EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant: Mr P Levick

Respondent: (1) London Luton Airport Operations Ltd
(2) Mr P Allen
(3) Mr N Thompson
(4) Mr B Hunter

Heard at: Watford (in public; by CVP) **On:** 1 November 2021

Before: Employment Judge George (sitting alone)

Appearances
For the claimant: Mr R O'Dair, counsel
For the respondents: Ms G Nicholls, counsel

JUDGMENT

1. The claims for unpaid holiday pay and arrears of pay are dismissed on withdrawal.

2. The claimant is, and has been since February 2017, disabled by reason of depression.

3. The claims of unfair dismissal and breach of contract/wrongful dismissal are struck out on the basis that there is no reasonable prospect that they can succeed because the Employment Tribunal does not have jurisdiction to consider them.

4. Leave is granted to the claimant to amend his claim to include complaints that the first respondent was in breach of the duty to make reasonable adjustments and that the first and/or fourth respondent subjected him to unfavourable treatment for a reason arising in consequence of disability contrary to s.15 of the Equality Act 2010, as set out in the List of Issues sent to the parties separately.

REASONS

1. At the preliminary hearing I have the benefit of a bundle of documents running to 188 pages (referred to in these reasons as pages 1 to 188, as the case may be), a medical bundle running to 687 pages (referred to in these reasons as MB pages 1 to 687), a witness statement on time issues prepared by or on behalf of the claimant, a statement setting out the impact upon the claimant of the impairments upon which he relies (together with an amended version of that statement), a skeleton argument by Mr O'Dair (hereafter referred to as the CSA), a skeleton argument by Ms Nicholls (hereafter referred to as the RSA) and several legal authorities both counsel drew my attention.

2. At the outset of the hearing, Mr O'Dair applied for leave to rely upon the amended impact statement. The respondents objected on the basis that no explanation had been given for the claimant's apparent failure properly to prepare the evidence upon which he wished to rely when the amount of detail that was required should have been clear, not least because of his experience of cross-examination in his first claim and the circumstances in which that was dismissed.

3. I granted leave for reasons which I gave at the time and which do not I do not now repeat but which, in summary, were that the additional paragraphs seemed in large measure to cross refer to passages in the medical evidence bundle which had been in the possession of the respondent since that evidence was disclosed to them. There would be clear prejudice to the claimant in not being able to rely on the full detail in the doctors' records and reports and the respondents did not point to any particular prejudice caused to them. Indeed Ms Nicholls fairly indicated that she was in a position to proceed with cross-examination on the amended statement.

4. The present claim is the second Tribunal claim brought by this claimant against the first respondent. In the first claim (Case No: 3328750/2017), presented on 5 November 2017, the claimant complained of a breach of the duty to make reasonable adjustments said to have been continuing as at the date of presentation. He also alleged that a refusal of promotion was unfavourable treatment for a reason arising in consequence of disability contrary to section 15 of the Equality Act 2010 (EQA). In the first claim he alleged that he was disabled by reason of the physical impairment of Atrial Fibrillation (hereafter referred to as AF).

5. A public preliminary hearing was conducted in the first claim on 22 August 2018 the judgement in respect of which (see page 37 of the bundle) was sent to the parties on 19 September 2018. It is apparent from that judgement that the employment judge decided that the claimant was not disabled within the meaning of s.6 of the EQA by reason of AF , but was disabled by reason of depression. That condition had not been relied on by the claimant in the pleadings in his first one and the respondents to that claim appealed. The appeal was successful and the first claim was dismissed by the EAT on 17 January 2019 (page 46.1).

6. The first claim was brought during the currency of the claimant's employment as an aviation security officer by the first respondent, which operates an international

airport. This employment started on 23 May 2011 and ended on 17 October 2019 in circumstances which the first respondent argues to be a fair conduct related dismissal.

7. The full details are not relevant for the purposes of this preliminary hearing but, following some sickness -related absence, a decision to dismiss the claimant on notice on grounds of capability was made on 22 August 2019. However, he was also investigated for allegations of misconduct and a subsequent decision taken by the second respondent on 17 October 2019 to dismiss him without notice allegedly for that reason. The claimant's appeal against his conduct dismissal was dismissed by the third respondent on 24 December 2019 and his appeal against the capability dismissal was rejected by the fourth respondent on 7 January 2020. The claimant alleges that each of these actions were acts of unlawful victimisation on grounds of the first claim and/or an email which he sent to the Airport Attendance Manager on 19 July 2019 which he alleges to have been protected acts. It is also argued that the present claim includes an allegation that the capability dismissal and rejection of that appeal amount to disability discrimination contrary to sections 15 of the EQA. That is one of the matters which I need to decide the present hearing.

8. The claimant approached the legal representative who had represented him in the first claim in about July 2019 for advice about the developing situation and signed a letter of instruction in about 15 August 2019. Sadly, that representative passed away. The claimant was not sure exactly when but by November 2020 he was a litigant in person and (page 98) his wife was corresponding on his behalf with the Tribunal. She referred at that time to difficulties that he was having in complying with the time limit because of his own mental health problems and because the documentation had been retained by his now deceased legal representative.

9. The present, second claim was presented on 18 March 2020 following a period of respect of each of the respondent between 15 January 2020 and 15 February 2020. As explained in paragraph 6 of the order of Employment Judge Alliott, on the face of it the claim was presented three days out of time. This is one of the defences relied on by the respondents although they also entered a substantive defence on behalf of all four of them which is at page 67.

The issues

10. The substantive matters to be considered at today's preliminary hearing in public were set out by Judge Alliott (page 157) and added to following an application by the respondent for orders striking out the claims or, in the alternative, for the claimant to pay a deposit as a condition of being able to pursue the claims (page 187):

    (i) Whether the claimant was a disabled person within the meaning of the Equality Act 2010 at all relevant times;

    (ii) Whether the claimant needs permission to amend his claim to include allegations of disability discrimination (s.15 Equality Act 2010) and a failure

to make reasonable adjustments (s.20 and s.21 Equality Act 2010) and, if so, whether permission should be granted.

(iii) Whether the claims of unfair dismissal/wrongful dismissal/breach of contract were brought in time and whether the claims can proceed.

(iv) The respondents' applications for an order striking out the claim and, in the alternative for a deposit order.

11. It was not possible in the time available for me to give oral judgment on the above issues and I reserved judgment on them. The substantive issues between the parties which potentially fall to be determined by the Tribunal following my judgment are set out in separate case management order.

12. It was confirmed by Ms Nicholls that the preliminary issues as to time for determination at this hearing (paragraph 10(iii) above) were in relation to the unfair dismissal and breach of contract claims only. However, in her submissions upon the application to amend the claim, it became clear that her expectation had been that it would be necessary for me to determine whether or not it was just and equitable to extend time for presentation of the claims sought be joined by amendment hearing. It did not appear to have been Mr O'Dair's expectation that that was something it was necessary for me to decide at the public preliminary hearing.

13. I drew the representatives' attention to the cases of Galilee v Commissioner of Police for the Metropolis [2018] I.C.R. 634, EAT and Reuters Ltd v Cole (UKEAT/0258/17). Ms Nicholls argued that evidence had been put forward by the claimant as to why it would be just and equitable to extend time in respect of those claims. He does rely upon his evidence that he had placed the conduct of his claim entirely into the hands of his former legal representative and trusted to him to formulate the claim in the most advantageous way and one which fitted the facts that he was alleging. It was argued on his behalf that the accepted failure of that representative to present the unfair dismissal claim in time supported the argument that he had not acted with reasonable professional competence.

14. Although the explanation for the need to amend the claimant, and for any delay in the application to amend, are certainly matters which I need to take into account in deciding whether to exercise discretion in favour of permitting any amendment, that is different to a definitive determination of whether it is just and equitable for claims which have been presented out of time to proceed. My reading of the Galilee is that that may be a matter which is best left to a final hearing.

15. I heard submissions from the representatives on whether this was a matter that should be determined at the present hearing, were I minded to permit the amendment, and concurred with the claimant's representative that, in the present case, any and all time points which arise in EQA claims should be added to the list of issues to be considered at the final hearing. The issues that are already live will require the full Tribunal to consider whether there was a continuous act extending up to and including the dismissal of the capability appeal on 7 January 2020 and it therefore seems sensible that, were any claims to be permitted to be added by amendment, the question of whether it is just and equitable those to be presented

should be considered at the same time. However, there may be different considerations as to whether it is just and equitable for original claims to proceed compare with whether it is just and equitable for claims joined later by way of amendment to proceed because, depending upon the findings of the Tribunal, there may be different periods of delay under consideration.

16. The substantive issues on the claim involve allegations of disability discrimination relying upon a disability of "depression coupled with [the claimant's] cardiac deficiency" (page 57 para.4). The parties had cooperated in attempting to draw up a list of issues prior to the preliminary hearing on 1 April 2021. It was agreed by the representatives before me that those issues not highlighted in the list that appears at page 134 of the bundle are agreed by both parties to be included as live issues. Those highlighted in that draft list of issues are the allegations which the claimant applies to add by amendment (subject to my decision on whether they are within the claim as currently pleaded). There has been no actual application to amend and no draft amended pleading.

Law applicable to the issues for the preliminary hearing

17. A person has a disability, for the purposes of the EQA, if they have a mental or physical impairment which has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Substantial in this context means more than trivial: s.212(1) EqA and Goodwin v The Patent Office [1991] I.R.L.R. 540. There is no sliding scale, the effect is either classified as "trivial" or "insubstantial" or not and if it is not trivial then it is substantial: Hutchinson 3G UK Ltd v Edwards UKEAT/0467/13. As it says in paragraph B1 of the Guidance on the definition of disability (2011), this requirement reflects the general understanding that disability is a limitation going beyond the normal differences which exist among people.

18. The cumulative effects of related impairments should also be taken into account as should the cumulative effects of more than one impairment, any one of which may not have a substantial adverse effect upon the employee's ability to carry out day to day activities (see paragraphs B4 to B6 but also paragraph C2 of the Guidance).

19. What the employee is not able to do or is only able to do slowly or less easily is frequently taken into account to decide whether there is disability: Ekpe v Commissioner of Police of the Metropolis [2001] I.R.L.R. 605 @ 608 para 27. Furthermore, the EAT gave guidance on evaluating the adverse effects of an impairment in Goodwin where they said,

> "The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. "

20. The EQA provides that, where an impairment is being treated, then it is to be treated as having a substantial adverse effect if, but for the treatment, it is likely

to have that effect (Sch 1 para 5(2)). However, where the effect of continuing medical treatment is to create a permanent improvement rather than a temporary improvement it is necessary to consider whether, as a consequence of the treatment, the impairment would cease to have a substantial adverse effect (See 2011 Guidance at B16 and C11 and also paragraph C5 and following).

21. Recurring effects are covered in paragraph 2(2) of Sch 1 of the EQA where it provides that if in impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

22. The effect of an impairment is "long-term" if it has lasted for at least 12 months or is likely to last for at least 12 months (Sch 1 para 2(1) – which also applies where the effect is likely to last for the rest of the life of the person affected). Likely means "could well happen": SCA Packaging Ltd v Boyle [2009] I.R.L.R. 54. What the tribunal has to assess is the likely duration of the effect judged at the time the allegedly discriminatory act took place. Likely has the same meaning when considering the effects of treatment and seeking to answer the question whether, but for the treatment, the impairment is likely to have a substantial adverse effect.

23. When considering the effect of a mental impairment such as depression a frequently cited case is J v DLA Piper [2005] I.R.L.R. 608 EAT. Paragraphs 40 & 42 of the judgment of Underhill LJ read,

> "40: Accordingly in our view the correct approach is as follows:
> (1) It remains good practice in every case for a tribunal to state conclusions separately on the questions of impairment and of adverse effect (and, in the case of adverse effect, the questions of substantiality and long-term effect arising under it) as recommended in Goodwin.
> (2) However, in reaching those conclusions the tribunal should not proceed by rigid consecutive stages. Specifically, in cases where there may be a dispute about the existence of an impairment it will make sense, for the reasons given in paragraph 38 above, to start by making findings about whether the claimant's ability to carry out
> normal day-to-day activities is adversely affected (on a long-term basis), and to consider the question of impairment in the light of those findings.
> …
> 42: The first point concerns the legitimacy in principle of the kind of distinction made by the tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness - or, if you prefer, a mental condition - which is conveniently referred to as 'clinical depression' and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or - if the jargon may be forgiven - 'adverse life events'. We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it

reflects a distinction which is routinely made by clinicians – […] - and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as 'depression' ('clinical' or otherwise), 'anxiety' and 'stress'. Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering 'clinical depression' rather than simply a reaction to adverse circumstances: it is a commonsense observation that such reactions are not normally long-lived."

24. When considering whether or not to exercise their discretion to permit an application to amend a claim the employment judge should consider all the relevant circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: Selkent Bus Co. Ltd v Moore [1996] I.R.L.R. 661 EAT. Relevant circumstances include:

(i) The nature of the amendment;

(ii) The applicability of statutory time limits;

(iii) The timing and manner of the application;

25. The Selkent principles form the basis of the Guidance Note 1 on amendments appended to the Presidential Guidance on General Case Management: 22 January 2018. However, properly understood, Selkent does not mean that the Tribunal should adopt a formulistic approach as though it prescribed a tick-box exercise.

26. The Tribunal should consider whether the amendment sought is minor or whether it is a substantial alteration to the pleaded claim: principle (5)(a) of the Selkent principles at para.22 of the judgment of Mummery J as he then was. As Underhill LJ put it in Abercrombie v Aga Rangemaster [2014] I.C.R. 209 CA at paragraph 48:

"the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

27. More recently, in Vaughan v Modality Partnership (UKEAT/0147/20), HH Judge James Tayler referred to this as a focus upon the practical consequences of allowing the amendment at paragraph 21,

"what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the

consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions."

28. In an earlier decision, Underhill P, as he then was, concluded that the fact that an amendment would introduce a claim that was out of time was not a decisive factor against allowing the amendment, but was a factor to be taken into account in the balancing exercise: Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07.

29. If the amendment seeks to introduce a new cause of action then it is not always necessary to determine time points as part of the amendment application: Galilee v Commissioner of Police for the Metropolis [2018] I.C.R. 634, EAT – where HH Judge Hand declined to follow cases which relied upon the obsolete and discredited doctrine of "relation back". The learned judge went on to give guidance on the correct approach of the Tribunal to the issue of time limits on an application to amend in his conclusions at paragraph 109,

"(f) The opinion of the Inner House of the Court of Session in *Edinburgh City Council v Kaur 2013 SC 485* should be applied to cases involving consideration of whether it would be "just and equitable" to grant an extension.

(g) Whilst in some cases it may be possible without hearing evidence to conclude that no prima facie case of a continuing act or for an extension on just and equitable grounds can arise from the pleadings, in many cases, often, but not necessarily confined to, discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation.

(h) As indicated in the opinion in *Kaur* , sometimes it may be necessary to hear a significant amount of evidence and sometimes it may not be possible or sensible to deal with the matter at a preliminary hearing and decisions may need to be postponed until all the evidence has been heard.

(i) In such cases permission to amend can precede decisions as to whether any new claim raised by the amendment is out of time; in other cases a decision on whether to grant permission to amend can be postponed."

30. Although the above case was potentially in conflict with an earlier decision of the EAT, it was held in Reuters Ltd v Cole (UKEAT/0258/17) by Soole J that he preferred the approach of HH Judge Hand QC in Galilee because the latter had undertaken an exhaustive analysis of the authorities.

31. It may be appropriate to consider the merits of the proposed claim but caution should be taken by the Tribunal about the extent of that enquiry. The EAT in Woodhouse v Hampshire Hospitals NHS Trust (UKEAT/0132/12) held that the first instance employment judge had erred in examining "the strength of the evidence that supports the now new allegations under the disability statute" for that was an irrelevant matter (paragraph 16 of the judgment of HH Judge MacMullan).

> "It is true that in the assessment of the balance of hardship and the balance of prejudice there may in all the circumstances include an examination of the merits — in other words, there is no point in allowing an amendment to add an utterly hopeless case. But otherwise it should be assumed that the case is arguable." (*ibid* paragraph 15)

The issue of disability

32. A request for further and better particulars was made by the respondents on 19 June 2020 and ordered on 11 October 2020 to be responded to. The claimant, who was self-representing at the time, made an attempt to respond (page 98) and a replacement set of further and better particulars was sent on 4 December 2020 and is found at page 105. When asked for particulars of the impairments relied upon it was said that the claimant relied on "depression and heart problems". Since the proposed reasonable adjustments claim alleged that the breach had occurred "from 2011 onwards but in particular from 2018 to the date of the claimant's capability dismissal" (page 135), the respondents presumed that the claimant alleged that he was disabled from 2011 onwards.

33. It was clarified in the CSA paragraph 21 that the claimant alleged that he was disabled from September 2018 or July 2019 at the latest. In oral submissions it was argued on behalf of the claimant that takes case at its lowest he was disabled by September 2018.

34. However the application to amend was not expressly limited to the period from September 2018 onwards as can be seen from the quotation in paragraph 32 above. The factual matrix in the existing pleading is in paragraph 3 at page 57 and that is also unclear. The further and better particulars (paragraph 3 at page 106) also open up the prospect of the claim dating from 2011.

35. I have therefore considered whether the claimant was disabled from 2011 onwards and, in particular, from 1 January 2018 onwards.

36. In its essence, the claimant argues, based upon on paragraphs 10 and 50 of Ministry of Defence v Hay [2008] IRLR 928, that the combined effect of the two impairments of depression and AF were disabling in the relevant period. I drew the parties' attention to the Guidance on the definition of disability paragraphs B4 to B6. It is also argued that, contrary to the respondent's objections, the current claim does not seek to go behind the finding of Judge Henry that the claimant was not disabled by reason of AF for the period relevant for that claim. That period should be taken to be the period up to 5 November 2017 because the allegation was that there was an ongoing breach of the duty to make reasonable adjustments as at that date. The claimant argues that there is no obstacle to him arguing that he was disabled by reason of AF or a combination of that and depression at a later date.

37. Mr O'Dair relies heavily upon the occupational health report at MB page 110 which sets out symptoms apparently described by the claimant to the occupational health physician. This history by the claimant to the physician is challenged by the respondent as being contrary to the contemporaneous medical notes. It is further argued on behalf of the claimant that evidence of the period over which the

impairments might be expected to last or rather the effect of the impairment might be expected to be last can be inferred from a letter at MB page 621 at 622. In that letter the claimant's consultant psychiatrist states that there is a diagnosis of recurrent depressive disorder. The letter has been received by the claimant's GP on 23 March 2017 and records the opinion following a review on the 23 February 2017. The claimant relies upon the recommendation as to continue treatment as indicative of his consultant's then opinion about the likely duration of the adverse impact of the impairment.

38. The respondent's submissions may be summarised as follows. They argue that it is improper to seek to go behind the findings of Judge Henry. Further it is said that there is scant evidence of the impact of AF on the claimant's abilities to carry out day-to-day activities. It was drawn to my attention that the only specific activity referred to in relation to AF was that the claimant had to forego weight training. As to depression, Ms Nicholls cross-examined the claimant on his impact statement where he gave evidence that he had told the occupational health physician in September 2018 that he had been suffering the symptoms since 2006 but that the effect of depression had been getting progressively worse over a period of two years. In particular, she argued that paragraph 19 of the impact statement provides scant evidence of what the claimant cannot do. Further it was argued that, save for references to medication which he had been prescribed, the medical notes did not provide contemporaneous evidence to support particular impacts which the claimant alleges he experienced.

39. The respondents also argued that where the claimant relies on Atrial Tachycardia, that should be regarded as a distinct condition from AF that was not the basis of the claimant's case.

40. The respondents' primary argument was that the claimant had failed to substantiate the allegation that either condition individually or in combination had a substantial adverse effect. There was no corroborative evidence that he was suffering from the effects which he apparently described to the occupational health physician in 2018. There was, argued the respondents, a distinct contrast between the position appearing from the medical notes and the position that the claimant was understood to have previously taken which was that between 2011 and 2018 he had been suffering depression with no let-up.

41. My findings on disability are as follows.

42. The claimant has experienced a number of challenging life events which he refers to in paragraph 17 of his impact statement and also which are listed in the occupational health report initially dated 24 September 2018 (see page 111). In particular he was bereaved in 2006.

43. The evidence of the impact on the claimant's ability to carry out day-to-day activities is, as the respondent's counsel says, somewhat limited considering the volume of medical evidence. The claimant alleges is that the information he provided to the occupational health physician is accurate. As appears from page 111 of the report he reported the following;

(i) The AF gives "intermittent symptomatic episodes of palpitations, and associated cardiovascular symptoms such as dizziness and shortness of breath". As at that consultation, as at September 2018, which took 2 ½ hours, he was taking 75 mg aspirin, atorvastatin 20 mg on alternative days, fluoxetine 20 mg. He told me orally that he also carried a tablet to take if required.

(ii) He told the occupational health physician that he was started on citalopram (an antidepressant) in 2016 "which was then titrated to a dose of 40 mg maximum dose. His dose was reduced approximately one year ago when his cardiologist had recommended a reduction in dose due to the potential cardiac effects of such a high dose."

(iii) The claimant had still been feeling low when the dose was reduced so it had not been due to an improvement in mood. He had been undergoing counselling at that time.

(iv) By the time of the report, he had changed to a new antidepressant, fluoxetine.

(v) He reported that when depression started in 2006 he was "low and tearful, neglecting himself, drinking too much alcohol, suffering from anhedonia, loss of appetite, poor concentration."

(vi) His account to the position was that he had been suffering from those symptoms to varying degrees ever since and over the past couple of years had got worse, feeling "more low himself, flat and emotionally blunted" with "anhedonia, fatigue, reduction in concentration, lack of appetite". He told the occupational health physician that he had episodes at work where he needed to go to the bathroom to cry, low self-esteem and fleeting thoughts of self-harm.

44. A summary of the medication that has been prescribed to the claimant from time to time is set out on MB pages 141 to 144. It appears that from before September 2014 he was prescribed citalopram (20 mg) although that may have been discontinued at some point because of other evidence that he was started on citalopram in 2016 (see paragraph 48 below). From 2016 onwards there is reference to descriptions of citalopram and zopiclone (a sleeping tablet) being prescribed in different amounts.

45. The claimant himself was vague about exactly what he had been prescribed when over the relevant period. However, it appears from the medical records, and in particular the correspondence disclosed as part of the medical disclosure that the claimant was on citalopram for several years in varying amounts. The significant past conditions at page 231 include depression dating from between 13 May 2014 and 19 November 2016.

46. The author of the occupational health report is described as an occupational health physician and medical director. It seems reasonable to presume that he had no concerns that the narrative history provided by the claimant was inaccurate or

overstated. However there is no indication in the report that the medical records of the claimant were available to him.

47. Other relevant entries in the medical records are at MB pages 177 and 178. There are entries suggesting the diagnosis of the problem of depression (consistent with the list of past conditions on page 231) and consultations about this on 13 May 2014 (when he was prescribed citalopram and zopiclone), 24 and 26 June 2014 (where he has a telephone consultation to review the depression medication and is referred for CBT), 18 July 2014 (when he is described as "stable and well since last time" and "making slow progress"), 19 September 2014 (when he is described as being a "bit better"). There are entries consistent with the concern about chest pains in March 2015 that proved to be non-cardiac and entries showing the date of some procedures that have benefited the symptoms of AF.

48. It is not until June 2016 when the claimant again and is recorded to report symptoms of depression. On 6 June 2016 the GP records starting him on citalopram again which is consistent with the referral on MB page 350. I deduce from this that there had been a period when he had not been taking medication and then restarted it in June 2016. There is evidence that the level of medication is revised he apparently reported that he did not feel the meds were helping much in August 2016 and he was referred for counselling (see the entry for 7 October 2016 on MB page 169). He had completed those sessions by December 2016 and there is record of a 30 December 2016 telephone consultation recommended trying to reduce the dose citalopram (MB page 166).

49. Although paragraph 19 of the impact statement itself only refers to the claimant reporting the effect of failing to care for himself, anhedonia, loss of appetite and poor concentration, in it the claimant also refers to the description of his symptoms by his doctor in the referring letter at MB page 350 (3rd paragraph). The letter is dated 21 June 2016 and in it the claimant's GP describes a diagnosis of "recurrent recalcitrant depression". He reports starting the claimant on citalopram 20 mg a day but saying "he is really quite slow to respond ". He describes the claimant experiencing low self-esteem and being very tearful. This is a referral to the mental health service.

50. A similar story is told in the care plan of 2 August 2016 (MB page 605). The observations recorded include "Mood was found to be very low, flat and very teary." The claimant demonstrated insight but described himself to the consultant as "mood low, anxious, struggling to cope. His sleeping pattern is poor, appetite is sporadic and his concentration is poor, struggling to focus and his cognition is well orientated." The consultant concludes that the claimant was clinically depressed, offered a psychology assessment and increased his medication to 40 mg. He was reviewed on 19 August 2016 (MB page 610) and, if anything, his mental health was worse. He had suicidal thoughts, had disturbed night with vivid dreams three to four times night. The claimant was reviewed on 11 November 2016 (MB page 614) when his mood was described as having improved. A further appointment on 23 December 2016 was recorded (page 616) when it was said that his "mood has been much better over recent weeks".

51. The next appointment on 23 February 2017 (documented on MB page 621) where the recurrent depressive disorder is described as "current episode sever without psychotic symptoms – in remission." The report makes it sound as though the claimant's mood has significantly improved. "His mood remains good and he feels that it has been back to normal for some time now. He feels that he can take a lot more in his stride". The agreed care plan did state "Citalopram 40 mg once daily; Zopiclone 7.5 mg once at night as required" stating that he takes it approximately twice a week which gives an indication of the degree of his difficulty sleeping. The claimant was seen in the mental health clinic on 9 March 2017 (page 165).

52. He was discharged from psychological therapy on 5 April 2017 as planned by the consultant psychiatrist (MB page 622). This was approximately 10 months after referral. I agree with Mr O'Dair's argument that there is significant evidence in the bullet point

    "I would normally recommend that he continues his antidepressant at the current dose for at least two years, as his depressive disorder is recurrent. However, given his cardiac issues, I suggest that this can be reduced to 20 mg once daily after six months".

    As later recorded by the OH, this reduction was because it was thought advisable due to the concurrent heart condition. However, the evidence suggests that the claimants mood was relatively stable for about 12 months at the point of time.

53. His cardiac condition was reported as doing very well on 27 January 2017 (MB page 618) and depression was said to have improved. The extent of the heart problem is detailed on page 621 where it appears that the impact of AF is that his heart has beat fast twice since January (this on 23 February 2017). He is managed under consultant control with intermittent reviews and in March 2019 he was described as remaining active and currently doing extensive building work on his house but was a little bit more fatigued than previously. Nevertheless, he was not symptom free (see MB page 654 from a clinic dated 5 April 2019 received by the GP in June 2019).

54. It seems likely that the claimant feels anxiety about the heart condition and the interaction between the two impairments is that that anxiety can affect his mood as well as stress affecting the heart. There is, however, little evidence of the direct effect of AF on the claimant's ability to carry out day to day activities beyond having to sit down and rest on the occasions when symptomatic. If anything, it appears the AF has remained stable or improved since the period covered by Claim 1.

55. As Ms Nicholls pointed out, there are no entries in the GP records that expressly mention depression between April 2017 and September 2018, although mood is mentioned when he consulted about another matter (MB page 160 when the GP and the claimant apparently discussed increasing his dos of citalopram). I also notice that, on 5 July 2017 (MB page 162) in a consultation about his heart he is described as "quite low and stressed" and it states the claimant "has been cutting back citalopram to 20 mg as thinking of coming off but hasn't helped mood". The comment is that he will go back to 30 mg citalopram. This suggests that the

claimant was reporting low mood – a symptom of depression – when consulting his GP primarily about another matter.

56. When stress at work begins to be listed as a reason for consultation on 29 May 2018 (MB page 158), the examination stated that the claimant was tearful with low mood. The citalopram was increased and he was certified unfit to work due to work related stress. I find that this demonstrates an underlying condition of depression which was at that time causing the claimant to present with low mood. As the claimant said in oral evidence, the problem is what is wrong with you on that day, not necessary the underlying condition. The GP re-referred the claimant to a counsellor psychologist on 6 September 2018 (page 360). Dr Panja also wrote a letter "To whom it may concern" dated 24 October 2018 stating "his chronic depression and certainly stress, anxiety and depression can trigger bouts of atrial fibrillation."

57. The picture which all of the above builds up about the claimant's mental health is that the claimant's description with the benefit of hindsight to the OH physician in September 2018 that his depression had become progressively worse since 2016 is not entirely consistent with the medical records. However, those records themselves show an underlying condition which received periods of treatment with medication (in 2014) and then once he was prescribed citalopram in June 2016 (see paragraph 48 above), he has been taking this consistently. A combination of medication and counselling over approximately 10 months from June 2016 appears to have improved his mood but he remained on medication until May 2018 when it was increased. His consultant gave the opinion following a February 2017 clinic that the claimant would need medication for the next two years but that the dose should be reduced after six months. This suggests to me that the psychiatrist expected the effects of the condition to last two years from February 2017 and that he considered the stable mood to be dependent upon the control provided by the medication. In fact, May 2018 onwards, the impact of the condition began to be felt again as once can see from the GP's response.

58. Overall, I therefore find that the claimant's description of a steady build up of a worsening position is viewed with the benefit of hindsight, because there was a period of stable mood. However, this does not mean that depression had no effect on the claimant in the period April 2017 to April 2018. I accept the claimant's oral evidence when explaining the lack of consultation with his GP in that period that,

    "Sometimes I feel fine and sometimes suicidal. I don't think it was an absolute continual day after day after day thing that the depression was getting bad. It is a hard thing to try and describe. For time to time in that period from 2017 when I ended up in hospitable again since then my depression has got worse over the period of time….. There were times after the counselling that I felt better but it didn't last. That why the medication is there. At the moment its been increased."

59. External factors were affecting the claimant's ability to cope as a person with depression and one case see the regular review of medication necessary to stabilise the claimant's mood. Without that medication, I find, the impact of depression on his ability to carry out day to day activities would have been substantial. Since at least February 2017, when one sees the consultant

psychiatrist letter at page 622, the claimant has been disabled by reason of depression the effects of which vary and varied in the period from February 2017 onwards. By that time, the claimant had had a diagnosable condition for many years but the immediate impacts had lasted at least 8 months and were predicted to last another two years. But for the effects of medication, that impairment would have had a significant adverse impact on his ability to carry out day to day activities. Those abilities were affected because of the symptoms of fatigue, loss of concentration, anhedonia, loss of sleep which affected day to day activities such as dressing and participating in social situations.

Does the Tribunal have jurisdiction to consider the claims of unfair and wrongful dismissal?

60. It is accepted on behalf of the claimant that both claims of unfair dismissal and breach of contract/wrongful dismissal were presented 3 days after the time limits prescribed in s.111(2)(a) & (b) of the Employment Rights Act 1996 ("ERA") and the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. It is also accepted that it was reasonably practicable for the claims to have been presented in time. The argument raised by the claimant's representative can be rejected quite shortly, in my view.

61. It is argued that, were the claimant in the position that he had made an in time EQA claim based upon the dismissal, he would be able to apply to amend his claim to add a claim for unfair dismissal and therefore should not be in a worse position because he included the out of time unfair dismissal claim in the original claim form.

62. First, that argument is hypothetical – the present situation is that the claimant has brought 2 claims for which the Tribunal has no jurisdiction because they were brought out of time and the statutory provision for extending time is accepted not to apply. Secondly, such a claimant would be able to *apply* to amend his claim in that way but would have, in my view, an uphill battle in persuading an Employment Judge to exercise their discretion in his favour. In such a hypothetical situation, the claimant would have brought a claim based, as this one is, upon a dismissal which took effect more than three months (plus any extension because of the effects of early conciliation) before the presentation of the claim but where the allegedly unlawful appeal was less than three months before presentation. The EQA claims would, potentially, be in time on the basis of an argument that there was a continuing act including both the act of dismissal and the act of dismissing the appeal. Alternatively, the claimant might be relying upon the discretion of the Tribunal to consider it to be just & equitable to permit the claim to proceed under s.123 of the EQA.

63. Any application to amend to add an unfair dismissal claim to the EQA claim would be an application to add a claim which was, on the face of it out of time not only at the date of the application but which would have been out of time had it been included within the claim form as originally pleaded. It would therefore be an application to join a claim for which the Tribunal, on the face of it, had no jurisdiction. While such applications are not bound to fail, that would be a factor which would weigh heavily against permitting the amendment. The argument by

Mr O'Dair that an amendment would cure the lack of jurisdiction is misconceived. Either the jurisdiction argument would be determined at the preliminary hearing at which the amendment application was considered (an, in all probability rejected) or it would be left to the final hearing at which the Tribunal would probably consider that it had no jurisdiction to hear the claim.

64. However, the principle reason I reject this argument is that it relies upon a hypothetical situation. The simple fact is that the unfair dismissal and wrongful dismissal/breach of contract claims were out of time and the claimant has not shown that the Tribunal has jurisdiction.

Does the claimant need leave to amend his claim and should that be granted?

65. It is argued that the claim that the dismissal was disability discrimination contrary to s.15 EQA is already in the claim because, of the text in paragraph 3.d of the particulars of claim (page 67) that.

"he was found without any basis to be incapable of doing his job, so enabling LLA to serve him with notice of dismissal effect following a future period of garden leave."

66. It is argued on behalf of the claimant that he claimed to have been dismissed on the grounds that he lacks capacity to do his job and that that sets out the factual basis already pleaded for a s.15 EQA claim. Although this may set out the factual basis of the section 15 claim, I agree with Ms Nicholls that, compared with the 2017 claim, a deliberate decision appear to have been made not to claim that the dismissal was unlawful because contrary to s.15 EQA. The headings specifically focus upon harassment and victimisation. That does not necessarily mean that the claimant's explanation that he described the situation to his legal representative and depended upon him to formulate the claim in the way which best fitted his complaints as explained and as was in his best interests is untrue. It may simply be that a judgment was made by the claimant's then legal representative to confine the case to claims of harassment and victimisation.

67. Similarly, it is argued that paragraph 3.a. founds the basis of an existing reasonable adjustments claim,

"he was kept at work in the stressful search area and prevented form working outside the search area in outposts which would have been less stressful purportedly because of his uniquely arranged working hours"

68. Again, this may set out the facts which are now relied upon as a practice which put the claimant to a substantial disadvantage but the actions are claimed to be harassment which is a quite different kind of claim. I do not read the particulars of claim as presently included either of the claims which the claimant seeks to add by way of amendment.

69. The claimant argues that relevant factors to be taken into account are that he was let down badly by his legal advisor in whose hands he had left the conduct of the

litigation and who did not plead the claim in potentially the most advantageous way. It is argued that in the particular circumstances where the adviser is now deceased, leaving the claimant to complain against his estate is prejudicial to him. The claimant also relies upon his state of health at the time which caused him to rely upon the advisor. It is argued that the relevant facts would need to be gone into in any event and the balance of injustice is in favour of granting leave.

70. The respondent's arguments include the following:

(i) It is not a merely relabelling but the fundamental change of the basis of claim which had been pleaded by a legally qualified represented who obviously knew about the prospect of claiming s.15 and ss.20/21 because that was the basis of the first claim.

(ii) There is a fundamental difference between the argument that the reason for the dismissal was a previous complaint (the victimisation claim) and that the reason for the dismissal was incapability of doing the claimant's job.

(iii) Looking at the real and practical consequences of the amendment the claim would go from the relatively constrained claim of harassment and victimisation to the greatly expanded claim considering whether there was a something arising, whether the unfavourable treatment occurred, the reason for that treatment and any justification defences which the Tribunal would not have to trouble itself with if looking at harassment and victimisation only.

(iv) Timing was an important factor and there was no evidence or argument from the claimant as to whether it would be just & equitable to extend time.

(v) The manner of the application was casual and no formal application had been made. Despite the claimant being in receipt of legal advice from his new representative since at least 4 December 2020 when he came on the record, there was no draft amended claim form. There was no explanation for the delay in making the application.

(vi) The prejudice alleged by the first respondent is primarily that potential witnesses have apparently left their employment. In addition, the fourth respondent has left the respondent's employment. However Ms Nicholls confirmed that she and her instructing solicitors were still representing him. Her instructing solicitor informed the Tribunal that they had written to him but had not had any response.

(vii) In essence, in the respondents' submissions at page 169 (sent in compliance with Judge Alliot's order), it is argued that the reasonable adjustments and discrimination for a reason arising from disability claims which the claimant now seeks to advance are factually inconsistent with the presently pleaded case. What is said is that the harassment claim is based upon an allegation that the claimant was targeted where as the reasonable adjustment claim would be based upon an allegation that any

requirement that the claimant work exclusively in the search area, due to the requirements of his job, had at least the prospect of being applied to a non-disabled comparator and is therefore opposed to the pleaded claims. In relation to the capability dismissal decision, it is argued that to argue that the reason for dismissal and/or dismissal of his appeal were (respectively) "his incapability to work his full contractual hours" or "his absence from work" (see the draft List of Issues at page 147) is inconsistent with the statement in the ET1 that the claimant "was found without any basis to be incapable of doing his job".

71. This application underlines the importance of applications to amend being considered on the basis of draft amended pleadings. It is possible that, had a draft amendment of the narrative in Box 8.2 and Box 15 of the ET1 been submitted it would have made clear whether an amendment to include s.13 direct disability discrimination claim was sought. It may have made clear whether the apparent factual assertion that the judgment that he was incapable of doing his job was "without any basis" was maintained since the claimant seeks to argue that his dismissal was due to his "incapability to work his full contractual hours from work". It may have made clear when it is alleged the duty to make reasonable adjustments is said to have arisen and the period which the claimant intends this second claim to cover. As Ms Nicholls says, the need for an amendment appears to have been identified by the respondents' response to the further and better particulars which led to the issue being listed by Judge Alliot for consideration at today's hearing. Despite the claimant having the benefit of his new legal representation since at least 4 December 2020 (page 104), no formal application was made alongside the replacement further and better particulars.

72. On the other hand, no order was made by Judge Alliot for a formal draft amended pleading and I note that the claimant has limited financial resources. In reality, the proposed amended claim was identified by the time of the first preliminary hearing. Although it is regrettable that that took place more than a year after the presentation of the claim it is still comparatively earlier in the litigation.

73. I start by considering the scope of the existing claim and the extent to which the proposed amendments will have a practical impact upon that. I bear in mind my judgment that the claimant has been disabled through the condition of depression since February 2017. Therefore, any claim of disability discrimination or harassment can only be in respect of a period from February 2017 onwards.

74. The claimant's submissions on amendment (page 165) proposed to add both s.13 and s.15 EQA claims. However, the draft List of Issues has no reference to a s.13 EQA claim and it is understood that the application is now limited to a s.15 EQA claim.

75. The proposed s.15 EQA claim seeks to allege that the notice of dismissal by Mr Graves and the rejection of the appeal by the fourth respondent were because of the claimant's incapability to work his full contractual hours from work and his absence from work respectively. Mr O'Dair confirmed in submissions that proposed issue 23 (as drafted) elides the allegedly unfavourable treatment with the "something arising" and clarified that the argument was as I have just outlined.

This will require focus upon the set of facts known to Mr Graves and the fourth respondent which they had in mind when making their decisions, just as the victimisation claim does. I accept that it might be argued that there is an inconsistency between claiming (as the present pleading appears to) that there was no basis for a judgment that the claimant was incapable of doing his role and positively arguing that he was incapable of working his full contractual hours and that that was due to his disability of depression. Arguing and deciding alternative claims is likely to expand the scope of the hearing somewhat, but the evidence relied upon by the parties is not likely to expand. The argument that the cases are inconsistent may be a relevant factor when deciding whether the claims are meritorious but at this stage, beyond giving some weight to that when considering balance of prejudice, I do not consider it to be a particularly strong argument against amendment. I also note that, in the claimant's submissions at page 165, it is described as "a reasonable but ultimately ill founded perception that the claimant could not fulfil his contractual obligations".

76. I therefore do not think that the practical impact on the logistics of the hearing and the factual scope of the claim as a result of the proposed amendment to add a s.15 EQA claim is particularly significant.

77. Turning to the proposed breach of the duty to make reasonable adjustments, I consider that the factual basis referred to in paragraph 3 of the existing particulars of claim at page 67, by necessary implication, is limited to the period after the claimant's return to work after cardiac problems. This is probably a reference to January 2018 onwards – the proposed claim for breach of the duty to make reasonable adjustments refers to the relevant period being "2011 onwards but in particular from 2018 to the date of the claimant's capability dismissal" (page 135). The claimant was attempting a phased return from his 2017 absences from January to May 2018. Despite the incidents referred to in paragraph 3 of the original pleading, by agreement the harassment claim has been limited to that in paragraph 9 of the proposed List of Issues (page 135) – that of the alleged refusal to allow the claimant to work outside the SSA.

78. It seems that the existing harassment claim is alleged to be related to disability because "it arose from the respondents' frustrations with his disability-related health problems". The harassment claim will therefore require consideration of the mindset of those members of the first respondent's management who made decisions about where the claimant should work and whether he should work outside the SSA in order to consider whether their actions were related to disability because they were prompted by any such frustrations.

79. The proposed claim for breach of the duty to make reasonable adjustments would require investigation of whether the first respondent's managers had actual or constructive knowledge of any substantial disadvantage the claimant may prove he suffered of working in the SSA area. It will require the Tribunal to apply a different legal test but the evidence will cover the same ground. The adjustments suggested are to allow the claimant to work outside the SSA or to give him regular breaks. Whether these were implemented, whether they could reasonably have been implemented and whether they would have had a prospect of alleviating any proven substantial disadvantage would need to be considered by the Tribunal but

the factual basis for those questions will also be the factual basis for questions such as whether the claimant wanted to work outside the SSA, whether it caused him to suffer the harassing effect and whether, in all the circumstances including any options open to the first respondent for allocating the claimant work elsewhere, it was reasonable for it to have the harassing effect.

80. I, similarly, do not think that the effect of adding the proposed breach of the duty to make reasonable adjustments claim will have a very significant impact upon the scope of enquiry at a final hearing.

81. This is relevant to the question of any prejudice likely to be suffered by the respondents as a result of the amendments. Their witnesses will need to cover the same factual matters in the claim as presently formulated and therefore any prejudice to the respondent by difficulty in securing the cooperation of witnesses is not caused by the amendment but separate to it. The first respondent would face a claim in the case of the s.15 EQA claim which potentially requires it to justify the capability dismissal where as previously it only had to prove a genuine reason which was not that of victimisation. Conversely, were the amendment to claim that dismissal was an unlawful act under s.15 EQA not to be permitted to proceed, the claimant would potentially suffer the prejudice of not being able to pursue an apparently viable claim.

82. In my view, the application to amend should be regarded as having been made on 1 April 2021 at the telephone preliminary hearing. Neither the replacement further and better particulars, not the covering email to that document, refer to any suggestion that the claimant wishes to amend his claim and I have not been taken to any other document which makes such a request. The claims which it is sought to join by way of amendment were therefore made out of time. The matters relies upon to explain that are the alleged incompetence of the claimant's original legal representative and the claimant's own vulnerability which made him particularly dependent upon him.

83. There are aspects of the existing claim which may be out of time, depending upon whether the claimant succeeds in arguing that there were a series of unlawful acts which were linked in such a way as to amount to a continuing act extending up until the appeals. Both appeals took place less than three months before the date of presentation of the ET1 but neither stage 1 dismissal decision did. The claimant conciliated within three months of the conduct dismissal but nearly 5 months after the capability dismissal. It is therefore also possible that the Tribunal will, in any event, be considering whether it is just & equitable to extend time for presentation of the claim, depending upon their findings.

84. I do not think that I can conclude that there is no prima facie case of a continuing act or for an extension of time on just and equitable grounds in relation to the claims which it is proposed to add by way of amendment. However, I think that a decision on whether to grant permission to amend to include these claims can be made, weighing up all of the considerations to which I have referred.

85. On balance, although the respondents' points on the risk the claimant runs in pleading potentially inconsistent allegations are, in principle, well made, it seems

to me that there is more prejudice to the claimant in not being able to advance the claims which he seeks to add than there is to the respondents in having to respond to them. I do not think that the practical consequences of the amendments are anything like a dramatic as the respondents argue but, rather, will be to enlarge the scope of submissions and decision making but not of the evidence. The relatively casual way in which the application has been made has made the application somewhat difficult initially to understand but the agreed List of Issues was helpful. The claimant, even if successful, will have to explain why it is just an equitable to extend time in relation to the claims for which an amendment application should be treated as having been made on 1 April 2021 but that is best done by the Tribunal hearing the full evidence which will be considering similar arguments when considering the different question of whether the original claims were made in time and, if not, whether it is just and equitable to extend time for them to be brought.

86. I have decided to grant the amendment and set out in a separate case management order the List of Issues following amendment. In my case management orders following the hearing, I directed that the parties should write to each other and the Tribunal with any remaining submissions on the application for strike out and/or deposit orders in relation to the claim as it now stands and I repeat those orders now. For the avoidance of doubt, I have not considered that the question of whether or not any of the claim as amended should be struck out on the basis that it is unreasonable conduct of the proceedings to include within the second claim matters which were the basis of the previous unsuccessful proceedings and/or that they are scandalous, vexatious or have no reasonable prospects of success (see the application for strike out dated 16 July 2021 which, in essence, raises questions of whether the claims are *res judicata* and/or an abuse of process by reason of the rule in *Henderson v Henderson*).

I confirm that this is my reserved judgment in the case of 3303325/2020 Levick and that I have signed the Orders by electronic signature.

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Employment Judge George

Date:…16 November 2021 ……

Sent to the parties on:

26 April 2022

For the Tribunal: