**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case Nos: 4105457/2020 and 4107770/2020**

**Held by CVP on 3 June 2021**

**Employment Judge McManus**

| | |
|---|---|
| **Mr Mohammed Saife** | **Claimant**<br>**Ms Cochrane**<br>**Solicitor** |
| **EntServe UK Limited** | **Respondent**<br>**Represented by:**<br>**Ms A Bennie**<br>**Counsel** |

**PRELIMINARY HEARING DECISION**

**Decision**

1. The ET1 is amended in terms of the claimant's Further and Better Particulars dated 8 January and 23 February 2021.

2. The claim of direct race discrimination under section 13 of the Equality Act 2010 is not struck out and may proceed to a Final Hearing.

3. The issues for determination by the Tribunal at the Final Hearing will include whether there was a continuing course of conduct in what is alleged in the claimant's Further and Better Particulars dated 8 January and 23 February 2021

4. Any application for expenses will be considered following the conclusion of the Final Hearing.

## REASONS

### Background

1. The claimant has brought two ET1 claim forms. ET1 claim form registered under case number 4105457/2020 initiated claims for discrimination on the grounds of race and sex. ET1 claim form registered under case number 4107770/2020 brought a claim for unfair dismissal (redundancy). A Conjoining Order was issued on 9 April 2021 in respect of these claims.

2. A Telephone Case Management Preliminary Hearing ('TCMPH') took place on 11 December 2020 and 9 February 2021. The Note issued after each TCMPH is in the Joint Bundle produced for this Hearing, at pages 55 - 56 and 84 -87 respectively.

3. The Note issued following the TCMPH on 11 December 2020 (which was in case no 4105457/2020 only) records that claims were brought for discrimination based on the grounds of the protected characteristics of both sex and race and that it was agreed that further specification was required. The claimant was directed to answer a number of questions, set out in the PH Note issued on 16 December 2020.

4. At that stage no ET3 had been received. An extension had been granted to 29 January 2021. The PH Note records that both parties consented to vary that extension period to 7 February 2021, that being 4 weeks after the due date for the claimant's response to the questions in that PH Note.

5. The claimant's answers to those questions is set out in a document headed Further Particulars of Claim sent on 8 January 2021. This is in the Joint Bundle at pages 58 – 63. The claimant now seeks that the ET1 be allowed to be amended in terms of those further particulars.

6. In their ET3 for case number 4105457/2020 , the respondent position is that the discrimination claims are time barred. A substantive defence is also set out and the claims were denied.

7. At the TCMPH on 9 February 2021, it was confirmed that the claim (under case no 4105457/2020) was for race discrimination only. As set out in that PH Note, the correct identity of the respondent was confirmed to be EntServe UK Limited. Case Management Orders were issued, as set out in the PH Note issued following that TCMPH. In those Orders, the claimant was directed to answer further questions.

8. Answers to those further questions were provided in a further document headed 'Further Particulars of Claim' which was provided with the claimant's representative's email of 23 February 2021 (at page 102 - 105 of the Joint Bundle). In that email, the claimant's representative requested that *"the Tribunal exercise their discretion to allow the claimant's claim be amended to include those claims as set out in paragraphs 1(a) and 1(f) of the Further Particulars of Claim sent to the Tribunal on 8 January 2021, together with the further and better particulars attached to this email."*

9. The claimant's representative's position in that email re the proposed amendment application was as follows:-

> "T*he proposed amendment introduces two ways in which the claimant considers that he was treated less favourably on the basis of race which were not explicitly included in original claim. It is the claimant's position that the acts and/or omissions which he now seeks to add to his claim form part of a sequence of incidents which are evidence of a continuing discriminatory state of affairs.*
>
> *The claimant did not have legal representation at the time when the ET1 was submitted. He approached a number of solicitor firms but was unable to find one with capacity to take on his case. He had previously discussed his concerns about discrimination with a solicitor in 2019, before the exclusion from meetings and failure to delegate*

*responsibility took place. He required to complete his tribunal claim himself and did not what information he should include. He included the information which he considered to be most relevant.*

*It is submitted that the amendment of the claim would not cause delay or additional costs, as the respondent has already had the opportunity to address the matters raised in this amendment application in their ET3. It is submitted that the claimant will face greater injustice if the amendment is refused than the respondent will face if the amendment is accepted, and that it is therefore in the interests of justice that the amendment be granted."*

10. On 9 March 2021, the respondent's representative requested a strike out of the claims registered under case number 4105457/2020. That email is at page 113. Their position was that the Tribunal does not have jurisdiction to hear any of the claimant's claims, on the basis that each and all of the claims were presented late to the Tribunal and are therefore out of time. The respondent's stated position was that the acts alleged are not continuing acts and that they do not consider that it would be just and equitable to extend the time limits. Written submissions were presented with that email (page 114-119).

11. The claimant's representative's opposition to the strike out application was made, with reasons, in their email of 16 March 2021 (page 120 – 121).

12. This PH was arranged to take place to consider both the claimant's amendment application and the respondent's strike out application. This hearing took place remotely, via the Cloud Video Platform ('CVP'), accordance with measures put in place to deal with restrictions as a result of the Covid 19 pandemic.

**Sources of guidance re Effects of Covid-19 Restrictions**

13. In response to the restrictions in place due to the Covid-19 pandemic, the President of the Employment Tribunal (Scotland) has issued:-

- Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic (being Joint Presidential Guidance issued with the President of the Employment Tribunals (England and Wales),
- FAQs about the Covid-19 pandemic (being a document issued jointly with the President of the Employment Tribunals (England and Wales),
- Practice Direction on the Fixing and Conduct of Remote Hearings
- Route Map 2021 – 22 (issued jointly with the President of the Employment Tribunals (England and Wales).

14. The overriding objective, as set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules'), is to deal with a case fairly and justly. In order to progress the case in accordance with the overriding objective and in circumstances where, for the foreseeable future, there are likely to be challenges with holding a hearing attended by the parties and their witnesses in person, in terms of this objective, in some circumstances and with regard to these documents, it may be appropriate for a Judge to fix a hearing to be heard remotely.

15. The Practice Direction, Remote Hearings Practical Guidance and Frequently Asked Questions about the Impact of COVID-19 on Tribunal practice are all available online.[1] The parties must make themselves aware of the guidance in those documents.

**Proceedings at PH**

[1] https://www.judiciary.uk/publications/directions-for-employment-tribunals-scotland/

16. The parties had liaised to prepare a Joint Bundle containing all documents relied upon at this PH. The numbers in brackets refer to page numbers in this Joint Bundle. This Joint Bundle was produced in digital format only (PDF).

**Proceedings at PH**

17. Both parties were professionally represented, although the respondent was represented by Counsel rather than a solicitor. No evidence was heard. The claimant was not present. An email had been sent to the representatives by the Tribunal prior to this PH asking the claimant's representative to confirm the position re the claimant's attendance, given the position n their email to the Tribunal of 16 March 2021 re evidence from the claimant. The claimant's representative confirmed their position by email of 1 June. That was that the claimant would not be giving evidence at the Preliminary Hearing and that it is the claimant's position that it would be in the interests of justice for him to be given the opportunity at a full hearing on the merits of the case to substantiate his claim that there has been continuing discrimination, or, if that is not accepted by the Tribunal, that it would be just and equitable in the circumstances to extend the time limit for his claims.

18. Submissions were first heard from the claimant's representative re the amendment application. The respondent's representatives submissions on both their application for strike out and their response to the amendment application were then heard, followed by the claimant's response to the strike out application and comments on the respondent's representative's submissions. The respondent's representative had the opportunity to comment on the claimant's representative's submissions.

**Terms of Proposed Amendment**

19. The submissions centred on the terms of the Further Particulars of 8 January. For ease of reference, these terms are now restated:-

"*1. The claimant claims that he was subjected to direct discrimination*

*on the grounds of race, contrary to section 13 of the Equality Act 2010. The claimant is Arabic. The following incidents of discrimination are alleged:*

a) ***The claimant was not offered a contract of employment as quickly as white Scottish and/or white British agency staff were***

*(i) On 17/07/2017 the claimant started working in the KBR department at the Respondent's premises at Osprey House, Rosehall Road, Bellshill, ML4 3NR as an agency worker. He was employed by Kelly Services employment agency. The claimant became aware that a number of white Scottish and/or white British agency workers who had started working after him had been offered contracts of employment with the Respondent. In the KBR department, Jenna Reynolds and a worker whose first name was Kim were both offered permanent roles before the Claimant, despite having less experience. In addition, the Claimant became aware that a number of white Scottish and/or white British agency workers who had started working within the RTS department after the Claimant commenced work with the Respondent were also offered contracts of employment with the Respondent. Their names were David Toal, Ronan Black and Kyle Sanders. No vacancies had been advertised. In or around April 2018 the claimant approached a manager, Diana Mundy, to request that he be offered a contract of employment with the Respondent. The claimant was told that the next available contract of employment would be offered to him. In April or May 2018, the Respondent offered a contract of employment to William Campbell, a white Scottish agency worker who had commenced working with the Respondent nine months after the Claimant. The Claimant was eventually offered a contract of employment with the Respondent in July 2018. The Claimant claims that he was treated less favourably than Kim, Ms Reynolds and Mr Campbell and/or a hypothetical comparator, being a white Scottish or white British*

*worker who had worked as an agency worker for the Respondent in the same role and for the same length of time as the Claimant.*

*b)* ***Available overtime was given to white Scottish and/or white British colleagues in preference to the Claimant***

*(i) In or around February 2018, the Claimant was offered additional hours of work on two days a week. At the time the offer was made, he Mr Campbell were both working four hours a day, five days a week. The Claimant asked his manager, Andrew Black, if he could work additional hours on three days per week instead of two. Andrew Black told the Claimant to leave it with him. The Claimant then approached Andrew Black again and told him that he would accept additional hours on two days per week. Andrew Black replied that the additional work would have to be made available for other staff members to apply for. The Claimant requested that he be considered for the additional work. Three months later, the Claimant became aware that Mr Campbell had been given additional hours on five days a week. On 02/05/2018 the Claimant asked Andrew Black why he had not been told the outcome of his application for additional hours. Andrew Black stated that he had forgotten that the Claimant had requested more hours. The Claimant claims that he was treated less favourably than Mr Campbell and/or a hypothetical comparator, being a white Scottish or white British worker who had worked as an agency worker for the Respondent in the same role and for the same length of time as the Claimant.*

*(ii) Angela Mackenzie, a full time employee of the Respondent, resigned in early 2018. The Respondents offered full time hours to Catherine Leonard, a white Scottish agency worker who had commenced working with the Respondent nine months after the Claimant. The Claimant was not offered any additional hours or given the opportunity to apply for them. The Claimant claims that*

*he was treated less favourably than Catherine Leonard and/or a hypothetical comparator, being a white Scottish or white British worker who had worked as an agency worker for the Respondent in the same role and for the same length of time as the Claimant.*

*(iii) When the Claimant was offered a contract of employment with the Respondent in July 2018 Ms Mundy told him that his hours of work would be from 3pm to 10pm Monday to Friday. On 22/10/2018 a new agency worker, Craig Foy, started working for the Respondent. Craig Foy is white Scottish. The Claimant was told to supervise him. On 27/11/2018 Andrew Black sent an email to the Claimant advising him that there was no longer enough work for the Claimant between 3pm and 6pm, and that his hours of work would be reduced to 6pm-10pm Monday to Friday. Approximately two months after the Claimant received this email, Craig Foy was moved to another department in the company. Shortly after that, Mr Foy was given overtime from 7am-3pm in the KBR department, where the Claimant continued to work. The Claimant was not offered additional hours or given the opportunity to apply for them. The Claimant claims that he was treated less favourably than Craig Foy and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the Respondent in the same role and for the same length of time as the Claimant.*

*(iv) Mr Foy's employment ceased on 28/02/2020. On 03/03/2020 the Claimant emailed Andrew Black and asked to be given the extra hours which would be available after Mr Foy left. Andrew Black replied stating that some of Mr Foy's duties were "drying up" and that there was no longer enough work available for him to work full time hours, but that if any additional hours became available they would be advertised. The following day the Claimant attended a Pod Lead meeting during which Andrew Black stated*

*that Mr Foy's duties would be taken over by Ronan Black because he had the most experience for the role. Ronan Black started working for the Respondents as an agency worker on or around 02/01/2018, and was made an employee of the Respondents before the Claimant. Ronan Black had been working in the RTS department, whereas the Claimant worked in KBR. It is the Claimant's position that he had more relevant experience than Ronan Black, as he already worked in the KBR department and had been working with the Respondents for longer. The Claimant claims that he was treated less favourably than Ronan Black and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the Respondent in the same role and for the same length of time as the Claimant.*

*(v) In or around April 2019 Joanne Gallett, a white Scottish agency worker, was given full time hours in the RTS department. Prior to that she had worked as an agency worker in the KBR department alongside the Claimant. Ms Gallett started working with the Respondent on 26/03/2018, eight months after the Claimant. The Claimant was not offered any additional hours or given the opportunity to apply for them.. The Claimant claims that he was treated less favourably than Joanne Gallett and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the Respondent in the same role and for the same length of time as the Claimant.*

*(vi) On 29/07/2019 two members of staff were given additional hours. The Claimant does not know the names of those staff members but is aware that they are white Scottish and/or white British. The hours were not advertised to other members of staff. The Claimant was not offered any additional hours, or given the opportunity to apply for them. The Claimant claims that he was treated less favourably than the two members of staff who were*

*given additional hours on 29/07/2019 and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the Respondent in the same role and for the same length of time as the Claimant.*

**c) *The claimant was not promoted to Pod Lead as quickly as his white Scottish and/or white British colleague***

*(i) In July 2017 the Claimant was told that he would be promoted to the role of "Pod Lead" in future. Pod Leads have a higher level of responsibility and are responsible for supervising other employees and agency workers. Jenna Reynolds started working for the Respondents as an agency worker on 01/04/2018. Within the first month or so that she worked for the Respondent Ms Reynolds was promoted to Pod Lead. The Claimant was promoted to Pod Lead the following day. The Claimant claims that he was treated less favourably than Ms Reynolds and/or a hypothetical comparator, being a white Scottish or white British worker who had worked as an agency worker for the Respondent in the same role and for the same length of time as the Claimant.*

**d) *The claimant was not shortlisted for interview for the role of Consumption and Invoice Co-Ordinator***

*(i) On 26/11/2019 the Claimant applied for the position of Consumption & Invoice Co-ordinator with the Respondent. On 04/12/2019 the Claimant received an email from Cheryl Mcpake acknowledging hisapplicationOn04/12/2019theClaimant received a telephone call from Ms Mcpake during which he was told that an interview would be arranged in two weeks' time and that she would call him again with the details of this. During the period from 04/12/2019 to 17/03/2020 the Claimant monitored*

*his application process through the Respondent's intranet. On 22/01/2020 and 17/03/2020 the Claimant emailed Ms Mcpake to request an update. On 18/03/2020 the Claimant received an email advising him that his application was not successful because he did not have the experience required for the position. On 19/03/2020 the Claimant telephoned Ms Mcpake and she stated that he was overqualified for the position and that they were looking for a new graduate with no experience. The Claimant does not know who was responsible for the decision not to shortlist him for interview. The Claimant believes that his experience did match the requirements listed in the job description, and that the real reason he was not shortlisted for interview for the role was because of his race. The Claimant believes that the role was given to Leeann Cannon, who is white Scottish. The Claimant claims that he was treated less favourably than a hypothetical comparator, being a white Scottish or white British employee with the same skills and experience as the Claimant.*

**e) *The claimant, together with his colleagues Vikram Singh and Alexandra Tor, was excluded from meetings on 23 and 24 March 2020 and subsequent dates***

*i) On 23 March 2020 Ms Mundy held a meeting with Jenna Reynolds (Pod Lead), Elizabeth Morrison (Pod Lead), Joanne Gallett (Team Leader), Andrew Black and Deborah Wallace (manager) to provide updates to staff. The Claimant and his colleagues Vikram Singh and Alexandra Tor were the only Pod Leads who were not white Scottish or white British, and the only Pod Leads who were excluded from this meeting. On 24 March 2020 a further meeting was held with the same members of staff, with the exception of Ms Mundy, who was not at work that day. Mr Singh was also*

*absent from work that day, but again the Claimant and Ms Tor were excluded from the meeting. The Claimant, Ms Tor and Mr Singh continued to be excluded from staff meetings over the following months. The Claimant believes that he and his colleagues were excluded from these meetings because of their race. The staff members who were invited to the meetings were all white Scottish or white British. As a result of being excluded from these meetings, the Claimant did not receive updates regarding issues with the internal systems or new rules. The Claimant believes that he was treated less favourably than Ms Reynolds, Ms Morrison and Ms Gallett and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the Respondent in the same role and for the same length of time as the Claimant.*

**f) *Responsibility was delegated to white Scottish members of staff over non-white Scottish and/or non-white British members of staff***

*i) Deborah Wallace, a manager in the KBR department, took annual leave on or around 6 September 2020. The two Pod Leads in the KBR department at that time were the Claimant and Mr Singh. Neither the Claimant nor Mr Singh were asked to take over Ms Wallace's duties in her absence. Instead, Joanne Gallett, a white Scottish Team Leader in the RTS department, was asked to cover for Ms Wallace during her absence. When Ms Wallace had taken annual leave previously in 2019 she had chosen to delegate her duties to Jenna Reynolds, who was at that time a Pod Lead in the KBR department. Ms Reynolds is white Scottish. The Claimant believes he was treated less favourably than Ms Reynolds and/or a hypothetical comparator, being a white Scottish or white British employee who had worked for the*

*Respondent in the same role and for the same length of time as the Claimant.*

*ii) The acts and/or omissions set out in paragraphs 1.a), 1.b), 1.c), 1.d) and 1.e) occurred more than three months before the Claimant submitted his claim, however they, together with the acts and/or omissions set out in paragraph 1.f) amounted to conduct extending over a period within the meaning of section 123(3)(a) of the Equality Act 2010. Further or alternatively, it is just and equitable in the circumstances for the tribunal to extend the time limit in respect of the incidents detailed at paragraphs 1.a), 1.b), 1.c), 1.d) and 1.e) for the following reasons: (1) the Claimant sought legal advice in 2019 as a result of which he understood that the conduct of the Respondents amounted to a continuing act of discrimination and that this meant there was no time limit for raising a claim and (2) the Claimant sought to resolve the matter with the Respondent by raising internal grievances on 29/03/2019 and 08/06/2020. The outcome of the grievance raised on 08/06/2020 has been appealed and the appeal process is still ongoing."*

**Facts**

20. No evidence was heard at this PH. The following facts relevant to the issues for determination at this PH were not in dispute.

21. The claimant's employment with the respondent terminated on 30 September 2020. The claimant started early conciliation 27 August 2020 (Day A) and the certificate was issued on 27 September 2020 (Day B). The ACAS EC certificate is at page 1 in the bundle. The claimant presented his ET1 in case number 4105457/2020 himself, on 9 October 2020 (pages 2 – 16).

22. The claimant ticked the box at 8 indicating that he was bringing claims of discrimination on the grounds of the protected characteristics of race and sex.

23. In his ET1, at section 8.2 (page 8 of the bundle), the claimant put (typos and punctuation included as stated in ET1):-

*"I started on 17/07/17 with the agency.*

*From the first month I was told that I will be Pod Leed (sic) (team leader).*

*Within the first year a lot of employees who came after me were converted to the DXC company without my knowledge and without an advertising of available vacancies.*

*When I asked the management (DIANA) about converting from the agency to DXC she said that she is waiting for approve from DXC.*

*Then I was told that the next available conversion will for me.*

*I was surprised that the new staff from the agency who came nine months after me was converted to DXC instead of me, when I asked Andy Black (site manager) about this he said it is not me ask Diana, when I asked Diana, she said to me? do you want to work for DXC?, This surprised me as I had previously told her that I would like to work for DXC.*

*One of DXC employee who was on a full-time basis, when she resigned from DXC they put on her place a member of staff who is same like me (from the agency) but! Who came nine months after me.*

*I was initially offered to do extra hours over two days, I asked the management (Andy Black) to increase those days from two to three days, He said leave it with me, I came back and said I would accept two days, and he said it would now have to be made available to other staff who may also be interested in extra hours and we need to shortlist this, I said ok put me on the list.*

*After three months I noticed that the extra hours were given to a new staff from the agency and also not just two or three days, he had been*

*given five days, when I asked them why they did not come back to me about the extra hours, simply he said ? I forgot?*

*On July 2018 I was converted to DXC.*

*3. Less favourable treatment*

*another person who came six months after me who has less experience and does not have the same level of skills was promoted to Pod Leed (team leader) before me and then to OPS monitor despite myself being recommended by our supervisor, when I asked why, the answer was ?Diana?*

*I approached management again to see if any extra hours were available, even although I am a DXC employee, they give full-time hours to agency employee who started nine months after me.*

*On November 2019 I applied for (Consumption and invoice Co-ordinator), despite I was told about the interview I was excluded on March 2020 and the role was given to an inexperienced person despite the add requesting experience person."*

24. At the stage of Initial Consideration, the claim was considered to contain a claim of discrimination. No ET3 had been received at that stage. Following standard procedure for discrimination claims, a Preliminary Hearing ('PH') was fixed for case management purposes and Agenda forms were sent to parties. In advance of this PH the claimant and the respondent submitted their completed Agendas. The claimant provided some additional information in his Agenda in relation to the claims he was making.

25. On 22 November 2020 the respondent sought an urgent extension of time to lodge the ET3 (email at page 28). It was their position that neither DXC Technology Company nor its subsidiary EntServ UK Limited had received the Notice of Claim. It was their in-house legal counsel's position that they had first learned of this claim (case no 4105457/2020) on receipt of the claimant's completed Agenda form. Parties were informed by email from the Tribunal of

27 November 2020 that in the circumstances I was minded to grant the requested extension. The claimant's comments were sought within 7 days. It was confirmed that the PH arranged for 12 December 2020 would proceed.

26. The claimant confirmed in his Agenda form (in response to standard call 2.1 re details of the claim) that he was making a claim under the Equality Act 2010 (page 18 of Bundle). He stated that his claim was for 'direct discrimination'.

27. In section 4 of Schedule 1 of his completed agenda form claim, in respect of direct discrimination the claimant states in response to the question re less favourable treatment:-

> "- *Overtime was given to (White employees)*
>
> - *no obvious reason why I was not shortlisted*
> - *I had trained the majority of the employees*
> - *a lot of meetings were consist just white employees despite we are at the same position"*

28. The claimant did not complete any other answers in that Schedule.

29. An Agenda form was completed on behalf of the respondent prior to the lodging of the ET3. The response included, at box R2.7:-

> "*In box S.4 the Claimant has failed to specify the date or dates of the alleged treatment and the person or persons responsible.*

30. The respondent compiled a draft List of Issues when completing their Agenda. The terms of this were:-

> *"Jurisdiction*
>
> 1. *Which, if any, of the Claimant's complaints are prima facie out of time, having regard to ss. 123(1)(a) and 123(3) Equality Act 2010 ("EqA") (discrimination) and the relevant ACAS Early Conciliation provisions?*
> 2. *Can the Claimant show that there was conduct extending over a period which is to be treated as done at the end of that period?*

3. *In respect of those complaints that are prima facie out of time, does the Tribunal nevertheless have jurisdiction to determine them, on the basis that they were presented within such other period that the tribunal considers to be just and equitable (pursuant to s.123(1)(b) EqA)?*

*B. Direct discrimination because of sex and/or race*

4. *Did the Respondent subject the Claimant to the following treatment?*

*(a) [details to be provided by C]*

5. *Has the Respondent treated the Claimant less favourably than it treated or would have treated the* comparators. The Claimant *relies on the following comparators [[details to be provided by C] and/or a hypothetical comparator].*

6. *Was such less favourable treatment because of the Claimant's sex or race?*

*C. Remedy*

7. *Did the Claimant fail to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures in failing to appeal the outcomes of his two grievances (outcomes issued on 7 October 2019 and 24 August 2020)? "*

31. In their ET3 submitted under case no 4107770/2020 (page 89 pf Bundle) , the Respondent set out a substantive defence to the unfair dismissal claim Grounds of Resistance at pages 64 – 83), with reference to the details of claim set out in the Further Particulars of January 8.

32. In paragraphs 9 and 10 in the PH Note from the TCMPH which took place on 9 February 2021 it is stated:-

*"9. The Claimant advances claims of Direct Discrimination on the basis of race (due to being of Arab race or origin). He claims to have been treated less favourably in the following respects:*

*a. Offer of a contract of employment;*

*b. Provision of overtime;*

*c. Promotion to POD Lead;*

*d. Application for role of Consumption and Invoice Co-ordinator;*

*e. Exclusion from meetings; and*

*f. Delegation of responsibility.*

*10. Mr Edward took exception to claims (e) and (f) mentioned above on the basis that these had not been included in the ET1 and had only been introduced by the Claimant's Further and Better Particulars. In his submission these were time barred and were being introduced by amendment. He also took exception to claim (e) based on lack of specification. After discussion, the Tribunal determined the way forward was to order further and better particulars of claim (e), a written application to amend to include claims (e) and (f), and written submissions on the application to amend, covering issues of time bar and any necessary extension of time on just and equitable grounds. The Respondent would be afforded time to respond. The issue would then be determined at a further TCOPH as would further case management. The Parties were also in agreement that the additional application that had been lodged by the Claimant asserting unfair dismissal could be heard together with this application. The unfair dismissal claim is at an earlier stage and no ET3 has been lodged yet."*

**Relevant Law**

33. Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules'), being:-

> *"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*
>
> *Dealing with a case fairly and justly includes, so far as practicable -*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
>
> *(c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
>
> *(d) avoiding delay, so far as compatible with proper consideration of the issues; and*
>
> *(e) saving expense.*
>
> *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."*

34. The duty to deal with cases fairly and justly is a duty of the Tribunal towards all parties before it.

35. The relevant law in respect of time periods for presenting a claim under the Equality Act 2010 is in section 123 of the Equality Act 2010. For employment cases, this is (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.* Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)) and failure to do something is to be treated as occurring when the person in question decided on it. (section 123(3)(b)). Section 123(4) provides that in the absence of

evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

> *(a) When P does an act inconsistent with doing it, or*
> *(b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

36. Lady Smith summarised the relevant law in respect of amendment applications (at paragraphs 20 – 26) in *Margarot Forrest Case Management V Miss FS Kennedy* UKEATS/0023/10/BI. That decision was made with reference to the 2004 Tribunal Procedure Rules, but remains relevant, as follows:-

> "*20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Rules 10(2)(q) and 27(7)). Thus, if a claimant's representative seeks permission to alter, add to or subtract from what is written in the claimant's form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim."*

37. In *Ladbrokes Racing Ltd v Traynor* UKEATS/0067/06MT, the EAT helpfully set out the normal procedure which should be followed by a Tribunal when considering an amendment to an ET1. In that case it had become apparent to the Employment Tribunal in the course of a hearing that the claimant was seeking to pursue a line of evidence that had not been foreshadowed in the form ET1. The line of evidence had been objected to but the Tribunal had allowed the questioning to continue. The issues raised on appeal gave rise to consideration of the procedure that an Employment Tribunal ought to follow when, at a hearing, it appears that a party is seeking to present a case that differs from that of which notice has been given in the form ET1. That was set out from paragraph 30 of the EAT's decision, as follows:-

> *"30 We are persuaded that this appeal is well founded. The Tribunal seems, unfortunately, to have jumped too far too fast. What, in our*

*view, it required to recognise before making its decision was as follows:*

*31 Firstly, the Claimant had not, it seems, actually made any application to amend the ET1. The decision recorded in the written reasons is a decision to allow a line of cross examination which was manifestly not foreshadowed in the Claimant's statement of his case in his ET1. The line which the Claimant sought to pursue was plainly a separate issue in law, as discussed, and involved different facts from any of which notice had been given in the ET1, albeit that it would not take the case outwith the 'unfair dismissal' umbrella. That being so, the allowance of the line of cross examination would have been extremely difficult to justify in the absence of amendment.*

*32 Secondly, the Tribunal thus did need to turn its mind to the matter of amendment but the question is how? We see no difficulty in a Tribunal in such circumstances enquiring of the Claimant or his representative whether he seeks to amend the ET1 in the light of the line of evidence which he appears to seek to explore.*

*33 Thirdly, if the answer to that enquiry is that the Claimant does seek to amend, then the Tribunal requires to enquire as to the precise terms of the amendment proposed. If it does not do that, then it cannot begin to consider the principles that apply when considering an application to amend, as discussed above. Further, unless it does so, the fair notice obligations referred to in the quotation from Ali, above, will not be complied with.*

*34 Fourthly, it may be advisable, if not necessary, to allow the Claimant a short adjournment to formulate the wording of the proposed amendment.*

*35 Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.*

*36 Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response.*

*37 Seventhly, the Tribunal's response requires to be that of all members and requires to take account of the submissions made and the principles to which we have referred. The Chairman and members may require to retire to consider their decision.*

*38 Eighthly, the Tribunal requires to give reasons for its decision on an application to amend. Those reasons can be shortly stated and, as we have indicated, we would expect them to be given orally. They must, however, be indicative of the Tribunal having borne in mind all relevant considerations and excluded the irrelevant from its considerations."*

38. That case made reference to Ali *v Office of National Statistics [2005] IRLR 201,* where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

"*39…….. …a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states."*

39. The position set out in paragraph 20 of *Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT*, is also relevant to the issues in this PH:-

*"20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and*

*why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661."*

40. The leading authority in respect of amendment applications is *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661,* [1996] ICR 836. There the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, and set out the factors to be considered as including:-

> *(ii) The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;*
>
> *(iii) The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;*
>
> *(iv) The timing and manner of the application.*

41. In *Selkent*, Mummery J, as he then was, set out at paragraph 26:

*"…an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application."*

42. The relevant law in respect of time bar re discrimination claims is in the Equality Act 2010 section 123:-

*"(1) 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.*

*(3) For the purposes of this section –*

*(a) conduct extending over a period is to be treated as done at the end of the period;*

*(b) failure to do something is to be treated as occurring when the person in question decided on it."*

43. In *Hendricks v Metropolitan Police Commissioner [*2002] EWCA 1686, at paragraph 48, Mummery LJ set out well known dictum re an act extending over a period (within the meaning of the time limit provisions of the relevant 1975 and 1976 Acts, which precede the Equality Act 2010).

44. In *British Coal Corporation v Keeble 1997 IRLR 336*, the Court of Appeal set out the factors to be taken into consideration when considering whether it would be just and equitable to extend the three month time limit, being in particular:-

- The length of and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay;

- The extent to which the party sued has co-operated with any requests for information;
- The promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action;
- The steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

45. Rule 37(1) (contained in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013):

> *"A tribunal may strike out at any stage of the proceedings, either on its own initiative, or following the application of a party, all or part of a claim or response on any of the following grounds –*
>
> - *that it is scandalous or vexatious or has no reasonable prospects of success;*
> - *the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent, as the case may be, has been scandalous unreasonable or vexatious;*
> - *for non-compliance with any of these Rules or with an order of the Tribunal;*
> - *that it has not been actively pursued;*
> - *the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."*

46. Following *Hasan v Tesco Stores Ltd UKEAT/0098/16*, when considering whether to strike out, a Tribunal must consider whether any of the grounds set out in Rule 37 have been established, then go on to decide whether to exercise its discretion to strike out, given the permissive nature of the rule.

47. Guidance was given by the Court of Appeal in Ezsias *v North Glamorgan NHS Trust [2007] EWCA Civ 330,* in particular at para 29

*"It would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute."*

48. The EAT provided guidance in *Mechkarov v Citibank* [2016] ICR 1121, at para 14:

- *Only in the clearest of cases should a discrimination claim be struck out*
- *Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence*
- *The claimant's case must ordinarily be taken at its highest*
- *If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out*
- *A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*

49. Nevertheless, there is authority for discrimination and other claims being struck out.

50. In *Croke v Leeds City Council UKEAT/0512/07/LA,* Mr Croke, a litigant in person, presented discrimination claims against the Council, which applied to have them struck out. After requiring Mr Croke to provide full particulars of his claim, at a PHR an employment judge held that his claims were for victimisation. However, as there was no material from which the necessary causal link between a protected act and the Council's alleged conduct could be identified, the judge struck out the claims as having no reasonable prospect of success. Upholding the employment judge's decision, the EAT held that where, on the available material, the employment judge considered that a case was "not, in any ordinary sense of the term, fact-sensitive", it could be struck out without evidence being formally heard.

51. In *Ahir v British Airways plc 2017 EWCA Civ 1392*, CA, the Court of Appeal asserted that Tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established. The Court accepted that the test for strike-out on this ground with its reference in rule 37(1)(a) to 'no reasonable prospect of success' was lower than the test in previous versions of the strike out rule, which referred to the claim being frivolous or vexatious or having 'no prospect of success'. In this case, the Court upheld an Employment Judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. The Court concluded that the Employment Judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success. There was a well-documented and innocent explanation for the appellant's dismissal, and his dishonest conduct was considered in light of his airside clearance. It was held that cases could not be allowed to proceed simply on the basis of assertions.

52. In *Shestak v Royal College of Nursing EAT 0270/08* it was held that undisputed documentary evidence — in the form of emails which could not, taken at their highest, support the claimant's interpretation of events — justified a departure from the usual approach that discrimination claims should not be struck out at a preliminary stage.

53. In *E v X, L & Z* UKEAT/0079/20/RN(V) & UKEAT/0080/20/RN(V), the EAT gave a useful summary of relevant case law and the set out the principles to be applied when dealing with issues of time bar, amendment and strike out. The key principles were set out from para 50, as follows:-

> *"50. With the qualification to which I have referred at paragraph 47 above, from the above authorities the following principles may be derived:*
>
> *1) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form:* ***Sougrin;***

2) *It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial:* ***Robinson****;*

3) *Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant:* ***Sridhar****;*

4) *It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated, or (2) substantively to determine the limitation issue:* ***Caterham****;*

5) *When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case:* ***Lyfar****;*

6) *An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs:* ***Aziz****;* ***Sridhar****;*

7) *The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor:* ***Aziz****;*

8) *In an appropriate case, a strike-out application in respect of some part of a claim can been approached, assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required — the matter will be decided on the claimant's pleading:* ***Caterham*** *(as qualified at paragraph 47 above);*

9) *A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason:* ***Robinson*** *and paragraph 47 above;*

10) *If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing:* ***Caterham****;*

11) *Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out:* ***Caterham****;*

12) *Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing:* ***Caterham****;*

13) *If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively,, so that time and resource is not taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may make no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue:* ***Caterham****.*

**Claimant's Representative's Submissions**

54. The claimant's representative relied on *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore [1996] IRLR 661,* [1996] ICR 836 and *Ali v Office of National Statistics [2005] IRLR 201* as setting out a non-exhaustive list of factors to be taken into account by the Tribunal. She asked that all the circumstances be taken into account and that the Tribunal consider the balance of injustice and hardship to the claimant and the respondent should the amendment not be allowed.

55. The claimant's representative accepted that the proposed amendment contained two new incidents of alleged race discrimination which were not detailed in the ET1. Her position was that the they do not alter the nature of the claim, but give further details of fact to the claim of direct discrimination on the grounds of race. She relied upon the further particulars which for the

amendment being made early in proceedings, before the submission of the ET3.

56. The claimant's representative did not accept that the claim of race discrimination did not have reasonable prospects of success. She relied on *Eszias v North Glamorgan* [2007] EWCA Civ 330 re. the high bar for strike out of discrimination claims, and that it would be very exceptional to strike out without evidence. It was her submission that there are facts in dispute in this case and that discrimination cases should not be struck out without evidence except in the plainest and most obvious cases. It was her submission that this case should be allowed to proceed to be examined on its merits and the alleged facts. She relied on a witness statement having been taken form an individual who supports the claimant's position (that witness statement was not before me and no evidence was heard). The respondent's explanation of events was not accepted. She submitted that there were documents which did not support the respondent's position. Her position was that there are clearly disputes of fact which would require evidence to be heard at a hearing on the merits.

57. It was accepted that in the ET1 there is no mention of the grievances raised by the claimant. It was submitted that these were not 'at the forefront of the claimant's mind'. The claimant's representative relied upon there being an ongoing discriminatory state of affairs throughout the employment relationship. She relied on the claimant being unrepresented when submitting his ET1 and having had difficulty finding legal representation. She relied on it being the claimant's recollection from legal advice received in 2019 that there was no time limit for a continuing act (although no evidence was heard from the claimant).

58. Reliance was placed on the claimant's lack of awareness, with reference to his indication in his completed Agenda form that his case would take '*5 mins*'. Reliance was also placed on the details set out by the claimant in his Agenda form at S.4.

59. It was submitted that a discriminatory state of affairs persisted during the course of the claimant's employment with the respondent and it would be unjust and of greater hardship to the claimant than the respondent should the claim not be allowed to proceed. It was the claimant's representative's position that if the amendment is allowed then there is no issue of time bar as the last incident brings the claim in time and on the face of it (*prima facie)* what is set out by the claimant is capable of being a continuing act. It was submitted that if the amendment is not allowed then it would be just and equitable to extend the time limit to allow the claim to proceed.

60. In respect of the time bar point, reference was made to the Equality Act 2010 s123(3)(a). Reliance was placed on the claim being lodged within 3 months of 30 September 2020 (on 9 October 2020).

61. The claimant's representative's submission was that the cogency of the evidence was not likely to have been affected by the passing of time. Reference was made to the detailed grounds of resistance already provided by the respondent. Reliance was placed on *Hendricks v Metropolitan Police Commissioner [2003] ICR 530,* in particular paragraph 50 of the Court of Appeal's decision in respect of practical difficulties.

62. It was submitted that there would be a greater prejudice to the claimant if the claim were struck out than to the respondent if the amendment were allowed or the time limit were allowed to be extended.

63. The claimant's representative accepted that the onus is on the claimant to prove that what is set out is a *prima facie* case (i.e. that the claim may be successful on the face of the alleged facts).

64. In response to the respondent's representative's submissions, it was submitted that the fact that the decision not to shortlist the claimant for the Consumption and Invoice Co- Ordinator role was taken by someone other than the claimant's line manager indicates cultural racial bias in the workplace, which influences decisions in the workplace. It was submitted that the allegations all relate broadly to the category of lack of opportunity to

progress which was continuing and that that implies a permeation through the culture of the workplace. Her position was that what is set out in the further particulars, including what is set out at (d), are all part of a continuing state of affairs, where the claimant was not given the same opportunity to progress as white British colleagues.

65. The claimant's representative opposed the respondent's representative's application for strike out. Reliance was placed on *Hendricks v Metropolitan Police Commissioner [2003] ICR 530,* in particular paragraph 52 of the Court of Appeal's decision in respect of whether something is an ongoing situation or state of affairs. It was submitted that each of the allegations is an example of an ongoing situation where the claimant was denied the opportunity to progress. She submitted that the rejection of the claimant's application for the Consumption and Invoice Co- Ordinator role was part of the same act, although there was a different decision maker. She accepted that the claimant had not appealed the grievance outcome but relied on additional documents as showing an exchange of communication between the claimant and the respondent's HR Connect. She noted that the respondent had set out in their written submissions their response to the claimant's position that there was a continuing act.

66. The claimant's representative's position was that the amendment should be allowed, the strike out application refused and the issue of whether there was a continuing act should be reserved for the Final Hearing on the merits.

**Respondent's Submissions**

67. The respondent's representative noted that the claimant had submitted two separate claims, for discrimination, and, separately, for unfair dismissal. It was noted that it was not suggested that the dismissal was an act of discrimination.

68. Reliance was placed on the ET1 in the discrimination case (case no 4105457/2020) having been submitted on 9 October 2020, with ACAS Conciliation having commenced on 27 August 2020 and the Early Conciliation

certificate being dated 27 September 2020. Reliance was placed on the dates mentioned in that ET1, the latest being March 2020, and later, in the further particulars, stated as being on 18 March 2020 (being the date of notification re unsuccessful in application). On that basis, it was submitted that the last act of discrimination was on 18 March, conciliation ought to have commenced at the latest by 17 June and the claim ought then to have been submitted by 17 July. It was the respondent's position that the claims in the ET1 were then out of time. It was further submitted that there was no continuing course of conduct.

69. With regard to the terms of the proposed amendment (Further Particulars at pages 58 – 63), it was the respondent's representative's position that what is set out there is the 'first glimpse' of the matters in the application to amend, with further particulars being requested and provided thereafter.

70. The respondent's representative went through what is set out in the first further particulars. The previously provided written submissions were adopted and expanded upon. The written submissions set out considerable detail on the defence to the alleged facts set out in the further particulars.

71. It was noted that in his ET1 (as clarified by the further and better particulars provided on 8 January 2021), the Claimant makes the following allegations of direct race discrimination:

a) He was not offered a contract of employment as quickly as white Scottish and/or white British agency staff.

b) Available overtime was given to white Scottish and/or white British colleagues in preference to him.

c) He was not promoted to POD Lead as quickly as his white Scottish and/or white British colleagues.

d) He was not shortlisted for interview for the role of Consumption and Invoice Co-ordinator.

72. In the written submissions, reliance is made on what is set out as facts, including:-

(a) the claimant was offered a contract of employment by the Respondent on 18 June 2018.

(b) As a result of the Claimant raising a grievance in relation to overtime, the approach of allocating overtime was formalised in that all available overtime was advertised to the whole team from around mid-October 2019. Further, in any event, from November 2019 overtime ceased to be available at the Bellshill site, with the exception of one piece of work for a different department (not KBR).

(c) The Claimant was promoted to POD Lead on or around March 2018.

(d) The Claimant was informed of the fact he had not been shortlisted for interview for the role of Consumption and Invoice Co-ordinator on 18 March 2020.

73. Reliance was placed on the allegations set out above at (a), (b) and (c) above relating to alleged acts or omissions on the part of the Claimant's managers, Ms Mundy and/or Mr Black. Reference was made to the Claimant having raised a grievance in relation to these issues in or around August 2019 and the outcome being issued to him on 7 October 2019. Reliance was made on the grievance being not upheld, although several recommendations being made, and the Claimant not appealing this outcome. It was the respondent's position that any claim in respect of these events is significantly out of time and that they are not continuing acts.

74. Reliance was placed on the claimant's position in the further and better particulars provided on behalf of the Claimant on 8 January 2021 that the Claimant sought legal advice in 2019 in respect of these matters. It was the respondent's position that that the claimant should have been aware at that date of the possibility of taking legal action and the onus should be on him to

act promptly. It was submitted that it would then not be just and equitable to extend the time limit in respect of these allegations. It was further submitted that if the claimant was advised that there were no time limits, then his remedy would lie in a negligence claim against the relevant adviser.

75. Alleged facts were set out in the written submissions to support the respondent's position that there is no continuing course of conduct. Reliance was placed on the allegation set out above at (d) above (that the claimant was informed of the fact he had not been shortlisted for interview for the role of Consumption and Invoice Co-ordinator on 18 March 2020 relating to alleged acts or omissions on the part of Mr Jackson, who it is stated was the hiring manager in relation to the Consumption and Invoice Co-ordinator role. It was set out in the written submissions that Mr Jackson works for a different team and in a different location to Ms Mundy and Mr Black and has no working relationship with either of them. Reliance was placed on the claimant having raised a grievance in relation to this matter on 8 June 2020, the outcome being issued to him on 24 August 2020, a number of recommendations being made as a result of the grievance, but the claimant's complaint of discrimination not being upheld and that not being appealed by the claimant within the 14 day time period. It was stated that the claimant belatedly informed the respondent of his wish to appeal this grievance outcome, that being on 10 September 2020, after the claimant had been put at risk of redundancy. It was stated that the appeal outcome was issued to the claimant on 15 February 2021.

76. The respondent contended that the Tribunal does not have jurisdiction to hear any of the original claims and it would not be just and equitable to extend time. It was their position that these allegations do not form a continuing act, either individually or together, form a continuing act. Reliance was placed on the length of the delay in bringing the claims being considerable (well over two years for some of the allegations) and that if the historic allegations are allowed to proceed, witnesses will have to give evidence about events from

at least three years ago, by the time the case comes to full hearing. It was stated that one key witness has already left the Respondent's employment.

77. It was submitted that the respondent has dealt with the claimant's concerns by way of its internal grievance process and has co-operated fully in this regard, even allowing him to raise an out of time internal appeal.

78. On those basis it was the respondent's submission that the claims in the ET1 are out of time and should not be allowed to proceed.

79. It was further submitted that in the further and better particulars provided on 8 January and 23 February 2021, the claimant is now seeking to add two additional claims by way of amendment, namely:

(a) On 23 and 24 March 2020 *"and subsequent* [unspecified] *dates"* the Claimant, together with his colleagues Alexandra Tor and Vikram Singh, was excluded from meetings.

(b) On or around 6 September 2020 management responsibility was delegated to white Scottish members of staff over non-white Scottish and/or non-white British members of staff.

80. It was the respondent's position that these allegations are being raised out of time and that had the Claimant raised these allegations in his original ET1, only the second would have been plainly in time. Reliance was placed on the respondent having responded to this allegation with 'a clear and credible explanation of the relevant events' (paragraphs 63 to 68 of its grounds of resistance). It is noted that that the particulars state that after 24 March 2020 he *"continued to be excluded from every subsequent POD Lead meeting"*. Reliance was placed on their being no specifics in that regard.

81. Further detail of their defence to these allegations was provided in the respondent's written submissions, following on the second further particulars being received on 23 February 2021. This detail includes reference to Mr Black, Ms Wallace and Ms Munday. It was denied that the Claimant, or any

of his KBR POD Lead colleagues (including Ms Tor and Mr Singh) were ever excluded from a POD Lead meeting, because of their race or otherwise.

82. It was the respondent's position that these allegations are spurious and have no reasonable prospect of success. Reliance was placed on the claimant not having raised these matters in his grievance, even though he had availed himself of the Respondent's internal grievance procedure on several previous occasions. The respondent's position was that the purpose of the application to include the new allegations is simply to be able to point to at least one allegation which is in time and thereby argue that there is a continuing course of conduct with the historic allegations, at least those involving Mr Black and Ms Mundy. It was their position that there is no plausible reason why the Claimant did not include these allegations in his ET1 and that if he had genuinely believed that he, and both of his non-white British POD Lead colleagues, had been repeatedly excluded from regular POD Lead meetings from 23 March 2020 up until the date of his dismissal over six months later, on 30 September 2020, this would surely have been foremost in his mind when submitting his ET1 in early October 2020.

83. It was the respondent's position that although they had responded to the allegations, the 'bulk of the work that would be involved in defending the claims (including dealing with disclosure and witness statements) is still ahead and significant time and costs would be incurred in dealing with the allegations, several of which are well over two years out of time. It was submitted that it would not be in the interests of justice or in line with the overriding objective to allow the amendment.

84. Further, it was submitted on behalf of the respondent that all of the Claimant's claims (under case number 4105457/2020) should be struck out, because the Tribunal does not have jurisdiction to hear them because they are out of time and it would not be just and equitable to extend the time limit.

85. In the oral submissions, reference was made to a number of documents in the Joint Bundle to support the respondent's submissions re the time line of events and their position that the discrimination claims were not submitted within the relevant period. Reliance was placed on the balancing exercise which requires to be carried out, following *Selkent Bus Company Ltd v Moore* [1996] ICR 836. It was submitted that it is only if what is alleged in (e ) of the further particulars is allowed that what is alleged previously can be viewed as continuing conduct. Reliance was placed on lack of specification, in particular of any events after 26 March 2020, and the 'bold assertion' that the situation was continuing being stated after there had been two Preliminary Hearings, and after the respondent had raised the issue of time bar. It was submitted that the claims were materially lacking in specification. Reliance was made on the terms of the grievances lodged by the claimant, and that they had not included what is now set out at (e), even at the stage when a late appeal of the grievance outcome had been allowed by the respondent. It was submitted that the claimant's representative's position that that aspect had 'not been at the forefront of the claimant's mind' was not persuasive.

86. It was accepted that if what is now set out at (f) of the further particulars had been in the ET1 from the outset, then the discrimination claims would have been in time. It was submitted that as those particulars were not received until 23 February 2021, they are out of time. It was submitted that the balance of prejudice to the respondent 'far outweighs' that to the claimant of refusing the application to amend, on the basis that allowing the amendment would expose the respondent potentially to claims that but for the amendment would be timebarred. Reliance was placed on there being 'logistical and evidential difficulties' because key staff had now left the respondent's employment.

87. It was submitted that it is only if the allegations now set out at (e ) and (f) are tied to what is set out in (a) (b) and (c) that there is any basis to the claimant's position that there was a continuing course of conduct.

88. It was submitted that the claimant's proposed amendment should not be allowed, and in the alternative, that if allowed should be restricted to

allegations of events to 24 March 2020 only. Reliance was placed on the claimant having had ample opportunity to set out his specific claims clearly and that he had not done so re allegations beyond 24 March 2020. Reliance was placed on the respondent's defence of the claims.

89. It was submitted that there is nothing to conclude that it would be just and equitable to allow the claims, which have been lodged out of time. It was submitted that if the Tribunal takes the view that what is set out at (a), (b), (c), (d), (e ) and (f) are separate matters and not a continuing course of conduct, then the claims are all out of time and should be struck out on the basis of having no reasonable prospect of success because the tribunal has no jurisdiction.

90. The Tribunal was invited to refuse the amendment application in total, or if allowed to restrict (e ) to events prior to 24 March 2020.

91. It was submitted that even on the basis of the claimant's position that he had sought legal advice in 2019 and understood there to be a continuing act of discrimination, any such continuing act would have ended with the claimant's redundancy on 6 September 2020. With regard to the position that the claimant had difficulty accessing a legal advisor, reliance was placed on the claimant having sourced advice prior to the pandemic.

92. In response to the claimant's representative's submissions, it was submitted that if the amendment were allowed then that would potentially allow grounds for the claimant to argue that there was a continuing act of discrimination. It was not accepted that there was a continuing act, but was accepted that on the face of it (*prima facie*) what is set out in the amendment could be a continuing act. It is the respondent's position that there was no continuing act of discrimination, that the claims now set out in the particulars are all out of time, with the exception of what is now set out at (e ), which, if allowed, could potentially open up argument that there was a continuing course of conduct, which is denied by the respondent.

93. In respect of the submission that the claimant had a misunderstanding of the law, reliance was placed on there having been no evidence from the claimant and on the submission that the claimant had had legal advice on the matter in 2019.

94. It was submitted that the respondent has provided detail in their response to the claims as part of their duty to the Tribunal and that there would be an issue for the Hearing re witnesses who have left their employment with the respondent.

95. It was submitted that (d) could not be part of the alleged continuing course of conduct because there was a separate decision maker and that that part of the proposed amendment should not be allowed. It was submitted that there was no case of institutional discrimination pled.

**Equal Treatment Bench Book**

96. When considering the issues in this case I took into account the guidance in the Equal Treatment Bench Book. I took into account that the time of submitting his ET1 now registered under case number 4107395/2020, the claimant was unrepresented (a 'Litigant in Person' or 'LIP'). The Equal Treatment Bench Book is an online publication available to the Judiciary and to the public.

97. In particular, I took into account the guidance on the difficulties which that LIPs may have in presenting their case (Chapter 1 'Litigants in Person and Lay Representatives' para 15) and the factors which have an adverse effect on the presentation of their case (Chapter 1, para 16).

98. I also took into account the content of Chapter 8 on Racism, Cultural /Ethnic Differences, Anti-Semitism and Islamophobia. It was not suggested to me that English was the claimant's second language.

**Decision**

99. I considered the terms of the further particulars which are the amendment application. It is not helpful that the terms of the proposed amendment are set out in the Answers / Further Particulars, rather than in terms of a specific amendment application. With regard to the principles in Selkent, I am satisfied that the terms of the proposed amendment are the terms of the further particulars from January and February 2021.

100. Also with regard to the Selkent principles, I take into account the nature of the amendment, being Answers in response to questions posed at a Preliminary Hearing and in response to an Order. The nature of the amendment is that of providing detail of the race discrimination claim which has been raised in the ET1. It is not argued before me that the ET1 did not set out a claim of race discrimination, but that what is set out in the ET1 itself was not presented within the applicable statutory period. The terms of the proposed amendment do not raise a new cause of action: the claim is under section 13 of the Equality Act only, now reliant only on the protected characteristic of race discrimination (although the ET1 had also brought a claim reliant on the protected characteristic of sex). I considered the timing and manner of the application to be significant: the ET1 had been completed by the claimant when unrepresented, further particulars of the claim had been requested and the January further particulars were received before the ET3, as an extension had been granted to the respondent. I considered the terms of the PH Note from December 2020, which led to the January Farther particulars being provided. The claimant had timeously responded to being asked for further details of the claim. These further particulars do not seek to bring new heads of claim. The ET3 was allowed to be lodged late and clearly responds to the claim of race discrimination as set out in both the ET1 and the January Further Particulars.

101. I considered it to be significant that the respondent has set out in their ET3 a substantive and detailed response to the allegations in the further particulars of January 2021. It appears from the terms of the ET3 that the respondent has access to records which would assist with their defence of the claim. Although reference was made before me to ‘key witnesses’ no longer being

employed by the respondent, there was no detail given to me of who those witnesses are or why they may be unable to give evidence before the Tribunal. Witness Orders may be granted for any relevant and necessary witness if required for that witness to give evidence before the Tribunal.

102. I took into account that what is set out in the amendment application gives more information on the factual basis of the claim of direct race discrimination. It does not seek to introduce entirely new heads of claim and causes of action. The claim remains in reliance of section 13 of the Equality Act 2010, reliant on the protected characteristic of race.

103. I took into account the consequences of the amendment application with regard to allowing an argument that there was a continuing course of conduct, and the implications of that argument given the historic nature of some of the allegations.

104. In all these circumstances, I considered the balance of prejudice. The prejudice to the claimant in not allowing the amendment would outweigh the prejudice to the respondent. If the amendment were not allowed, on the face of it, the claimant's case would be timebarred, being reliant only on historic events. From their written responses so far, including the written submissions for this Preliminary Hearing, it is clear that the respondent has recourse to documentary evidence which will allow them to defend the claim. Allowing the amendment is no indication of the prospects of success of the claimant's claim, merely that on the face of what is set out in the amendments, the claimant may be successful in his claim of direct race discrimination, taking his case at the highest. I took into account that in discrimination proceedings claims inferences may be drawn from lack of explanation. I took into account costs of proceedings with this action. I took into account the submissions re 'key witnesses' being no longer employed by the respondent. That is no of itself a barrier to those individuals giving evidence before the Tribunal.

105. I took into account that on the face of it what is set out in the ET1 is time barred and that it is only if the January further particulars are allowed in full that there is a *prima facie* case which sets out allegations of a continuing

course of conduct which was presented within the applicable statutory time limit in section 123 of the Equality Act 2010. I took into account *Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576 re.* there being no presumption that a Tribunal should extend the period and extension being the exception rather than the rule.

106. I had regard to the factors set out in *British Coal Corporation v Keeble 1997 IRLR 336*, including the length of the delay. I had regard in particular to some of the allegations dating as far back as 2018.

107. I took into account that there was no evidence before me.

108. In coming to my decision I took into account the discussion from para 45 in *E v X:-*

*"In **Caterham**, His Honour Judge Auerbach considered an appeal from the tribunal's determination that the treatment complained of, up to and including a complaint of constructive dismissal, had all formed part of "conduct extending over a period", for the purposes of S123(3)(a) of the **EqA**. The ground of appeal under consideration contended that the judge had erred in law in definitively deciding that question at a preliminary hearing without having determined, in respect of the relevant allegations, what had factually occurred and whether any of it, subject to the time point, had involved discriminatory treatment, as alleged. Having first concluded that the tribunal had made a definitive determination that all of the alleged conduct, up to and including the alleged dismissal, had formed part of a single piece of conduct extending over a period, His Honour Judge Auerbach held that determination to have been an error of law:*

*"53… in short, because, at this preliminary hearing, the judge did not have any evidence before her, at all, on the continuing conduct issue; and she did not make, indeed could not have made, any finding of fact at all relevant to that issue, nor any findings about whether any of that alleged conduct involved (subject to the time point) conduct amounting to discrimination, as alleged. Absent such findings she could not properly have determined,*

*definitively, whether any of the matters complained of involve something which, taken together with other matters complained of (so all of them), formed part of conduct extending over a period.*

*54. Rather, as is apparent in particular from paragraph 28, she reached her conclusion – in respect of the conduct extending over a period issue relating to these claims – solely on the basis of the consideration of the contents of the claim form. That, indeed, may be contrasted with the tribunal's conclusion on the question of just and equitable extension, which proceeded from the facts found…*

*…*

*56. But even if (which I did not, I think, have to decide), the Judge did, and was entitled to, take that view, that could only have led to the conclusion that the claims in question should not be struck out as being out of time. They would then proceed to a full hearing on the basis that the continuing conduct issue, and all the time points attendant upon it, remained live. …"*

109. I also took into account, from paragraph 46 in *E v X,* the observations of His Honour Judge Auerbach at paragraphs 58 to 66 of his judgment, as follows:

*"58. First, it is always important for there to be clarity, when a Preliminary Hearing is directed, at such a Hearing, and in the Tribunal's decision arising from it, as to whether the Tribunal is considering (or directing to be considered), in respect of a particular complaint, allegation or argument, whether it should be struck out (and/or made the subject of a deposit order), or a substantive determination of the point.*

*59. The differences, in particular, between consideration of a substantive issue, and consideration of a strike out application, at a Preliminary Hearing, are generally well understood, but still worth restating. A strike out application in respect of some part of a claim can (and should) be approached assuming, for that purpose, the facts to be as pleaded by the Claimant. That does not require evidence or actual findings of fact. If a strike*

*out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point, or on the merits), that will bring that complaint to an end. But if a strike out application fails, the point is not decided in the Claimant's favour. The Respondent, as well as the Claimant, lives to fight another day, at the Full Hearing, on the time point and/or whatever point it may be.*

*60. By contrast, definitive determination of an issue which is factually disputed requires preparation and presentation of evidence, to be considered at the Preliminary Hearing, findings of fact, and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the Full Merits Hearing of the case.*

*61. All of that applies equally where the issue is whether there has been conduct extending over a period for the purposes of the section 123 time limit. If the Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out. But if it is not struck out on that basis, that time point remains live."*

110. In all the circumstances, I am satisfied that the proposed amendment is the addition of factual details to the existing allegation of race discrimination, with regard to section 13 of the Equality Act 2010 (direct discrimination).

111. I am not satisfied that the respondent's position re cogency of evidence has basis or leads to undue prejudice to the respondent. It was not suggested that the respondent's processes had not been properly documented, or that such documentary evidence could not be recovered. If documents such as minutes and emails documenting the processes followed can be recovered (and there is no suggestion that they cannot), those documents can be relied upon in the Tribunal proceedings and are then likely to assist witnesses'

recollection of events. It does not appear that the respondent would not be in a position to properly prepare their defence of the race discrimination claim brought by the claimant. The ET3, drafted after the receipt of the January Further Particulars, indicates a substantive defence being made and the respondent's knowledge of events. In all the circumstances, the injustice and hardship to the claimant of refusing the amendment is disproportionate to any injustice and hardship to the respondent of allowing the amendment. If the amendment is not allowed then the claim of race discrimination as set out in the ET1 is time barred, given the claimant's reliance in the ET1 only to events more than 3 months prior to the date when the ET1 was lodged. On that basis, unless the amendment is allowed, the Tribunal would not have jurisdiction to hear the race discrimination claim. Although the claimant may continue with his claim of unfair dismissal there are separate considerations in respect of the race discrimination claim and either one may be separately successful or unsuccessful on the facts. The statutory caps on compensation which may apply to the unfair dismissal claim, if successful, may not apply to the claim made under the Equality Act, should that claim be successful and the quantification of that claim be above that level.

112. I consider it to be significant that at that time the claimant was unrepresented, that an extension was granted to lodge the ET3, that the first Further Particulars were received before the ET3 was drafted and that the ET3 sets out a substantive defence to what is alleged in the first (January 2021) Further Particulars (which is then expanded upon in the second (February 2021) Further Particulars).

113. In weighing up the balance of justice and the hardship in allowing or refusing the amendment I take into account that the respondent has already set out a substantive defence to the claim and that there is no indication that they will not be able to recover documentary evidence which they may rely on in their defence.

114. It is recognised that additional expense has been incurred by the respondent as a result of these preliminary proceedings in respect of the claimant's

proposed amendment. If the respondent wishes to seek expenses in respect of these preliminary proceedings, such application will be dealt with following conclusion of the Final Hearing.

115. I take into account that the claimant's representative's position before me is that there is a continuing course of conduct in respect of institutionalised racism, although the claimant has not particularised that.

116. In considering all the issues before me in this case, I applied the key principles set out in *E v X, L & Z* UKEAT/0079/20/RN(V) & UKEAT/0080/20/RN(V) from paragraph 50. I identified the substance of the acts of which complaint is made by looking at the claim form. (*Sougrin).* That claim form clearly set out an intention to bring a claim of direct discrimination on the grounds of race (being a claim under section 13 of the Equality Act 2010).

117. With regard to whether the ET1 set out a link (*Robinson*), I took into account that what is set out by the claimant at box 8 of the ET1 references two allegations of discrimination, firstly in respect of delay in being ,made an employee and secondly re delay in being promoted. The claimant was unrepresented at that time. What is set out in the ET1 and in the first (January 2021) Further Particulars (which is then expanded upon in the second (February 2021) Further Particulars) is a *prima facie* case of direct discrimination on the grounds of race. I noted that it is not essential for the claim form to explicitly state a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs *(Sridhar).* I noted the purpose of this PH and that no evidence was heard on which I could determine whether there was a continuing course of conduct or state of affairs. The test which I applied was whether the claimant has set out a *prima facie* case, in which connection it may be advisable for oral evidence to be called.

118. I took into account the respondent's reliance on separate individuals having made decisions which the claimant relies on as being a continuing course of conduct. I took into account that the fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor (*Aziz).*

119. In all the circumstances I allow the ET1 to be amended in terms of the Further Particulars from January and February 2021. The respondent is given the opportunity to amend the ET3 in response, if considered to be necessary.

120. In consideration of the application to strike out the claim under Rule 37(1)(a) of the ET Rules, on the basis of having no reasonable prospects of success. I took into account that the threshold for striking out a claim for having no reasonable prospects of success is high. I took into account that the respondent's application was based on strike out arising from the claim being time barred (i.e. on the basis of the amendment not being allowed). I took into account that the Tribunal does have discretion to strike out a discrimination claim on the grounds of no reasonable prospects of success.

121. In considering the strike out application, I took into account the circumstances and applicable law as set out above. I considered what is set out as being the claimant's case, at its highest, including considering whether any aspect of that case is innately implausible for any reason. I did not find any aspect of the claim to be innately implausible *(Robinson).*

122. I do not consider that there is no reasonable prospect of the claimant establishing at a Final Hearing that what he relies on was a course of conduct extending over a period, so having the effect that the race discrimination claim is not timebarred, with regard to the provisions of section 123(3).

123. I take into account the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of the issue of time bar, given the reliance on there being a continuing course of conduct.

124. In all the circumstances, I considered that in this case, the claimant is entitled to prove his claim beyond this preliminary stage on the basis that the burden of proof is on him to prove, either by direct evidence or by inference from primary facts, that the alleged incidents of discrimination and / or detriment are linked to one another and that they are evidence of continuing conduct

extending over a period, and in terms of the Equality Act 2010 section 123 is to be treated as done at the end of the period. I note that it is the claimant's representative's position before me that the last incident of discrimination was on 30 September 2020 and that her reliance on the claim being lodged within 3 months of 30 September 2020 (on 9 October 2020).

125. On that analysis, I am satisfied that if the claimant establishes that there was a continuing course of conduct throughout his employment with the respondent, then the relevant date for calculation of the limitation period would be 30 September 2020. The ET1 was submitted within 3 months of that date. On the face of the claimant's case (including what is particularised in the now allowed amendments of January and February 2021), the claim of race discrimination would not be time barred, so long as the claimant can prove that what he relies on was a continuing course of conduct. No evidence has been heard to enable me to come to a conclusion on that. On application of Rule 2 of the Employment Tribunals Rules of Procedure, amendment of the ET1 in terms of the Further Particulars of January and February 201 is allowed and the claims of race discrimination and unfair dismissal will proceed to a Final Hearing, where one of the issues for determination by the Tribunal will be whether there was a continuing course of conduct.

126. The respondent is entitled to fair notice of the claimant's claim and steps were taken to provide this by way of the Agenda questionnaire procedure and the Answers to the questions. Should the respondent require further particulars of what is now pled (including what is set out in the further particulars of January and February 2021), they may set out questions to be answered by the claimant. If a full response to the respondent's questions is not made on a voluntary basis, the respondent's representative may apply in terms of Rule 30 of the Employment Tribunal Rules for a Case Management Order in specific terms, seeking answers from the claimant to their questions.

127. In all the circumstances, the amendment is allowed, the claim of race discrimination is not struck out and the issue of whether or not the race discrimination claim under section 13 of the Equality Act 2010 has been

brought within the time limits set out in section 123 of the Equality Act 2010 will be for determination by the Tribunal at the Final Hearing in this case. It will be a question for the Final Hearing whether what the claimant relies on is in fact a continuing course of conduct. The issue of time bar is then live for the Final Hearing to that extent. It will be a finding of fact for the tribunal at the Final Hearing as to whether one act leads to another (*Lyfar).* The claimant has set out a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs, although not explicitly stated ( *Aziz; Sridhar).*

**Further Procedure**

128. The claims will be scheduled for a Final Hearing, in respect of disability discrimination and unfair dismissal.

129. A further TCMH will be arranged for the purposes of case management. The matters to be discussed will include:-

- The issues to be determined by the Tribunal at the Final Hearing
- Whether the Final Hearing should be in person or via CVP
- Whether witness statements should be used
- Witnesses (being necessary and relevant to the issues for determination)
- Fixing dates for the Final Hearing
- Issue of any Case Management orders to ensure preparation for the Final Hearing, including re exchange of documents and preparing and lodging the Joint Bundle for use at the Final Hearing
- Whether both parties are willing to engage in Judicial Mediation as an alternative means of dispute resolution.

130. Both parties' representatives should liaise on these matters prior to the TCMPH. It would be helpful if a draft List of Issues is produced to the Tribunal 7 days prior to the TCMPH.

131. Date listing letters will be sent to parties to seek information on availability for the Final Hearing and their position as to whether or not this case is suitable to be heard via CVP.

Employment Judge: Claire McManus
Date of Judgment: 05 July 2021
Entered in register: 20 July 2021
and copied to parties