EMPLOYMENT TRIBUNALS

Claimant: **Mr J Lawrence**
Respondent: **British Gas Limited**

Record of an Open Preliminary Hearing by Cloud Video Platform

Heard at: **Nottingham**
On: **Friday 9 July 2021**
Before: **Employment Judge P Britton**

Representation
Claimant: **In person, assisted by his wife Mrs C Lawrence**
Respondent: **Miss L Kay of Counsel**

Covid-19 statement:
This was a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V – video. It was not practicable to hold a face-to-face hearing because of the Covid-19 pandemic.

JUDGMENT

1. The application of the Claimant to amend the current claim so as to bring claims relating to matters pre 5 September 2019 is refused save that in the context of the events the Claimant is permitted to bring by way of amendment a claim for harassment pursuant to section 26 of the Equality Act 2010 relating to the alleged remarks of his line manager, Mr Wier, including "blow job" in so far as they relate to the events in the immediate run up to the inception of the disciplinary proceeding circa 5 September 2019 i.e. August 2019.

2. No other amendments are permitted.

3. Directions as to the main hearing scheduled to commence 9 August 2021 at Leicester are hereinafter set out.

REASONS

Introduction

1. For reasons I shall come to I am seized with determining whether to grant various amendments to the current claim or not, the Respondent opposes those amendments. Before I deal with them, I am going to set out the procedural history of this matter.

2. On 18 March 2020 the Claimant presented via Simpsons, Solicitors, his claim (ET1) to the Tribunal including in it were the grounds of the claim. The Claimant set out how he had been employed by British Gas for a very long time namely some 28 years commencing on 1 September 1991 and ending with his resignation with immediate effect on 6 December 2019. The claim was ACAS early conciliation compliant and in time. He was at the time of his resignation a Lead Engineer based at Leicester. He ticked the boxes for claims of constructive unfair dismissal, disability discrimination and breach of contract (notice pay). There was no other claim. The grounds were singularly lacking in proper particularisation.

3. There is an agreed bundle of documents before me to which I shall refer where necessary by the by the prefix Bp followed by the page number.. So that first claim as to the grounds is at Bp15. The Claimant started in terms of the narrative with that on 21 October 2019 he attended a disciplinary interview relating to essentially allegations that had he falsely stated hours of work on the provided electronic app and particularly relating to such things as break time and start/finish. It was pleaded that having been told he faced a charge of gross misconduct with a possible outcome of dismissal that this was changed to that if he were found guilty, the penalty would not include “a dismissal sanction”. Having set out how he defended his position and that the allegations had no substance, he pleaded that having been found guilty and received a written warning, he appealed and also raised a grievance about what had occurred. He was then informed that the written warning had been quashed and that “his grievance was closed”. This I can piece together was at an appeal hearing which took place on 28 November 2019. His case then seemed to be predicated upon that he didn’t receive the letter of confirmation as quickly as he ought to have done. So on 5 December he chased the manager who had heard the appeal, Mr Soni Rai, and who confirmed that the warning had been quashed and the grievance “thrown out.” This appeared to be the “last straw” triggering his resignation with immediate effect and thereafter the claim for constructive unfair dismissal pursuant to s95 of the Employment Rights Act 1996 (the ERA).

4. As to the claim for notice pay that would be predicated upon the basis that if he was constructively unfairly dismissed then he would then be entitled to his notice pay.

In the schedule of loss that he has prepared this is stated to be 4 weeks' pay.

5. As to how the disability discrimination is engaged all that was pleaded was:: " *The Claimant believes that he was subjected to less favourable treatment by the Respondent because of his disability due to depression, back pain and carpal tunnel syndrome which amounted to discrimination under the Equality Act 2010."* (the EqA)

6. That appears to be a claim for direct discrimination under s13.That requires a comparator essentially on the premise that a non disabled employee in the same circumstances would not have been taken through the disciplinary process or had his grievance thrown out.

7. That brings me to the Response (ET3). Unsurprisingly pleaded was that that the Respondent could not be guilty of constructive unfair dismissal as it had upheld the Claimant's appeal and in effect the grievance as it was on exactly the same territory as the grounds of appeal and so added nothing. Also that it did not understand how disability discrimination was engaged and that further particulars were required.

8. Against that background the matter came before Employment Judge Blackwell on 22 June 2020 at a telephone case management discussion (TCMPH). The Claimant's solicitor didn't attend and gave no explanation as to why not. What the Judge did having set out that the case was already listed for hearing between 9-11 August 2021 was to set out very clearly what further and better particulars were required of the Claimant at his paragraph 2.

9. First of all, what was the repudiatory breach relied upon for the purposes of the constructive unfair dismissal claim. Stopping there, of course the Claimant would have to show that by a serious of actions in this case, let us assume starting with the onset of the disciplinary process, that the employer had acted without reasonable and proper cause so as to undermine the fundamental term of trust and confidence culminating in an identifiable last straw by way of said actions which added something to the preceding repudiatory conduct thus meaning the Claimant is entitled to say, "this is a fundamental breach hence I am resigning".

10. The second point that was spelt out very clearly by the Judge was section 13 of the Equality Act 2010 (the EqA) and what it engaged and thereafter the particulars which the Claimant needed to provide.

11. As to disability or not, as the Respondent did not concede that the Claimant was a disabled person by virtue of s6 and Sch1 of the EqA, he made the usual orders for disclosure of his medical notes and the provision of an impact statement. He made deadlines for the Respondent to reply on that footing and respond to the further and better particulars. Finally he then varied the current standard directions for the main hearing to accommodate for all of this.

12. As to the further and better particulars, Simpsons supplied these on 22 September 2020 (Bp49-50). It came in via David Tolcher, by now described as a locum

employment lawyer with Simpsons. It is within the this judge's knowledge from cases before him involving Simpsons, that he has been associated with that firm for some years. He said how he had taken the case over from his colleague who by now had become ill and in fact we now know shortly thereafter left the employ: her name is Kathy Durham.

First observations

13. In any event these further the further particulars essentially first repeated the already pleaded scenario and added that the process was a sham. Further that the written warning should never have been imposed in the first place and was an "abuse of process". As to Mr Rai, re-stated as to the outcome of the appeal was that the Claimant had by now no trust in confidence in the Respondent. Thus, what had occurred "amounted to a fundamental breach of his contract". What it did not deal with is how this was the last repudiatory act. The problem faced by the Claimant is an obvious one. The Claimant engaged in the disciplinary process, which is part and parcel by implication of his contract of employment, if not explicit, by appealing the outcome. He had representation throughout the process from his Trade Union. In that respect I have read his grievance dated 25 October 2019 during this hearing. It mirrors the grounds of appeal that he put in. Thus, when Mr Rai informed him that the grievance was in effect at an end, it of course was because his appeal had been successful. So how can that be a last straw? And if instead of resigning when he received the written warning he remained in the employment and successfully appealed has he not affirmed the contract of employment? The jurisprudence is quite clear. And if not, why not? None of this was addressed. Today the Claimant has waived privilege in explaining what went on with Simpsons who ceased to act after filing the further and better particulars. I note therefrom that he was formerly advised by Mr Tolcher circa 13 November 2020 that the considered advice was that the claim had little merit, hence the GMB which was sponsoring the Claimant via supporting him via Simpsons as its solicitors was being advised it should withdraw support, and which it did.

Additional claims

14. What I then wish to stress is that the claim first as originally and secondly as then additionally particularised, did not do any of the following:

    1. Raise a claim for non-payment of outstanding holiday pay.

    2. Refer to a claim of disability discrimination by way of association pursuant to section 13 of the EqA on the basis that the Claimant was less favourably treated because he needed to take time off to assist his autistic son by taking him for psychological assessment or how this might link to the disciplinary events which was the focus of the claim and the first particularisation.

    3. Raise a claim based upon harassment pursuant to s26 of the EqA relating to his line manager, Mr Weir, having said when he needed to have time off for his own disabilities by reason of reasonable adjustment or more

important extended lunch breaks which meant he'd go home if possible for lunch: "Why? are you going to have a blow job".

4. No reference to the Claimant having been less favourably treated by way of section 13 or one could argue harassment pursuant to section 26 by reason of having been deliberately isolated and if so, as to when. The crucial point being that Employment Judge Blackwell had specifically asked that Simpsons when replying on behalf of the Claimant by way of those further and better particulars make plain whether or not there was a claim being advanced in relation to matters prior to the onset of the disciplinary process, thus: "any events occurring before 9 September 2019". As is obvious none of that was addressed in the further and better particulars.

15. In December 2020 following upon Mr Tolcher having informed the Claimant circa 13 November 2020 that Simpsons could no longer act, the Claimant wrote into the Tribunal saying that he was concerned that he had received a costs warning letter from the Respondent. He wanted to know what he should do. Employment Judge Adkinson sometime thereafter coming into the New Year decided that what was now needed was a further case management discussion. Obviously first of all as to the timetable for the main hearing given the Claimant was now unrepresented and second to deal with that issue. At that stage the Claimant was not seeking to amend his claim.

16. In the interim as per the orders of Judge Blackwell the Respondent had received the medical notes of the Claimant and his impact statement. On 11 December 2020 it conceded that the Claimant was a disabled person as to the depression and the back issues but it didn't accept that he was disabled by reason of carpal tunnel syndrome. So that would have been another issue perhaps on the agenda for the case management hearing.

17. It also pleaded that the Claimant had in any event set up a limited company as at 13 May 2019 which on the face would enable him to employ himself using his undoubted skills in the gas fitting industry. Accordingly given his stated loss of earnings to date and the forecast future loss additional information, it wanted further information as to loss. It also queried given the timing as to whether his resignation was triggered by what had happened or whether in fact he seized the moment and is bringing the claim to finance his enterprise him having actually already planned to go before his resignation. That again is not an issue really for me to deal with today. Suffice it to say that I understand the Claimant has provided some documentation. Also, as of today there should also be accounts for at least the first year of trading. What the Respondent's solicitors did not address was the clear inadequacies of the further and better pleading or the self-evident weakness of the constructive unfair dismissal claim which I have identified as indeed had Simpsons.

The second case management hearing: pleadings prior thereto; and the emerging procedural issues

18. Against that background a second case management was heard by Employment Judge Broughton on the 12 May 2021. In the immediate run up thereto, there was

a flurry of activity from Mr Lawrence and his wife. They set out that the Claimant had been badly served by Simpsons. They had given full instructions on his case right back when GMB gave approval for Simpsons to act and indeed before me I have got the answers that they gave to Ms Durham immediately after her being instructed on 11 March 2020 wherein she was in effect by way of a series of questions wanting full particulars of the claim that he was bringing. That is before me at Bp136-137. I can also glean from that period that the Claimant had prior thereto made abundantly clear to the GMB that he wanted to raise a claim for non payment of outstanding holiday pay, and although I think matters were already becoming difficult between Mr and Mrs Lawrence and Ms Durham they clearly were flagging up to her that there was an outstanding holiday pay issue as at 30 March 2020 (see Bp141).

19. I therefore am quite clear that before I move on a pace that Simpsons as solicitors knew the following:

    1. That the Claimant wished to bring a holiday pay claim.

    2. That as regards the disciplinary process to which I have referred the primary complaint was not that the warning was rescinded but that Mr Rai had said that the grievance " was thrown out…there's just nothing there" . Thus in effect this was the last straw that the Claimant was relying upon. As to the disability issue and its interface to the material events he gave details to Ms Durham. Thus he had a first period of absence for depression in November 2018. The back issues flared up in June 2019 with a recurring absence in September 2019 and with the disciplinary focus being on time recording issues, which I briefly touched upon in August 2019. But it can be detected in those instructions in the questionnaire that he was saying that the Respondent had not helped him sufficiently viz reasonable adjustments following an Occupational Health report (see Bp138), and that he wasn't given the extended lunch breaks and lighter workload as part of his phased return to work, post the depression, that OH had recommended;: hence he couldn't always fulfil all his workload for a given day. And he therefore referred to pressure put upon in that respect and the line manager referring to "blow job" in the context of him wanting to be able to have the extended lunch break and thus be able to go home. And he said this: "I believe due to ongoing health issues that company did not want me any longer and that I wasn't selling and bumping up his sales figures. I was a hinderance to the team..".

20. So, taking that document, Ms Durham had clear instructions on much of what the Claimant now sought to introduce by way of amendments. She did not however, have any reference therein to the autism and disability by association issue. Take matters therefore forward and to the hearing before Employment Judge Broughton and what we have is as follows.

21. First of all, the Claimant put in a document headed 'Further and Better Particulars from the Claimant updated from now being litigant in person' this commences at Bp 68-69. Now in came under paragraph 1c the lunch break issues to which I have referred. Now also came in an issue that when he went off sick in circa September

2019, his line manager having taken his laptop used it improperly to input sales figures in terms of targets achieved and which goes to team awards as if they had been generated by the Claimant when they hadn't. I learnt today that what this would mean for Mr Weir is that if the team within which the Claimant worked exceeded its target, he would get a cash bonus. The team would be given as a reward a paid night out. I don't see at this moment what that would have to do with disability discrimination and even if it did it clearly in terms of what the Respondent was by now having to face raised a new issue because it had never been previously pleaded.

22. Having dealt with that at some considerable depth and that this was fraudulent activity issue which went to the integrity of the disciplinary process integrity, he also pleaded that it was direct disability discrimination. But he did not say why.

23. He now brought in that the failing to adjust his working hours and accommodate longer rest breaks caused him to take the time off in August 2020. "This was then used against me in a disciplinary process without proper fact and investigation". On that issue I can see that contextually it does link to the primary claim and also in that respect the integrity and motivation behind the disciplinary process.

24. Also, when I cross-referenced to the grievance that he raised on the 25 October 2019 which of course is all part of the appeals process, I can see this issue being flagged up therein as well. But I stress: no reference to isolation issues; the autism issue; and no reference to the harassments/ "blow job" issue.

25. Circa proving those further particulars the Claimant submitted " ET1 amendment request" (see Bp73-74). Therein is the critique of the poor service that he received from Ms Durham and thence f Mr Tolcher; hence why he should be permitted to amend to include the claims which he had by now particularised.

26. He also put in what looked like a new claim; but it isn't it's the old claim with an extra part put at the end of paragraph 9 with a table now referred to in terms of the disciplinary process to which I've gone and inter alia the grievance. What he seemed to be alleging as to the action taken by the Respondent was as to whether this was possibly due to:

    a) A personal vendetta that manager Ian Wier had against him.

    b) Disability discrimination due to long term sick beginning November 2018.

    c) Fraudulent behaviour by the Respondent in terms of such as manipulating targets.

27. And he now wished to in fact therefore claim, "for overall treatment of him dating back to 2018 when his period of sickness began". He now raised for the first time the outstanding holiday pay "accrued whilst on holiday leave". He referred to "derogatory comments in regard to disability requests". He didn't particularise.

28. Not surprisingly the Respondent at that stage made lengthy submissions that these

amendments should not be allowed as to which see its letter dated 10 May 2021 (see Bp 95-96). Rehearsed were the ***Selkent*** principles, namely there was now unacceptable delay in making in what where very late amendments; that if granted this would require the Respondent to have to re-prepare its case by obviously extending lines of enquiry, discovery, and preparation of witness statements including probably having to call more witnesses if they were available given the length of time of course since these events had occurred. The reference to Selkent is ***Selkent Bus Company Ltd v Moore 1996 ICR 836 EAT*** per Mummery J as he then was. It is the seminal case on the issue of whether or not to grant amendments.

29. In the immediate run up to the hearing before EJ Broughton,. as to the Claimant's agenda on an aside he had now increased his schedule of loss from £29.47k to £85k largely this seems to be based upon pension loss and future losses of earnings. I say no more than that is not a matter for me today.

30. He raised that there was still the carpal tunnel issue. He also put in a list of issues (see Bp 92-94). In effect it contains more particularisation of the amended claims he was seeking to bring. Also now alleged was that the Respondent failed to follow the ACAS code of practice. As to why was not clarified. He added that holiday pay act claim was for 66 hours, and also in terms of the failure to pay "is this disability discrimination". Now, is that meant to be a claim in fact for victimisation pursuant to s27 of the EqA based on the premise that the payment was not made because he raised a grievance or because he brought is claim to Tribunal? Not at all clear.

31. Reference was now made to a remark by Mr Tonks in the context of the disciplinary hearing. I gather he chaired that meeting. That, I don't have a problem with because Mr Tonks is presumably is going to be giving evidence anyway and he can be cross-examined about said remark. That might be just really adding additional evidence to the substance of the claim based upon the disciplinary process and the alleged mal fides of those involved for the Respondent. He was now seeking to raise failure to make reasonable adjustment which would be pursuant to s20-22 of the EqA. In the context this goes to that issue as to whether or not he had a justified reason for needing to take time off in August for an extended lunch break; or that if he could only take his lunch break lunch at the end of two working assignments and in so doing ran out of time to undertake the third assignment then he should not be penalised. Apropos ***Selkent*** this is elaboration on an already pleaded case with additional labelling and thus does not prejudice the Respondent because it knows the case it has to meet in that respect..

32. As to Employment Judge Broughton, who did her valiant best to try and get the Claimant to focus on what claims he was and was not bringing, she decided as the case management hearing before her did not have this issue on the agenda, and which would need more time than was allotted, that a further preliminary hearing would be needed to rule on the amendment application: thus she listed it for 22 June 2021, but subsequently it had to be taken out of the list due to lack of judicial resources. It was re-listed for today: hence my involvement.

33. That leads me to the final document that I think the Claimant put in which is on the 18 May, so post EJ Broughton, entitled 'ET1 Amendment request' (Bp114-115). He

prayed in his aid that it would be wrong for the Tribunal to exclude him from bringing claims viz matters pre- 5 September 2019 apropos the order of Judge Blackwell, because he wasn't present at the hearing and he never gave his instructions post thereto to that effect. And second that he did not see the short comings in the pleadings whether it be the ET1 or the first further and better particulars until he got this file from Simpsons on 20 December 2020. In its reply to that entreaty, the Respondent reiterated its objections as per its detailed letter to Tribunal of 25 May (see Bp 119-121). Helpfully set out were the time lines which I have rehearsed.

My adjudication.

34. First I have of course now set out the history of matters and my observations thereto. As I say I have been guided in my approach by the guidance to be gained from ***Selkent*** and also on such as out of time issues in the context thereof by in particular Mr Justice Underhill, as he then was, in ***Transport and General Workers Union v Safeway Stores Ltd EAT0092/07***.I have considered the submissions of Ms Kay and I've heard of course from Mr Lawrence and particularly from his wife who has championed his course well.

The direct discrimination by association proposed amendment

35. The application to amend to bring a claim based upon discrimination by way of association per section 13 is a wholly new course of action. It was never pleaded by Simpsons Furthermore it is not in his instructions to Ms Durham as per the answers in the questionnaire circa March 2020. It will require, if permitted, the Respondent to have to freshly prepare on a new issue inter alia as to when it is alleged the discriminatory acts took place. Having heard in that respect from the Claimant, this seems to centre on that in circa November 2018 when he was not absent because of depression, he needed to take his son for a psychological assessment. From what he said it seems clear that he did not give his employer advanced warning and which he would be required to do unless this was an emergency. It clearly wasn't because he would have had notice of that appointment for some time given my judicial experience as to matters of that nature. It follows that he should have sought permission. Instead he sent a belated email when he went off shift early having it seems not taken his lunch to catch up. I am not at all sure what the alleged detrimental treatment is other than is it one of the absences that gets involved in the disciplinary investigation starting in September 2020. Anyway, it's a wholly new cause of action. This Claimant is intelligent. He is ably helped by his wife who undertook all the correspondence on his behalf with Simpsons. She has his case to her fingertips and was able to quickly access the information for me on her laptop.

36. This claim in itself is way outside the 3-month time limit for bringing a claim to Tribunal. I therefore have to decide in the context of all the circumstances first as to whether it was possible to have brought that claim at the onset and in any event well before before flagging it up in May 2021. I have heard no evidence from the Claimant that means that such as his depression prevented him from giving full instructions to the GMB and thence to Simpsons. He was able to put together prior thereto an articulate appeal and grievance. In his answers to the questionnaire he

was able to raise in considerable detail the context of his claims and he was able to make reference to the blow job remark. It follows that I am wholly unsatisfied by Mr Lawrence and his wife's evidence on this issue. There is no satisfactory reason why they could not have brought this claim before they did. That finding therefore engages in terms of whether it is just and equitable to extend time.

37. If I was just dealing with this as a claim on its own sent in by way of a new claim form I would have no hesitation in striking it out because it is not just and equitable to extend time given my first finding. . As it is of course I have to look at it in all the circumstances of the case including where the balance of prejudice lies. But the length of and reasons for the delay is a significant factor. In this case it is a substantial delay and with no satisfactory explanation as to why. As to prejudice, the Claimant still has his original claim on the discrimination front. But as to having to now defend this wholly new claim, the Respondent is undoubtedly prejudiced because it will have to additionally prepare a case which is a matter of 6 weeks away. As to whether potential witnesses might still be available, is a matter Miss Kay does not know about at this stage. There is the additional expense the Respondent will be put to and the likely knock on effect of lengthening the main hearing and if that cannot be done having to postpone the same.

38. Accordingly, I refuse that amendment.

The holiday pay proposed amendment.

39. A claim for holiday pay must be brought within 3 months of the last act of complained of. That would be when the Claimant did not get his holiday pay in the payroll run in December 2019 ie before the claim presented on his behalf in March 2020. Did he know that he had a holiday pay claim? The answer to that is yes because he flagged it up to Simpsons as I have now rehearsed ie 30 March 2020 (Bp 141). It cannot conceivably link to constructive unfair dismissal claim, as he suggests, because the non payment occurred after he had resigned. As to a link to disability discrimination Claimant has not said that it links in any of the pleadings up till May 2021. And reverting to the instructions which he gave to Ms Durham (Bp137-138), he raises no such link. If that claim was being dealt with as a separate claim in its own right, by for instance, a new claim form then the test is was it reasonably practicable to bring that claim within the 3 month's time limit, and if not was it presented within a reasonable period thereafter. Well, his solicitors knew he wanted to bring a claim at the time when they lodged ET1. It follows that on the face of it this is his lawyer's fault, therefore the Tribunal would not extend time under the reasonably practical principle see: the long established principle as per ***Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA.***

40. However, it does not necessarily render it fatal to the amendment application as per **Selkent**. I still have to decide as to where the balance of prejudice lies looking at the other factors but taking into account that there is a substantial delay in this matter and a fault by the solicitors on the face of it for not bringing it before it was. Stopping there, it would thus mean that the Respondent would yet again have to additionally prepare a case to deal with a matter which would have otherwise crystallised at latest by the 18 March 2020. So many months stale. It will have to

research into whether or not holiday pay is outstanding. It will have to add to the bundle. It may have to call additional witnesses. Yet again, it will probably have a knock-on effect on the current 3 days of this hearing and the costs incurred by it. The prejudice to it is therefore obvious.

41. Against that, of course, is the prejudice to the Claimant if he cannot bring this claim but in the overall context of events which I have now rehearsed, and in particular that but for the lawyers fault this claim could have been brought at the outset, I have decided that the balance of prejudice falls on the scales in favour of the Respondent. It follows that I refuse that application to amend.

Isolation; Targets; Failure to make reasonable adjustments; he "blow job" remark

42. The claim relating to isolation and not being included in such as the reward for the hitting of the target, which seems to be circa September 2020, and , the alleged failure to make reasonable adjustments by Mr Wier and his alleged "blow job" remark in the context of the need for the Claimant to be allowed time for his lunch in August, I consider are matters which could be said to link into the core issues before the Tribunal.

43. But otherwise the proposed amendments go far wider that that. The Claimant has made plain he is alleging that there was an inherently discriminatory long standing culture, in particular in frontline engineering roles such as his, where employees such as him with physical and/or mental disabilities were therefore perceived as unproductive. Also, as personified by Mr Weir, an ageist culture of wanting to get the older long standing employees out because they cost more money. Hence his treatment of the Claimant and the alleged "trumped up" disciplinary charges. That is an altogether different kettle of fish from whether or not Mr Wier made a remark in August or thereabouts about the Claimant going home for a long lunch and "did he want a blow job" and the issue of whether the employer failed to give sufficient weight to the fact that the Claimant couldn't do job number 3 on the relevant day because he needed to have his lunch. But he says he made all this plain in his instructions to Ms Durham. Of course if he did, then it was never pleaded by Simpsons in the ET1 or their further particulars on his behalf.

44. As per Selkent its back to where the balance of prejudice lies. If granted, the Respondent will have to interrogate its statistics as to inter alia the treatment of disabled or older employees. This would be a substantial exercise. It may well decide to not confine it to front line roles so as to provide a wider picture. It may of course need to call additional witnesses from such as HR. Furthermore, it is a fresh claim. It is not simply providing additional information to an already pleaded head of claim. If granted, it substantially widens the span including time of allegations. And given he says he raised it with Ms Durham, I am not satisfied that this couldn't have been brought before May 2021.

45. Accordingly, I have again decided that the balance of prejudice weighs in favour of the Respondent. What it means is the Claimant will not be permitted to advance a case of disability discrimination outside the compass of events commencing circa

August 2019 and of course focussing on the inception of disciplinary proceedings circa 5 September. Issues relating to lunch breaks etc and the "blow job" remark are clearly relevant in the context of what then ensued. He can advance that Mr Weir wanted to get rid of him because he was disabled. But he cannot advance a claim based upon a wider culture issue whether it be ageism or disability related. I also make plain that I permit in terms of the remark that it is to be labelled as harassment pursuant to section 27 of the Equality Act 2010.

Observations

46. I have the following observations to make.

47. I already opined that on the face of it the claim of constructive unfair dismissal may be in considerable difficulty because if, as it did, the Respondent allowed his appeal and quashed the written warning and in the context thereof given the grievance was on all fours in effect upheld it, therefore it is difficult to see how there is a last straw upon which the Claimant can rely. The Claimant will be well advised to take some advice.

48. As to the disability claim, given the Respondent quashed the warning on appeal, the claim may be limited in compass to events prior thereto. In other words if he wins, confined to an injury to feelings award but not including losses flowing from his resignation.

49. Whether or not that it is a section 13 claim as opposed to a section 15 claim, I observe as follows. A claim under section 13 requires the Claimant to deploy a comparator, namely an employee in similar circumstances who was not disabled. Thus applying ***Mayor and Burgess of London Borough of Lewisham v Malcolm 2008 IRLR 700, HL,*** if another engineer who was not disabled had got some sort of dispensation in terms of extended lunch break but had gone off without reporting he couldn't do a 3rd job, which is part of course of the case against the Claimant, would that employee have been treated any differently? In that sense if this case is going to go the distance the Respondent, as a large PLC, would be expected to at least disclose in terms of the engineering teams details of similar disciplinary proceedings and outcomes and whether the non disabled are more or less favourably treated . This in a context where I suspect that British Gas like many organisations has tightened up on timekeeping and job recording and in that context utilised electronic apps.

50. If there would have been no difference in treatment, then is this not pursuant to s15 a case of unfavourable treatment because of something arising in consequence of his disability? He needs no comparator. The unfavourable treatment would be because of the ignoring of the need to make reasonable adjustment with the knock on effect on the Claimant's utilisation of time ie extended lunch breaks and requiring longer time to complete a particular job? If he isn't getting this support from Mr Wier through the material period, then prima facie he is being treated unfavourably

because of something arising in consideration of this disability. The Claimant has not pleaded that. But as per ***Selkent*** prima facie it is a relabelling. I observed to Ms Kay that if the Claimant therefore decided to amend to plead unfavourable treatment, then the Respondent can of course deploy the justification defence, if it's engage, which it cannot of course do under s13.

The way forward

51. This case has been long since listed for 3 days of hearing before a full panel starting on Monday 9 August 2021 at Leicester. It it has been allocated a reading in period for the Tribunal panel up to 12 noon on that day which means there are 2.5 days of live attended hearing with of course the Tribunal needing first to determine liability and make a decision before it moves on to deal with remedy if applicable. The Claimant of course will be giving his evidence first and I suspect that it might take longer than is presently envisaged. He is then is calling his trade union rep. The Respondent is now likely to call 3 possibly 4 witnesses in light of where we are. What it means is that Counsel and I share the view that 3 days is insufficient.

ORDERS

1. The hearing is hereby cancelled from 9-11 August 2021 and re-listed to be heard over the five days **Monday 23 May to Friday 27 May 2022 at Leicester.**

2. The current directions are varied by consent as follows:

    1. The Respondent now how leave to amend in the light of the amendments that I have granted to the claim. It will do this this by **Friday 23 July 2021.**

    2. The date for the final bundle, which is well advanced in terms of preparation, is also now **Friday 23 July 2021.**

    3. The date for exchange of witness statements becomes **Friday 30 July 2021**.

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Employment Judge

Date: 2 August 2021

JUDGMENT SENT TO THE PARTIES ON

13 August 2021

FOR THE TRIBUNAL OFFICE

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