid document. Secondly, it is well established in Scots law that a review of a decision or act of a public officer (such as an ACAS conciliation officer) is to be challenged exclusively by way of appeal to the Court of Session's supervisory jurisdiction unless express contrary provision is made in statute (for example a statutory right of appeal). For this reason, the Tribunal is not permitted to go behind the validity of the Second EC Certificate and is to proceed on the basis that the Second EC Certificate valid. As such the presumption of regularity applies (*omnia praesumuntur rite esse acta*) and the Tribunal is to proceed on the basis that the Second EC Certificate is valid.

Statutory Nature of the Tribunal's Jurisdiction

3.10. Being a creature of statute, the Tribunal's jurisdiction is limited to that conferred on it by statute. That is trite.

3.11. There is not statutory warrant for a jurisdiction of this Tribunal to determine the validity of an ACAS EC Certificate.

3.12. In particular, there is no indication in s.18A of the 1996 Act that Parliament intended to confer on the Employment Tribunal a jurisdiction to determine the validity of acts of third parties who are not even a party to the proceedings and has no opportunity to defend his decision. This is particularly so where, as here, nothing in the 1996 Act requires the Claimant to provide a valid Early Conciliation Certificate Number with her ET1. Therefore, there would have been no reason for Parliament to confer on the Tribunal jurisdiction to determine the validity of the EC Certificate by operation of section 18A. Accordingly, any statutory jurisdiction that the Tribunal has to review the validity of the ACAS Conciliation Officer's decision to issue an EC Certificate is not to be found in s.18A.

3.13. The requirement to provide a valid EC Certificate Number arises from the terms of the Procedure Rules as opposed to the 1996 Act. However, the Procedure Rules cannot enlarge the Tribunal's jurisdiction particularly to encroach on a matter which, as discussed below, falls within the supervisory jurisdiction of the Court of Session. Further, none of the powers under which the *Employment*

Tribunals (Constitution and Rules of Procedure) Regulations 2013 were made conferred on the Secretary of State a power to enlarge the Tribunal's jurisdiction to determine the validity of acts of a conciliation officer: ss. 1, 7, 7A, 7B, 9, 10, 10A, 11, 12, 13, 13A, 19, and 41, 1996 Act.

Exclusive Jurisdiction of the Court of Session

3.14. *Separatim*, a challenge to a decision or act of an ACAS conciliation officer, being a public officer, ought to be by way of Judicial Review and not by any other process: *Brown v Hamilton District Council* 1983 SC (HL) 1; *McDonald v Secretary of State for Scotland (No.2)* 1996 SC 113; *Ruddy v Chief Constable, Strathclyde Police* 2013 SC (UKSC) 126, para 15; para 54, Civil Procedure (Reissue), *Stair Memorial Encyclopaedia* (**"Stair"**); para 118, Courts and Competency (Reissue), Stair.

3.15. Further, the present challenge by the Respondent meets the classical example of a *"tri partite"* relationship in Scotland where Judicial Review is competent: *West v Secretary of State for Scotland* 1992 SC 385.

3.16. Given the pre-existing jurisdiction of the Court of Session to determine the validity of acts of public officers, if Parliament had intended to transfer this jurisdiction to the Tribunal it would have done so expressly.

3.17. Given that the Respondent's competency point relies on the Tribunal making a decision as to the validity of an act of the ACAS Conciliation Officer, a matter within the exclusive purview of the supervisory jurisdiction of the Court of Session, this Tribunal does not have jurisdiction to entertain it.

Previous Authorities

3.18. It is of note that the authorities cited by the Respondent relation to the ACAS Point do not address the question of jurisdiction. Therefore, they are of no assistance or authority in relation to the jurisdiction question. In those cases, neither party took the point that the Tribunal did not have jurisdiction to determine

the validity of an EC Certificate. Therefore, the issue of jurisdiction was not given any – let alone considered – thought in the authorities relied upon by the Respondent.

3.19. Further, the authorities cited by the Respondent are all English authorities. They are of limited assistance, therefore, in determining whether the matter in question here falls within the exclusive jurisdiction of the Court of Session: *Ruddy v Chief Constable, Strathclyde Police* 2013 SC (UKSC) 126, para [18].

Tribunal's Role

3.20. The result of the above, is that the Tribunal is left with an ACAS Certificate that is *ex facie* valid. The presumption of regularity (*omnia praesumuntur rite esse acta*). The presumption is of wide application and includes both public and commercial matters. The effect of the *omnia praesumuntur* doctrine is that, until established to the contrary, the ACAS Conciliation Officer is presumed to have been valid and in accordance with the statute. See*: Trustees of the Scottish Solicitors Staff Pension Fund v Pattison and Sim* 2016 SC 284, para [19] *et seq*; *Burke v Burke* 1983 SLT 331; and *Cumbernauld Housing Partnership Ltd v Davies* para [12].

3.21. Accordingly, the Tribunal ought to proceed on the basis that the Second EC Certificate is valid and that, accordingly, the ET1 relating to the Post-Resignation Claim contains a valid Early Conciliation number a required by Rule 12(1)(c).

Different Matter

3.22. In any event, the two certificates relate to different matters.

3.23. Again the presumption of regularity applies. Therefore, even if the Tribunal has jurisdiction to consider if the Second EC Certificate related to a distinct *"matter"* in terms of section 18A (which is denied), then the Respondent still bears the burden of showing that the Certificate is invalid. The Respondent does not begin to provide sufficient analysis for the Tribunal to make such a determination.

The Respondent does not state the *"matter"* which it considered was encompassed by the First EC Certificate nor that covered by the Second EC Certificate. On that basis, the Tribunal is not in a position to properly consider the Respondent's argument.

3.24. Nevertheless, the scope of a *"matter"* encompassed by any EC Certificate is a matter of fact and degree: *Compass Group UK & Ireland Ltd v Morgan* [2017] I.C.R. 73, para 23.

3.25. The Post-Resignation Claim concerns matters that include the Respondent excluding the Claimant from decision making in relation to Group Exercise.

This was a key element of her role. It is not suggested that this was in any was related to the Claimant's disability or a protected act. It was a separate and distinct matter from any allegation of disability discrimination. Therefore, the Second EC Certificate must relate to a different matter and accordingly the Respondent's competency objection must fail.

New Rules

3.26. In any event, even if the Second EC Certificate is invalid, the Tribunal is not to reject the claim standing the terms of the Rules as they now stand not how they stood (in different terms) in the authorities referred to by the Respondent.

3.27. Reference is made to the line of authority relied upon by the Respondent. That line of authority does not suggest that an Employment Judge ought to reject the claim under Rule 10 where the Tribunal has failed to do so. Neither does the line of authority suggest that the Tribunal is to conduct a review of the Tribunal staff's previous failure to reject the claim under Rule 10 or to refer the claim to an Employment Judge under Rule 12(1).

3.28. The line of authority put forward by the Respondent in their Grounds of Resistance suggests that the Employment Judge is required to directly reject the claim under Rule 12(2) (despite the lack of prior Rule 12(1) referral): *E.ON Control*

Solutions Ltd v Caspall, para 53. However, since the Tribunal is acting invited to act directly in terms of Rule 12(2) (as opposed to reviewing the Tribunal's previous alleged failure to reject the claim in terms of Rule 10 or 12), it requires to act in terms of Rule 12 as presently drafted.

3.29. In particular, on 8 October 2020 Rule 12 was amended by the insertion of *inter alia* paragraphs 12(2)(da) and 12(2ZA): Reg 7, *Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020*. None of the authorities cited by the Respondent addressed the situation in relation to the post-October 2020 incantation of Rule 12.

3.30. In particular, as presently drafted Rule 12(2)(c) requires to be read in conjunction with new Rule 12(2)(da) and 12(2ZA). Where a valid EC Certificate exists but the incorrect number is entered onto the ET1, such an error falls within the more specific provision of Rule 12(2)(da) as opposed to the more general provision of Rule 12(2)(c). Where a statute makes a provision for a general situation and a specific situation, the presumption is that the specific provision applies.

3.31. On the Respondent's hypothesis, the alleged defect on the ET1 is that ET1 has the wrong EC Certificate Number on it as opposed to there not existing a valid EC Certificate at all. Such a defect falls within the scope of Rule 12(2)(da) as opposed to Rule 12(2)(c). Rule 12(2) does not provide for a defect of the kind mentioned in Rule 12(2)(da).

3.32. Where there is a Rule 12(2)(da) defect, the Employment Judge must act under Rule 12(2ZA) and only reject the claim where he does not *"consider[…] that the claimant made an error in relation to an early conciliation number and it would not be in the interests of justice to reject the claim"*. That was the clear intention of the new Rule 12(2ZA); reference is made to the Explanatory Notes of the 2020 Amendment Regulations *"Regulation 7 also adds a new rule 12(2ZA) to allow a judge to accept a claim form with an error in relation to an early conciliation number where it would not be in the interests of justice to reject the claim"*. It is

clear that the amendments to Rule 12 introduced by the 2020 Amendment Regulations were designed to prevent the very technical challenge that the Respondent is now attempting to mount.

3.33. The defect here is clearly one where the wrong number has been entered onto the ET1 – that is the very essence of the Respondent's competency point. Further, the defect is minor and has caused the Respondent no prejudice. Accordingly, it would not be in the interests of justice to reject the claim and the Tribunal should reject the Respondent's invitation to do so.

4. **AMENDMENT**

4.1. The Claimant seeks to amend the Pre-Resignation Claim by inserting those claims stated in the Post-Resignation Claim.

4.2. This would resolve the technical *"ACAS Point"* raised by the Respondent in connection with the validity of the EC certificate.

4.3. It is well established that causes of action arising after the date of the presentation of a claim can be made by way of amendment to that claim: *Prakash v Wolverhampton City Council* (23 June 2006 EAT) and *Okugade v Shaw Trust* (11 August 2005).

4.4. On the Respondent's hypothesis that both the Pre-Resignation Claim and the Post-Resignation Claim arise out of the same *"matter"* for the purposes of s.18A, the amendment would be to add a new cause of action in the Pre-Resignation Claim that is linked to or arises out of the same set of facts as the original claim. Therefore, amendment can be made without reference the time limits that would otherwise apply: *Home Office v Bose* [1979] ICR 481, *Jesuthasan v Hammersmith and Fulham LBC* [1998] IRLR 372; *Capek v Lincolnshire County Council* [2000] IRLR 590; and *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209; paras 312.02, and 312.05, Division PI, *Harvey on Industrial Relations*.

4.5. In any event, it is submitted that even were the time limits to be considered a new claim arising out of different facts (which is denied), that the time limit should be extended in terms of s.111(2)(b) of the 1996 Act. It is noted that, as recorded in the November 2020 Preliminary Hearing Note that time-bar for the purposes of *Galilee v Commissioner of Police of the Metropolis* would stop running when the amend application was made (para 10, November 2020 PH Note). The amend application was made at the November PH.

4.6. In either case, the fact that the issues arises due to a difficulty with the ACAS EC process is a relevant matter favouring amendment since the use of conciliation is to be encouraged: *Revenue and Customs Commissioners v Garau* [2017] ICR 1121, para 26.

4.7. The Post-Resignation Claim relates to a claim of unfair dismissal that relies on many of the same events that are referred to in the Pre-Resignation Claim. More importantly, given that the evidence relative the Post-Resignation Claim will almost entirely overlap with that relative the Pre-Resignation Claim. Very little delay or inconvenience would be caused by allowing amendment. Indeed, allowing amendment before considering the ACAS Point would save Time of both the Tribunal and the parties. It would save expense all round. Accordingly, the grant of the proposed Amendment would be consistent with the overriding objective.

5. **FURTHER AND BETTER PARTICULARS**

5.1. Further and better particulars of the Respondent's case are requested and indeed necessary to allow the Claimant to properly prepare her case.

5.2. Unfortunately and despite the Respondent being given an opportunity to amend their pleadings, the Claimant's representatives are struggling to understand the nature of the Respondent's defence. Indeed whilst they extend to 11 pages, the vast majority of the Respondent's grounds of resistance are legal argument and/or simple denials. The Respondent gives very little indication of what is version of events is; their pleadings are wholly vague and lacking in specification. They do not provide fair notice to the Claimant.

5.3. In particular, the Respondent fails to state what its factual position is on certain key matters. For example:

5.3.1. The Respondent does not state what its version of events are in relation to any of the Claimant's claims under Allegation Group 1 of the Scott Schedule (see pages 1 to 9, Scott Schedule).

5.3.2. In failing to address Allegation Group 1, the Respondent does not provide its version of events relative the Claimant's claims in respect of (a) her holiday requests which ought to be stored on the Respondent's own holiday management system, (b) the "Sick Note Incident" on 1st February 2020, (c) the *"too many days off"* comment on 5th February 2020, or (d) the Performance Review meeting of 6th February 2020. The Claimant is not provided with fair notice of any version of events the Respondent will attempt to lead evidence of at the Final Hearing in relation to these matters. Indeed, it is not clear if the Respondent even accepts that the Sick Note Incident or the *"too many days off"* incident even occurred. The Claimant does not even provide fair notice of matters in relation to holiday requests that ought to be apparent from their own records.

5.3.3. The closest the Respondent comes to addressing Allegation Group 1 is to state at paragraph 40 that *"[t]he respondent concluded that the claimant's grievance had been fairly investigated, that she had not been treated unfairly in relation to her holiday or performance review, nor her self-employed contract"*. That does not give fair notice of the Respondent's position at all.

5.3.4. The Respondent does not give fair notice of its version of events in relation to any of the Claimant's claims under Allegation Group 3 of the Scott Schedule (see pages 12 to 14, Scott Schedule). This relates to the Grievance Meeting of 5th March 2020. The Respondent simply makes perfunctory averments that the meeting occurred (para 30). However, the Respondent does not address the detailed allegations of unlawful conduct – for example, the derogatory comments by John McMillan and the Claimant's disability being trivialised.

5.3.5. Remarkably, the Respondent does not address the Claimant's averments about her Performance Review including the conduct thereof (allegation 4, page 14 to 16, Scott Schedule). The contents of the Performance Review ought to be a matter that the Respondent would have a record of.

5.4. The Respondent has simply failed to engage with the factual allegations of the Claimant or provide fair (or any) notice of its position in relation to the same. The Respondent ought, therefore, be required to aver the factual basis upon which it defends this Claim including, in particular and where its position is at odds with the Claimant's, any alternative version of events that it wishes to lead evidence of. The Claimant has set out the factual basis of her claims; the Respondent now requires to set out the factual basis of its defence.

5.5. The Respondent's averments on legitimate aim also are lacking in specification. The *"legitimate aim"* for each PCP is said by the Respondent to be *"maintaining an effective workforce"*. Such an averment is wholly lacking in specification to the point that it is irrelevant. Almost any *"legitimate aim"* will fall under the umbrella of an employer *"maintaining an effective workforce"* (para 54, Amended Grounds of Resistance). However, the averments fail to give the Claimant fair notice of what precisely that legitimate aim is or how specifically it was a proportionate means of achieving a legitimate aim. For example, on what basis does the Respondent say that *"refusing /revoking holidays for workers who had sickness absences"* (the so called PCP2, para 52, Grounds of Resistance) is a proportionate aim of achieving the *"legitimate aim"* of *"maintaining an effective workforce"*. Without that fair notice, the Claimant cannot properly prepare for a Final Hearing and there is a risk of the claim becoming derailed if the justification contended by the Respondent is not pled with sufficient precision at the outset.

5.6. Further, whilst the Respondent pleads (in identical terms) a vague justification for each PCP, no justification is pled in relation to each incident of unfavourable treatment where discrimination arising disability contrary to s.15 of the 2010 Act is alleged. Discrimination arising from disability does not rely upon a PCP so the requisite justification is of the unfavourable treatment itself.

5.7. Despite denying the majority of the Claimant's allegations (without stating its own version of events), the Respondent pleads that it *"***does not admit** *that it failed to provide the claimant with a statement of changes within the meaning of s4 ERA"* (para 59, Amended Grounds of Resistance; emphasis added). This ought to be a matter within the Respondent's own knowledge. However, the Respondent does not plead if/when it provided the Claimant with (a) a written statement of particulars of employment and/or (b) a written statement of changes. It also does not provide any details (or a copy) of any such written statements.

5.8. The Respondent's pleadings are also lacking in other respects and in this regard the proposed further specification set out in the Annex is selfexplanatory.

5.9. Accordingly, the Claimant seeks an order for further and better particulars of those matters within 14 days.

5.10. Lest the Respondent complain about the scope of proposed specification that the Claimant seeks, the Tribunal might find it beneficial to consider the degree of specification that the Respondent considered was appropriate from the Claimant (although not accepted in its entirety by the Tribunal) that would have required the Claimant to plead in minute detail the basis of her claim including in relation to matters that ought to have been obvious:

> *For the avoidance of doubt, we consider that a properly constituted specification of claims confirms, for example andinter alia:*
>
> • *In relation to each claim of indirect discrimination, the PCP(s) relied upon, the comparative group disadvantage(s) caused by the PCP, and how the condition(s) result in that particular disadvantage;*
>
> • *In relation to each claim of a failure to make reasonable adjustments, the PCP(s) relied upon, the substantial disadvantage(s) caused by the PCP, how the condition(s) result in that substantial disadvantage, and what reasonable adjustment(s) the claimant says should have been made to remove the disadvantage;*

> • *In relation to each claim of discrimination arising from disability, the "something" which arose in consequence of the particular health condition relied upon, and the unfavourable treatment which the respondent subjected the claimant to because of that "something";*
>
> • *In relation to each claim of harassment, the unwanted conduct relied upon and how that conduct is said to be related to the protected characteristic of disability; and*
>
> • *In relation to each claim of victimisation, the protected act relied upon, the detrimental treatment, and how the treatment is said to be related to the protected act.*

(Email from Respondent's agents to Tribunal dated 17th November 2020)

5.11. The requirements of fair notice cut both ways. Therefore, given the Respondent's views of what constitutes proper specification, it should have no difficulty in properly pleading the essential facts and elements that the Claimant seeks further and better particulars of.

6. **RRO AND PRIVACY ORDERS**

6.1. The Claimant's application for a Restricted Reporting Order and various other privacy orders has already been well particularised in her Application of 1st April 2021 (Joint Bundle Page 126-138). To avoid repetition, the terms of that application are fully repeated herein by reference.

Terms of the Order Sought

6.2. The Orders sought are set out at pars 3.2 to 3.4 of the Application.

6.3. Para 3.3 (*"Anonymisation and Register Deletion Order"*) and para 3.5 (*"Private Hearing Order"*) are self-explanatory.

6.4. However, an explanation might be required as to why two types of RRO are sought under para 3.2 (*"1996 Act RRO"*) and para 3.3 (*"Permanent RRO"*).

6.4.1. The 1996 Act RRO will only have effect until the conclusion of proceedings and cannot prohibit identification of the relevant branch where the Claimant worked.

6.4.2. The Permanent RRO is sought to (a) be permanent (as the name suggests) and (b) to prevent reporting of the branch that the Claimant worked. The Tribunal has a power to make such an order under Rule 50(1) independent of the 1996 Act particularly where required to protect a Claimant's Convention rights: *Fallows v. News Group Newspapers Ltd* [2016] IRLR 827, and para [941.01], Division PI, *Harvey on Industrial Relations and Employment Law*.

Respondent's Position

6.5. By correspondence of 13th April 2021 the Respondent' solicitor suggested that any RRO *"should apply to all parties including the respondent and any witnesses giving evidence"*. The legal basis for such a restriction on the **Respondent's** identity was not set out in that correspondence. No objection was made in that email to the grant of an RRO in principle and, standing the terms of Rule 30(2), it is assumed that no such objection exists.

6.6. The Respondent's solicitor further claimed that *"[t]he claimant appears to be in agreement on this point, as per para 3.2 and 3.4 of the RRO application"*. That was plainly wrong. Paragraphs 3.2 to 3.4 of the Application set out the terms of the Order and made no reference to the protection of the Respondent's identity. The Claimant's application made clear that she *"does not seek anonymity of the Respondent"* (para 7.7, Joint Bundle Page 134). On what basis the Respondent's solicitor made this statement is unclear, but unfortunately it is one of a number of

occasions that she has misrepresented the Claimant's position in correspondence to the Tribunal.

6.7. On 20th April 2021 the Employment Judge (via Tribunal office email) asked the Respondent's solicitor to confirm on *"what basis does the respondent argue that an RRO should be made in respect of the respondent's organisation and any witness giving evidence other than those in respect of whom the claimant seeks an RRO and anonymity orders?"*.

6.8. On 23rd April 2021, the Respondent emailed to respond to that question in the following terms *"[t]he Respondent contends that in order to give effect to the restriction sought by the Claimant it will be necessary to restrict reporting in relation to the Respondent and those giving evidence."*.

Analysis of the Respondent's Position

6.9. It is not clear what the basis of the Respondent's position is.

6.10. An RRO is not competent in respect of a corporate body: *"it was the clear intention of Parliament to extend the protection of anonymity afforded by a restricted reporting order to individuals only"* (*Leicester University v A* [1999] ICR 701, 713).

6.11. Despite being invited to clarify its position, the Respondent has not addressed this authority in correspondence to the Tribunal.

6.12. The Claimant has analysed the issue of *"jigsaw"* identification in terms of her application. An RRO on this occasion is designed to protect the dignity and private life of the Claimant. Anonymisation of the Respondent should not be forced upon her when she neither wants nor asks for such an order.

6.13. The Tribunal is invited to grant the RRO and Privacy Orders in the terms sought in the Claimant's application without any anonymisation or protection of the Respondent's corporate identity.

7. **SPECIAL MEASURES**

7.1. The Claimant's application for Special Measures was made on 1st April 2021. Again, to avoid repetition, the terms of that application are fully repeated herein by reference.

7.2. The Respondent has opposed that application on the basis that there would be *"significant prejudice"* to it by such an order.

7.3. However, there will be no prejudice to the Respondent unless it has adequate averments of an alternative version of events in which it seeks to lead evidence of or put to the Claimant. If there is no alternative version of events with which to cross-examine the Claimant on then there can be no prejudice since the issue of credibility will not arise. Indeed, such allegations of prejudice do not come well from the Respondent whose managers, according to the medical evidence, are responsible for the Claimant's Adjustment Disorder and consequent difficulties.

7.4. In any event, the Respondent does not have an absolute right to crossexamination: *Zurich Insurance Co v Gulson* [1998] IRLR 118.

7.5. In any event, it is accepted that this application ought to be subject to further discussion at the Preliminary Hearing. It is submitted that such discussion would benefit from an indication from the Respondent as to any different version of events that they intend to lead evidence of in order that the Tribunal can properly assess the *"prejudice"* to the Respondent.

8. **EXPERT EVIDENCE**

8.1. The Claimant has previously set out that she intends to lead expert evidence from two experts – psychiatric and employment.

8.2. Firstly, the psychiatric evidence from Dr Harrison is relevant to the matter of psychiatric injury.

8.3. Secondly, the Claimant intends to rely on evidence from an employment expert in relation to her career loss of earnings. It is noted that Dr Harrison's evidence points to permanent effects of psychiatric injury that will affect the Claimant's career trajectory (para 5.3.8.1, Dr Harrison report).

8.4. The use of such an employment expert in respect of career loss of earnings would be standard practice in any personal injury claim where such a claim is advanced. The expertise of such an expert will be of assistance to the Tribunal in identifying the likely loss of earnings due to the impaired career trajectory and hence admissible: *Kennedy v Cordia (Services) LLP* [2016] UKSC 6, para 46.

9. **TABLE OF CLAIMS**

9.1. The Respondent sought clarification in respect of the Table of Claims on 13th April 2021, subject to which the Table of Claims could be agreed. The Claimant's solicitors provided that clarification on 26th April 2021. It would be thought, therefore, that the Table of Claims was now agreed.

9.2. However, the Respondent has indicated that it wishes to discuss the Table of Claims further. Without further specification of the issues that the Respondent now wishes to raise it is difficult for the Claimant to respond.

9.3. The Claimant's claim is adequately specified. All that is required is for the Claimant to set out the broad basis of her claim: *Honeyrose Products Ltd v Joslin* [1981] ICR 317, 322. She does not require to set out her claim in painstaking detail.

9.4. Further, if the Respondent disagrees with the legal basis of the Claimant's claim which comments from their recent correspondence suggests is the case, then that is not a pleading issue but rather an issue for the Hearing of this claim. At the stage of pleading, the Tribunal is not to concerned itself with the merits of the Claimant's claim: *Uwhubetine v NHS Commission Board England*, EAT (Unreported UKEAT/0264/18, 23 April 2019), para 46.

9.5. The Claimant's solicitors made clear that without advance notice of any further Specification that the Respondent seeks, her representatives will not be able to take instructions in advance of or address this matter at the upcoming Preliminary Hearing: Claimant's Solicitor's letter dated 3 May 2021. The Respondent wrote to the Claimant's solicitor on 6th May 2021 to advise that they were not going to respond to that letter.

9.6. In any event, without further specification of the additional clarification that the Respondent may require, the Claimant is unable to respond further than to state (a) adequate specification of the Claimant's claim has been provided; and (b) any request that the Claimant provide further specification of her claims would be disproportionate and ought to be refused.

10. **ARRANGEMENTS FOR FINAL HEARING**

10.1. It is submitted that arrangements should be made for a final hearing in this matter for the final hearing including the fixing of a Timetable and a "prehearing" PH.

CHARLES J.C. OLIVER
Counsel for the Claimant
6th May 2021

IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH
CASE REFS: 4102763/20
4104907/20

BETWEEN:

KATARINA MACAJ

CLAIMANT

And

DAVID LLOYD LEISURE LIMITED

RESPONDENT

CLAIMANT'S SKELETON ARGUMENT

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