Case Number 2505499/13

EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr Alan Johnson **The Secretary of State for Justice**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at Middlesbrough **On 20 April (reading day) and 4 July 2022**
Before Employment Judge Garnon **Members: Ms. C Hunter and Ms. E Wiles**

Appearances:
For Claimant Mr. M. Brien of Counsel
For Respondent Mr. A. Tinnion of Counsel

JUDGMENT ON REMISSION BY THE EMPLOYMENT APPEAL TRIBUNAL (EAT)

The unanimous judgment of the Employment Tribunal (ET) is that, the claimant having conceded the unwanted conduct constituting harassment was compelling him to complete an application form for assessment for Ill Health Retirement (IHR), which he did on 20 February 2013 though he did not want to retire, the time limit, as he concedes, started to run on that date. This claim, presented on 19 December 2013 was about seven months after expiry of the primary three month time limit. It is not just and equitable to deal with it notwithstanding its lateness. Therefore, the claim is dismissed.

REASONS (bold is our emphasis, italics are quotations , numbers in brackets preceded by "OB" are pages in the original trial bundle and, where preceded by "NB", in the bundle for today)

1. Introduction and Facts

1.1. The claimant was a Prison Officer from 4 July 1999 latterly at HMP Frankland, a Category A prison on the outskirts of Durham for male prisoners, many dangerous and violent. On 1 October 2011 he entered a cell of a prisoner murdered by two other prisoners. As widely publicised locally at their trial, they cut the victim's throat and disemboweled him with a scalpel made from plastic cutlery and a razor blade. The claim was presented on 19 December 2013, so unlawful conduct which occurred **or ended** prior to 20 September 2013 was, prima facie, out of time. The ET case was stayed while the claimant's claim in the courts for personal injury ("the court claim"), was resolved. It was delayed due to his ill-health, but, in late 2018, given a listing window of March-June 2019. In about April 2019, it was settled. All events pre-date Banaszczyk-v-Booker Ltd 2016 IRLR 273, but it was obvious by 2013 the claimant was disabled by post-traumatic stress disorder (PTSD) at all material times. Only in August 2019 did the respondent formally concede this.

1.2. The claimant had withdrawn all but one claim-harassment. The ET case was heard at North Shields on 17-19 February 2020, a few days before the ET was relocated to central Newcastle. We heard the claimant and, for the respondent, Senior Officer (SO) Gartside, SO Nutton and Ms Donna Pickering an HR Case Manager. Mindful of disruption relocation would cause, EJ Garnon ensured our reserved unanimous judgment, with reasons, was sent swiftly on 2 March 2020. We dismissed 4 of 5 allegations of harassment but upheld one about the respondent's conduct regarding IHR. **If** it was out of time, we found it just and equitable to hear it.

1.3. Paragraph 122 (ii) of the particulars read: "*Compelling the Claimant to **complete an ill health retirement assessment application** when he emphatically expressed the fact he did not want medical retirement*." At the original hearing we viewed this one sentence as having two aspects (a) pushing him to "complete" an application for IHR (b) doing nothing which may keep him employed rather than retired. **We did not view the pleaded case as confined to pressuring him to fill in the application form to initiate an assessment for IHR.** Pushing the claimant to IHR and omitting to take any steps to help avoid it were always, in our view, "two sides of the same coin". Mr Tinnion sought to separate the two, as is his function. Our function is to see beyond the advocacy skill to the evidence**.** In our view, positive acts such as telling the claimant the IHR process was "mandatory" taken together with connected omissions, extending over a period, to look for work he could do somewhere were the totality of "unwanted conduct" of which he complained.

1.4. The respondent's Notice of Appeal, dated 9 April 2020, but not sealed by EAT until HHJ Barklem's initial consideration on 16 September, asked the EAT to (1) set aside the judgment for the claimant (2) remit the claim to a fresh ET **to make findings on the date the claimant "completed" an IHR assessment application** (3) adjudicate upon the time limit issue in relation to that complaint, including whether it is just and equitable to "extend" time and (4) if it found it should determine the complaint, to do so on its merits. HHJ Tayler wrote:
*"7 The pleading **appears to** relate to the claimant being compelled to **make the original application** for* (IHR) *rather than the ongoing process during which that application was determined. The application **form** for* (IHR) *was submitted by the claimant on 20 February 2013. That is apparent from an email in the bundle ... The employment tribunal did not make a specific finding of fact determining the date on which the application was originally made, despite having the relevant email in the bundle.. and being referred to it in the respondent's chronology".*
*8. The claimant accepts after the application was submitted there were no specific additional **acts** on the part of the respondent that forced him to continue with the application, although it is contended the original pressure put on him to make the application **continued in some way** until the application had been determined.*

1.5. On 5 March 2021, HHJ Auerbach permitted two amended grounds to proceed, being the ET (a) in concluding at 4.10, the unwanted harassment of compelling the claimant to apply for IHR continued up to early September 2013, **failed sufficiently** to set out the findings or reasoning supporting that conclusion, having regard in particular to the fact the claimant had signed the original application for IHR in February 2013; and (b) erred when considering a just and equitable extension, in discounting the impact of the passage of time since the events, because
(i) the fact it was no-one's fault there was a delay of many years in the matter coming to a hearing was not a sufficient reason to do so; and/or (ii) even if the ET was entitled to regard the complaint as being only a few weeks out of time, this did not preclude this impact being a relevant consideration. HHJ Auerbach said Adedeji-v-University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23 may have a bearing on the second point.

1.6. Two grounds of appeal were dismissed. Ground 2 was that when addressing the time point we erred by (a) failing to apply our own findings at 2.37 to the issue of the date on which any pressure on the claimant to **complete** an IHR retirement application was no longer "unwanted' conduct (b) failing to apply that date to determine whether the IHR complaint had been presented in the 3 month primary limitation period or not. Mr Tinnion told HHJ Auerbach the ET made no finding that after 29 November 2012 the claimant ever wished to stop "hedging his bets"(a phrase used at the hearing) and no longer wished to apply for IHR. He averred we should have found (1) from 29 November 2012 the claimant was voluntarily applying for IHR (2) asking him to complete an IHR application after that date was no longer "unwanted' (3) the last date on which the respondent's conduct was "unwanted' must have been 28 November 2012. His fall-back was it cannot have

continued beyond when the claimant put in the final completed application form on 20 February 2013 and we erred by failing to identify that as the date from which time began to run or, alternatively, identify any other specific date. HHJ Auerbach said this did not preclude a finding the respondent was **still** subjecting him to unwanted, harassing, pressure to apply for IHR so he rejected ground 2 as not arguable. Ground 4 was we breached Chapman-v-Simon by (a) failing to adjudicate upon the complaint of harassment actually brought (b) adjudicating upon harassment complaints not brought. In the alternative, our determination was "tainted" by impermissible consideration of harassment complaints not brought. HHJ Auerbach took the view what we said at 4.9, indicated we had found pressure to apply for IHR was **reasonably viewed by the claimant as an expression he had been "written off"** which could be harassment. It arguably appeared from the final words of 4.10 we found the harassing conduct continued up until early September 2013 hence the reference to a "short delay" at the end of 4.12. So, ground 4 was not arguable.

1.7. At full hearing on 28 September 2021 (judgment sealed on 12 January 2022) HHJ Tayler held we failed to make **specific** findings about what conduct of the respondent constituted harassment and, if it extended beyond 20 February 2013 to no later than September (when he says "***it was accepted"*** any conduct was no longer unwanted), when the period over which it extended ended. **We never** accepted conduct was no longer unwanted after 20 February. HHJ Tayler found we had not explained our reasoning to support the conclusion **unwanted** conduct continued to September 2013. HHJ Tayler also found we erred in holding it was **only** appropriate to take into account the period by which submission of the claim exceeded the usual three month time limit. It was also necessary **to consider** the effect extending the time limit would have on the respondent's ability to defend the claim, including the fact it would result in us having to make determinations about matters which occurred many years previous to the hearing, and we should have regard to Adedeji.

1.8. HHJ Tayler remitted to the same ET to determine the date **or period over which the harassment occurred**, and if that ended before 20 September 2013, to determine whether it is just and equitable to hear it "*having regard to all relevant circumstances, including that an extension of time would require consideration of matters many years ago*". We interpret our task as to explain our reasoning in 2020, which we will, and then to decide the time point based on what we have been told, and have decided, today.

1.9. We had a reading day on 20 April done at our homes. In discussion by telephone at the end we thought HHJ Tayler's paras 7 and 8 of what the pleaded claim "***appears*** *to relate to*" was incorrect. We thought **20 February 2013 was not the date on which the IHR assessment application was "completed".** The claimant largely filled in a form, albeit under protest, on 29 November 2012 and **on 20 February,** a date never in dispute which is why we did not mention it, posted a final version at SO Nutton's request. As all EAT judges said, pressure on him to retire continued "***in some way*****".** HHJ Barklem wrote "*The ET held the fact the Claimant was later given ill health retirement and his civil claim for damages settled did not detract from the harm done from* ***writing him off*** *as a hopeless case for rehabilitation to do some work long before he or any medical advisors were ready to do so."* HHJ Barklem clearly saw we were concerned with the harassing effect of the respondent's omissions to explore ways for the claimant to return to some work. HHJ Auerbach said the pleading did not preclude a finding the respondent was **still** subjecting him to unwanted, harassing, pressure to apply (**which must mean to continue with the application**) and our paragraph 4.9, indicated we found this pressure was reasonably viewed by him as another **expression** he had been "written off". **That is precisely what we found was harassment.**

1.10. We will explain the law we applied in Part 2, after setting out the key facts, and our reasoning in 2020 so anyone without local knowledge and not present at the hearing can follow it.

1.11. The claimant went to work on the same landing the day after the murder on 1 October 2011. On 17 October, he had to enter the cell where the murder had taken place. He realised he was standing in dried blood swept into a pile by the forensics team. ~~O~~n 20 October in the same cell, he pressed down on the bed and blood ran onto his hand. In February 2011, he had applied to be transferred to another Wing, and on 8 November 2011 he was. His behaviour was so changed at home, his wife left and refused to return until he had treatment. The respondent arranged six sessions of counselling but refused his request to arrange more than six.

1.12. In December 2011 he tried to speak to Ms. Jeanette Liddell, Head of HR, but only got to speak to her assistant Moira Robinson whom he told he was feeling unwell, struggling to stay at work and had PTSD. **He suggested a temporary secondment to another prison or some post in the civil service and asked for a meeting with Ms Liddell to discuss his options. Despite many calls, she never rang back as Ms. Robinson promised she would. He continued to ring over the next three months, each time spoke to Ms. Robinson but was never contacted by Ms. Liddell. On 23 February 2012 he emailed Ms. Liddell about a post advertised on the prison service webpage. He had no reply.**

1.13. On 22 March 2012 the NHS Mental Health Team (MHT) diagnosed PTSD. On 26 March, MHT told the claimant he would be offered intensive treatment. On 30 March, a report confirmed he was having flashbacks. On 28 April he contacted SO Clarke saying he would be reporting sick. Governor Lamb telephoned 30 minutes later saying he should take an extra day of leave instead of reporting sick and he would investigate what assistance/support could be given. On his return the claimant saw Governor Lamb who waved at him in passing, but **no steps to help were suggested**.

1.14. On 12 June, despite having been transferred to G Wing he was detailed back, **for the fifth time** since transfer, to the landing on C Wing where the murder had occurred. On 19 June, a medical report confirmed the PTSD diagnosis and said the claimant was having nightmares, flashbacks, poor sleep, panic attacks, feeling frustration and anger. **Until today** we did not **know** how the claimant put the court claim but two prisoners, known to be dangerous, somehow acquired the means and opportunity to commit a brutal murder in a cell, which it is hard to imagine could have been allowed to happen. Chadwick-v-British Transport Commission 1967 1 All E.R. 945 held if a defendant is negligent is allowing something to happen and it is foreseeable someone coming on the scene may suffer harm, the defendant is liable to that person. The claimant today said the court claim was about what the prison did wrong, such as sending him back to C wing after transfer.

1.15. On 2 July 2012 the claimant went sick certified as "*PTSD (work related, under Psychiatrist*)". On 3 July a referral to ATOS was made and on 7 July, Dr Toft's report was forwarded to OH. The claimant telephoned Custody Manager (CM) Colin Harris requesting to maintain contact with a different manager or Linda Butler. CM Harris refused saying, according to his note, Ms Butler was "*only the disability rep*", it was not, in his opinion, "*in her remit*". **Today** the claimant told us, which the respondent had not, Ms Butler was assigned **by the prison service** to be his "advocate".

1.16. On 1 August 2012, SO Nutton took over as the claimant's line manager. He did not come across to us as ill-disposed to the claimant but made statements which did not bear logical examination, eg he believed the claimant was **making use** of the incidents in October 2011 as a means of exiting the prison service with the best financial package, which would be IHR entitling him to 75% of his salary until retirement at 65 years of age. SO Nutton was unable to reconcile his view with his assertions the claimant failed to co-operate with the process. Anyone who wanted IHR would "talk up" the severity and likely permanence of his PTSD and say he **needed** IHR. The claimant did the opposite. SO Nutton managed the patrol dog section. It was patently obvious he had no idea how to deal with a person with serious and complex mental health issues. He did what

he was told by Governors and/or Ms Liddell following orders and HR "advice" without understanding why. Emails show various HR officers dealing with the case at different times using a standard policy-based approach. Ms. Liddell, though Head of HR, never arranged for herself or someone senior with HR and disability training to see, or even speak by phone, to the claimant.

1.17. On 2 August 2012 Linda Butler met Governor Finley to advise on adjustments to assist the claimant back to work. Governor Finley could not understand why she was involved, stated it was not confirmed the claimant had PTSD and he did not believe the claimant was disabled. Ms Butler confirmed he had been diagnosed. We heard no evidence from Governor Finley. SO Nutton, and others thought Ms Butler advised on adjustments for physical disabilities only. The respondent's only HR witness, Ms Pickering, confirmed Ms Butler's role covered mental health disabilities too.

1.18. On 13 August SO Nutton spoke to the claimant with Ms. Butler present. On the same day ATOS OH Nurse Claire Stone reported (OB 110-111) the claimant had PTSD, was not fit for work and unlikely to be until his symptoms significantly improved. She recommended a review in 6 weeks and said he was likely to be disabled. The review never took place.

1.19. On 28 August 2012, a Governor told SO Nutton to ask the claimant to complete forms for a further OH referral and consent to a report **for the purpose of IHR.** SO Nutton's statement says "*I first spoke to the Claimant about this **on 10 September 2012** and the Claimant explained he did not wish to consider this and he intended to return to work. I advised him I would speak to the Governor again in light of his comments".* **This is the context in which IHR started to be suggested and the start of the pressure to apply for it. The claimant had only been off work for eight weeks**.

1.20. On 30 August the claimant was assessed by a Therapist, a Consultant Psychologist and a Consultant Psychiatrist. Their report of **3 September 2012** (OB112-113) confirmed PTSD and that he should have Cognitive Behavioural Therapy (CBT) and Eye Movement Desensitisation and Reprocessing(EMDR). Possible routes forward were (a) enough improvement in the claimant's mental health to enable him to return to some work or (b) acceptance he never would improve and should be ill health retired or dismissed for incapability. IHR entails a referral to CAPITA to give a medical opinion whether the criteria for it are met. It will not be granted if treatment may succeed, and it is **premature** to say he will be permanently incapable of work in the prison service.

1.21. On **17 October 2012** SO Nutton gave the claimant an IHR application form. The claimant asked why he had to complete it as he did not want to retire. SO Nutton replied he did not know. He told us IHR **must be** considered where an officer is on long-term sick absence, or has a serious underlying health issue, and may be dismissed as unable to render regular and effective service. It is hard to imagine someone with a health issue serious enough for IHR not being "disabled". No-one could reasonably doubt the claimant had a mental impairment likely, without treatment, to have more than minor adverse effects on his ability to perform day to day activities for at least 12 months.

1.22. SO Nutton said he asked the claimant about returning to work, who replied he did not wish to return **to Frankland. A different workplace may have helped the claimant, but he was never given one and did not return to work before his dismissal**. SO Nutton claimed he **proposed** a return to Low Newton (a women's prison very close to Frankland) and/or Deerbolt (for young offenders, near Barnard Castle over 20 miles away). Within commuting distance for the claimant there is also HMP Durham a category B prison housing remand prisoners and those convicted or less serious offences than the violent and dangerous ones at Frankland. Work elsewhere was an obvious avenue to explore, and one the claimant did not decline. In 2020 our view was he believed an alternative role would still be explored, **e**ven if he signed a form applying for IHR as something to fall back on if nothing could be done to get him well enough to work, **He did not expect it to be the**

only route to be explored. He made clear he wanted to remain working in a prison, or some civil service, role with extra training if needed.

1.23. On 23 October, Ms Liddell emailed SO Nutton saying IHR **paperwork needed to be completed**. In a significant exchange of emails at OB115 she says to SO Nutton this was "*not an easy case to manage*" and expresses surprise at the claimant's response to non-uniform work at Frankland or work at Low Newton or Deerbolt where SO Nutton says "*he would not have the flashbacks and panic attacks when **near** Frankland*". Ms Liddell adds there are "*not many prisons left in the area. Does he want a move out of the area? **Possibly something to explore in the future**".* SO Nutton replied the next day saying he did not. None of this was put in writing to the claimant and no-one from HR discussed it with him. Our view was , and still is, transfer to another workplace was **obviously** something to be explored **soon** if the claimant was ever to return to work.

1.24. On 27 November, SO Nutton advised the claimant to tick the box on the OH consent form that he wanted to be considered for IHR because, where a capability hearing is likely, an application for IHR is **compulsory** and, if he did not consent, he could not be considered for IHR but may be dismissed anyway. SO Nutton took advice "*from HR*" who said his letter was "appropriate". He was unable to explain why "HR" did not advise steps to help the claimant remain employed if his health improved. We found at the hearing, and reiterate, this was because the decisions were coming from above him–Governors and/or senior HR officers. The claimant replied on 29 November his hope, and wish, was to get better and return to work.

1.25. The claimant said **he came to believe, obviously later,** Ms Liddell and at least one Governor wanted him out of the prison service. For him, IHR involved mental acceptance he would never be well enough to work. Like physical illnesses, some mental ones can be cured, or controlled, while others cannot. He was still hoping to work in **a** prison by organising reasonable adjustments with the help of Ms. Butler and his union representative, Custody Manager Dave Redford of the Prison Officer's Association (POA), who works at HMP Durham and represents officers all over the region.

1.26. On 29 January 2013 the claimant wrote saying he had no issue with CAPITA or ATOS seeing his medical records, **his issue was with accepting retirement**. He received a memo dated **20 February 2013** saying it had been decided to progress an IHR referral for him **and** management were **considering** convening a capability hearing **at the end of the process**. We found long before he was prepared to give up hope of recovery, and before any medical advisors were, some Governors and HR had "written him off". No-one called knew enough to admit or deny that was a **conscious** decision, or, if it was, when it was made. On 26 February 2013, the claimant confirmed he had, on 20 February, posted the application form, as SO Nutton had asked.

1.27. **After that date**, on 1 March the claimant was told of a role at Kirklevington Grange, a category D prison near Stockton, much further from his home. The claimant had already approached HMP Durham directly for alternative roles. On 5 March he emailed SO Nutton (OB138) and the Frankland training manager, querying further training and saying "***As I have explained on numerous occasions, I have no intention of medically retiring despite being constantly forced by Frankland down that route and believe the above courses would afford me the means of a return to full duties albeit in another establishment in another role***". Usually in public sector employments, transfers to other jobs or workplaces are prioritised for people at risk of dismissal for redundancy or disability related reasons and the **active** support of **senior** managers **and/or HR** to identify suitable posts is very useful. SO Nutton, only one grade above the claimant. did not even believe he **needed** a transfer. SO Nutton emailed the claimant on 11 March saying the training he had asked for would not be provided. **The respondent did not say it was, or give the appearance of, ruling out options other than IHR or dismissal.**

1.28. On **9 April 2013**, OH again confirmed he had PTSD, was unfit for work and would not be ready until after EMDR treatment, **but full recovery was expected with it**. HR would see this. Still, no-one in HR took a grip on the situation. On **30 May (OB307)** the claimant again told SO Nutton "***Frankland***" were **pushing him to retire when he wanted to get better enough to work. That, in short, had always been his complaint.**

1.29. Mr Tinnion submitted the claimant was for a long time "in denial" about the severity of his PTSD and the likelihood of a return to work as he had admitted in answer to the ET's questions. The claimant, **in hindsight,** accepted he was, referring to his admission to himself and others of how bad his PTSD was as "*coming out*". He knew the job of prison officer requires mental strength, but, like many who suffer physical illness or injury, was **not yet ready to accept what turned out to be true**, that he would not recover to the extent needed to work in a prison. He was only 52 years old. Exiting the prison service would violate the dignity of any person who had worked all his life.

1.30. We agree, as Mr Tinnion told HHJ Auerbach, we did not find the claimant ever wished to stop "hedging his bets", but that was not the complaint he was making. His priority, and what he "wanted", was to become well enough to work. **If and only if**, he could not, he preferred IHR to dismissal. In contrast, we found his senior managers and HR, probably thinking he would never become mentally well enough to work, viewed steps which may help him remain employed as a pointless waste of time. Though they favoured him taking IHR to having to dismiss him, they explored no other alternative. Mr Tinnion, like any good advocate, cross examines asking questions designed to obtain the answer he wants but we must interpret the answer in context. The claimant gave one reply at the original hearing which Mr Tinnion said was acceptance the respondent's conduct was "no longer unwanted". In context, the reply showed no more than acceptance that if he had to leave the prison service, he would tolerate IHR as the least undesired outcome if all else failed. The respondent's suggestion the claimant at this time wanted IHR and was content no steps to avoid it be explored is, on the facts we found, well evidenced by documents, **wholly wrong**.

1.31. On 18 June CAPITA said their doctor wanted to meet the claimant face-to-face. On 28 June the claimant told SO Nutton (OB 310) he was to have such a meeting on 24 July, but had already told CAPITA he did not want to retire so did not know why he had to go. SO Nutton said it was a "***mandatory process*"**. The claimant was expected to give continuing co-operation with the process, disclose medical evidence and ultimately see the CAPITA doctor. **We have no note or recollection of the claimant ever accepting** no specific additional **acts** forced him to continue with the application. SO Nutton painted applying for IHR as a "box to be ticked" before anything else was done. In 2020, it appeared clear to us the claimant himself hoped "anything else" may include transfer to another role. We accept he was struggling to understand complex processes. **If his advisors, being CM Redford and Ms Butler, also thought "anything else" may still include transfer to an alternative role**, **we would need evidence from them to decide whether they held that view and, if they did, whether it was reasonable.**

1.32. OB322 confirms he saw the doctor as planned. On **5 August 2013**, four months since OH reported on **9 April 2013 he may recover with treatment** during which no steps to find him work outside Frankland were taken, CAPITA decided he did not qualify for IHR. The refusal certificate is dated **12 August 2013.** The reason given is plain. On the available medical evidence, treatment had started, may succeed, so it was **premature** to say he would be permanently incapable of any work in the prison service. The author actually writes the claimant did not want to retire but hoped for adjustments which, combined with success in treatment, would enable him to work somewhere.

1.33. SO Nutton had a discussion with the claimant on 28 August 2013, one year after a Governor had told him to get the claimant to consent to a referral for IHR assessment, during which no-one at

the respondent had given the claimant any practical help**. No-one had ever said they would do no more or done an act overtly inconsistent with looking for alternatives**.

1.34. On **2 September 2013** the claimant received a letter to attend a capability hearing to be chaired by Governor Fox **on 1 October 2013,** the same date as the murder two years earlier, which Governor Fox called an "*administrative oversight*". It was re-scheduled to **18 October**. An exchange of emails, and SO Nutton's log, show the claimant pleading to be allowed to attend the hearing with his wife, who was his carer, and his request being refused on grounds of "policy". Despite IHR being refused, the respondent was proceeding with a dismissal process. This **could be** seen as "inconsistent" indicating a **decision** not to even try to keep him employed, **but only if the outcome was a foregone conclusion**. Both the initial letter, and one of 11 September (OB167) setting a new date, had a list of points to be "*discussed*" including whether he would be able to return to work in **the near future**, then, each on a new line,
*your current fitness to work in **your** role as a prison officer*,
whether you will be able to provide regular and effective service going forward,
*whether there are any adjustments that could be made to enable you to return **to work***
*whether there are any adjustments that could be made to enable you to provide regular and effective service **now and for the foreseeable future**.*
A distinction appears to be made between return to his existing role and *regular and effective service* in another role. The last two points for discussion were "*Eligibility for Medical Retirement*" and "*Dismissal on grounds of medical inefficiency*".

1.35. OB322 shows Julie Bennett of HR telling SO Nutton on 27 August the "*No1 Governor* "would convene a capability hearing "*as all documentation is now in place*". If IHR assessment was seen as having to take place, and be refused, before a person can be dismissed for incapacity, it explains that phraseology. A report by Ms Bennett (OB 174-178), for Governor Fox says one option is to explore a return to work in an alternative role, if the claimant can provide an early return date. This is a "Catch 22 situation". For a return to work to succeed, steps to **explore opportunities** for another role needed to be taken before, not after, he was fit enough to try. A view held by some employers, based on what we consider to be a misreading of certain comments in reported cases, is that until a person is ready and able to return to work no duty to take **any step** arises. In Hill-v-Lloyds Bank plc, the EAT held it would have been a reasonable adjustment for an employer to give an undertaking to a disabled employee who claimed to have been bullied and harassed by colleagues that she would not be required to work with them. She had more anxiety and fear about work than a non-disabled person who had been bullied and harassed would have and the giving of the undertaking may have alleviated that. The parallel here is that everyone, including SO Nutton, knew the claimant had a major problem with flashbacks and anxiety when he was even near Frankland. Had he been told he could have an alternative role somewhere else, **if there was one available,** that problem may have been alleviated. At the time, the claimant, his wife, CM Redford and Ms Butler would not see Ms Bennett's report. If CM Redford and Ms Butler thought he may be allowed to remain in the service rather than dismissed even if he was not fit to work very soon, **we would need their evidence to decide if that was reasonable**.

1.36. On 19 September Professor Martin, Consultant Psychiatrist reported the claimant was very ill, had a less than 20% chance of getting better and was not fit to attend the hearing. He also said (OB169c) there was "*no doubt whatsoever*"" the claimant was disabled as defined in the EqA. He did not attend, but CM Redford and Linda Butler did. The hearing (OB189-190) lasted 20 minutes. CM Redford said his personal opinion was the claimant had the worst PTSD he had ever seen, was unlikely to return to work, had a very poor quality of life, was dependent on his wife for care **and at times unable to hold a rational conversation.** Governor Fox did not address a role elsewhere.

The claimant had 3 months from 12 August to appeal the refusal of IHR but, as at October, had not. The respondent's note of the hearing said he **would be** and was aware of the deadline to do so.

1.37. On **30 October** Governor Fox wrote telling the claimant of the decision to dismiss on the grounds of medical inefficiency with a 50% reduction in the compensation paid to people whose incapacity arose from work. The claimant received the letter on 5 November and **appealed** his dismissal on 6 November, indicating, though he had been off work for about 15 months, with no improvement in his health, he still **wanted** to remain employed, **not retire.** At the appeal on 23 December the Director of High Security Estate, Mr Richard Vince, threw the letter saying he would only get 50% compensation into the bin saying he would get 100%, but the decision to dismiss stood. The brief written for Mr Vince on 25 November by yet another HR officer, Janice Wake, says, by then, the claimant had appealed the refusal of IHR. IHR was granted at appeal on fuller medical evidence and the passage of time without recovery. He received no compensation payment because it is an alternative to IHR.

2. Mr Tinnion's argument and some Relevant Law

2.1. Mr Tinnion's position statement for today's hearing sets out these issues which we agree
First, what is the (correct) nature/construction of the one successful s.26 EqA harassment claim: "Compelling the Claimant to complete an ill health retirement assessment application when he emphatically expressed the fact he did not want medical retirement"
Second, whether the respondent (R) engaged in conduct after 20 Feb 2013 which "compelled" the Claimant(C)to complete an ill health retirement assessment application".
Third, the time limit for C to present a timely ET1 in respect of the claim.
Fourth, whether C's claim was presented out of time, and if so by how much.
Fifth, whether it is just and equitable for the ET to extend time in respect of the claim.

2.2. In an attempt to "pin the claimant down" he says:
It is essential for both R and the ET to understand C's case. To avoid further prevarication/ obfuscation on the issue, at the outset of the 4 July 2022 hearing R will ask the ET to put C to the following election before C gives any further witness evidence (a)to concede that after 20 Feb 2013 R did not engage in conduct which compelled C to complete an ill-health retirement assessment application (IHRAA) (b)to identify with particularity each and every act/omission C says R did after 20 Feb2013 which compelled C to complete an IHRAA.
We did not need to put this to the claimant because of the concession explained in Part 5 below.

2.3. He adds *"Common sense and logic suggest a party cannot be compelled to do something they have already done. The following facts are not (and have never been) in dispute: (a) on 20 Feb 2013, A NUTTON sent C a memorandum regarding C's future capability hearing/ill-health retirement [NB139-140] (b) on 20 Feb 2013, C completed (and posted) his one and only IHRAA [NB141];(c)on 20 Feb 2013,C informed A NUTTON he had done so [NB141].In this context, C's harassment claim (pleaded by Thompsons) is clear,* ***unambiguous****, and makes perfect sense:* ***it is a complaint about the conduct/steps R took on or before 20 Feb2013 which compelled C to complete his IHRAA on 20 Feb 2013****.* **We disagree entirely.**

2.4.Lord Hoffman in Investors Compensation Scheme-v-West Bromwich Building Society said
(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties ***in the situation in which they were at the time ...***
(4) The meaning which ***a document (or any other utterance****) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries*

and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean.

2.4. Mr Tinnion's reading inserts a word, shown in brackets below, **which is not there**: "*Compelling the Claimant to complete an ill health retirement assessment application* **(form)** *when he emphatically expressed the fact he did not want medical retirement*." **In colloquial speech**, using "completing an application" as synonymous with completing the form which **initiates** it may be acceptable if the person submitting the form has nothing else to do, eg applying for a ticket to an event where the number available is restricted. In contrast, filling in an IHR *assessment application* form means he is applying for his eligibility to be "assessed". It remains for all involved to "**complete**" the assessment, the application for which could be withdrawn at any time. Even as a matter of language, to equate "completing" an *assessment application* with completing the form which **initiates** the assessment, is plainly wrong.

2.5. To us, at the original hearing and today, any ambiguity is resolved by understanding public sector IHR. About 30 years ago there were concerns some employees were being given IHR **too readily**, which depleted pension funds, so new regulations provided for assessments by specialist doctors to decide if inability to work was likely to be "permanent". On the Disability Discrimination Act 1995 (DDA) coming into force this was decided having regard to the duty to make reasonable adjustments, so consideration was to be given to a person, for example, being moved to a vacancy outside his existing workplace, unless that imposed a disproportionate burden on the employer. IHR will not be given if medical treatment may succeed and reasonable steps, including transfer to an alternative role, have not either been tried or ruled out as unreasonable.

2.6. If the claim is not confined to pressure to fill in the form, what does it cover? In short, the unwanted conduct we saw as claimed was a combination of acts and omissions over a period starting in September 2012 and ending not before September 2013, more probably even later. Section 40 of the Equality Act 2010(EqA) makes harassment unlawful and s 26 includes:
(1) A person (A) harasses another (B) if—
(a) A ***engages in unwanted conduct related to*** *a relevant protected characteristic, and*
(b) the conduct has the purpose ***or*** *effect of—*
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect.

2.7. The Equality and Human Rights Commission Code of Practice ("EHRC Code") notes "conduct" can include a wide range of behaviour. An **omission or failure to act** can be unwanted conduct as well as positive acts. In Marcella-v-Herbert Forrest Ltd ET Case No.2408664/09 failure to provide female toilet facilities on a building site for the only woman bricklayer and in Owens-v-Euro Quality Coatings Ltd ET Case No.1600238/15, failure to remove a picture of a swastika for weeks, were unwanted conduct. This reflects s 212(2) and (3) which say:
(2) A reference (however expressed) to an act includes a reference to an omission.
(3) A reference (however expressed) to an omission includes (unless there is express provision to the contrary) a reference to—
(a) a deliberate omission to do something;
(b) a refusal to do it;
(c) a failure to do it.

2.8. Reed-v-Stedman 1999 IRLR 299 warned against carving up a case into a series of specific incidents. It endorsed a cumulative approach quoting from a USA Federal Appeal Court decision: '*The trier of fact must keep in mind that each successive episode has its predecessors, the impact of the separate incidents may accumulate, and the work environment created may exceed the sum of the individual episodes*' (USA-v-Gail Knapp 1992 955 Federal Reporter approved by the EAT in Driskel-v-Peninsula Business Services Ltd . We viewed Mr Tinnion's arguments as "carving up" connected acts and/or omissions and starting a time limit running from each, an approach which cannot be not anchored in statute or authority. HHJ Tayler wrote "*Conduct on the part of a respondent that constitutes harassment could potentially be conduct that extends over a period* If unwanted acts are followed by **connected** omissions and/or failures, time runs from when the last were decided upon, or **taken to have been** as shown by either an act inconsistent with exploring ways of him remaining employed or the passage of enough time to enable a reasonable person to conclude nothing would change.

2.9. As is obvious from the wording of s 26, if conduct ceases to be unwanted, it ceases to infringe the section. However, conduct may be tolerated but still be "unwanted" as said in Munchkins Restaurant Ltd-v-Karmazyn EAT/0359/09 "*there are many situations in life where people will put up with unwanted, or even criminal, conduct which violates their personal dignity because they are constrained by social circumstances to do so... Putting up with it does not make it welcome, or less criminal.* Mr Tinnion's written closing submission in 2020 included the claimant's attitude to being asked to complete an IHR application changed over time, from (i) an initial period in 2012 and part of 2013, when he was opposed to making one, to (ii) a period starting no later than early September 2013 when he accepted (following advice he trusted) it was in his own interests to seek IHR, and, since harassment relates only to unwanted conduct, his complaint was out of time. We note even Mr Tinnion did not then equate **completing** an IHR assessment application with filling in the initial form, but he said the claimant continued with an IHR application of his own free will. We rejected that at the hearing and again now. The flaw in his submission is to equate the claimant being content to have IHR **only if** he could not return to work, with him actually wanting IHR. The CAPITA report said he wanted to work, not retire. HHJ Tayler said it appears the ET "took its lead" from this submission by focusing on any conduct having ceased to be unwanted **by no later than** early September 2013, so any delay was relatively short. We did not "take a lead". To us, it was obvious, as the claimant wrote, **pushing** him towards IHR, **against his often repeated wish not to retire**, **was unwanted conduct until and beyond then**.

2.10. Pressure can also be exerted by the respondent **doing nothing** to find any viable alternative. In the public sector, transfers do not just "happen". The **active** support of **senior** managers and/or HR to identify suitable posts is vital to secure a transfer and, in our experience, **is normally forthcoming**, despite the risk he may still go off sick again. We often see a "trawl" for potential posts elsewhere. There was **no evidence** of any Governor or Ms Liddell or anyone in HR, for example, emailing or telephoning other prisons saying something like "*We have an experienced officer who cannot continue at Frankland but **may** be able to work in another role. Will you **consider** a transfer to your prison*?"

2.11. In February 2022, the Court of Justice of the European Union (CJEU) decided X-v-HR Rail SA. An employee training as specialist technician became incapable of performing essential functions of **that** post but could be employed in a post which met certain requirements. He was assigned to a temporary position and informed he would receive "personalised support" to find a new job with the company. However, he was later informed his traineeship was terminated owing to his total and permanent incapacity to perform the duties for which he was recruited. The issue was whether the employer was obliged to re-assign him. According to article 5 of Council Directive 2000/78/EC, to ensure equal treatment for disabled persons, appropriate steps must be taken, unless they impose a disproportionate burden on an employer. The CJEU held the employer was

required to take **effective and practical** measures, **taking each individual situation into account**, to enable a disabled person to have access to employment. Where one became permanently incapable of doing his existing job because of the onset of a disability, reassignment to another job may be "appropriate" within the meaning of article 5.

2.12. **There is nothing new about this.** Tarbuck-v-Sainsbury's Supermarkets said there is no obligation to **create** a post which is not necessary, merely to make a job for a disabled person, but, as Lord Hope said about 20 years ago in Archibald-v-Fife Council

16. As the determination of the employment tribunal makes clear, a substantial number of adjustments to the normal procedures were made in Mrs Archibald's case. Some of them involved positive discrimination in her favour, .. This was within the scope of the duty, as it was necessary for the council to redress the position of disadvantage she was in due to her disability. The crucial question is whether it should have taken ***one more step and simply transferred her*** *to a .. job for which she was suitable, or at least dispensed with the need for competitive interviews.*

2.13. Unlawful conduct under the EqA requires an **act** and a **type** of unlawful behaviour. One type of disability discrimination is s 20, the duty to make reasonable adjustments and s.21 which says an employer discriminates against a disabled person if it fails to comply with it. The DDA gave examples of steps it may be reasonable to take. The EqA does not but paragraph 6.33 of the EHRC Code does, including (i) transferring him to fill an existing vacancy (ii) assigning him to a different place of work. This, and other, types of discrimination were originally pleaded but later dismissed on withdrawal. The acts in s. 39 include subjecting an employee to detriment which means doing, or not doing, something, which he might reasonably consider changes his position for the worse or puts him at a disadvantage. **Section 212(1) says** ***"detriment" does not, …include conduct which amounts to harassment.*** We are well aware this is not a s20/21 claim, but quite apart from HHJ Auerbach dismissing ground 4, we did **not** decide a claim other than that pleaded.

2.14. Spence-v-Intype Libra EAT/0617/06 held an employer may carry out a proper assessment and fail to make reasonable adjustments, or fail to carry out a proper assessment but make all necessary adjustments. Elias J explained at paragraph 38*:"The issue … is whether the necessary reasonable adjustment has been made; whether it is by luck or judgment is immaterial".* **S.20/21 is not concerned with the process but the outcome**. Such a claim may fail if an ET finds a step would not have been reasonable. Pre EqA legislation introduced a new tort of harassment though the wording in each statute was not identical. Under s 26, the link is between the protected characteristic **and the conduct.** Slade J said in Bakkali-v-Greater Manchester Buses *"Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. … "related to".. includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour".* **Section 26 is concerned with how the process was handled and a claim under it may succeed where other claims would fail.** If an employer fails to comply with s20/21 and acts and/or omissions which could fall in s.20/21 are also unwanted conduct which has an effect proscribed by s.26, s212(1) means s.40 is infringed, not s.39. **If harassment covered the facts asserted, withdrawal of other claims was the right step for the claimant to take**.

2.15. But for today's developments, the key issue would have been when time started to run. We still need to address that to explain our 2020 reasoning and why the result today **may**, **though not inevitably would**, have been different had no concession been made. Section 123 EqA includes:
(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

2.16. An ET must distinguish isolated acts, or omissions, from ones inextricably connected, as Mummery L.J. did in Hendricks-v-Commissioner of Police for the Metropolis saying:
"*Miss Hendricks .. is, in my view, entitled to pursue her claim .. on the basis the burden is on her to prove, either by direct evidence or by inference from primary facts, the numerous alleged incidents of discrimination are* ***linked to one another*** *and they are evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period."*
I appreciate the concern expressed about the practical difficulties that may well arise in having to deal with so many incidents alleged to have occurred so long ago; but this problem often occurs in discrimination cases, even where the only acts complained of are very recent. Evidence can still be brought of long-past incidents of less favourable treatment in order to raise or reinforce an inference that the ground of the less favourable treatment is race or sex
The question is whether there is "an act extending over a period" as distinct from a ***succession of unconnected or isolated specific acts****, for which time would begin to run from the date when each specific act was committed.*
In Parr-v-MSR Partners 2022 EWCA Civ 24 the Court of Appeal held the respondents' acts were not "conduct extending over a period" but isolated acts with continuing consequences. This echoes a case we cited, and followed, in our original judgment- Cast-v-Croydon College.

2.17. Matuszowicz-v-Kingston-Upon-Hull Council 2009 IRLR 289 was a s.20 claim, but the time limit points apply to any omissions or failures. They start time running in a way less obvious than positive acts. Mr Matuszowicz, whose right arm had been amputated, was employed as a teacher by Hull Council. In September 2003 he began work for it at Hull Prison where he had a problem coping with heavy doors. In July 2005 he was transferred to another Prison but the problem was the same. He contended by August 2005 it was clear working in the prison sector was unsuitable because of his disability, and the respondent had a duty to transfer him to alternative work. From October 2005 he was given lighter duties, and, from December 2005, garden leave, but his post remained in prisons. On 1 August 2006 the Council transferred its undertaking of teaching in prisons, so his employment transferred under TUPE. He presented a grievance to the respondent on 4 October 2006 in relation to matters occurring up to 31 July 2006. After a premature attempt to claim, he presented a claim to the ET on 31 January 2007. The Court of Appeal was concerned with the failure to give him suitable employment and, **by default,** enforced transfer to unsuitable employment on 1 August 2006.

2.18. Lord Justice Lloyd said it was necessary to consider how the complaint was formulated and quoted the exact terms used in the ET1:*"The respondent* ***failed to transfer the claimant*** *to suitable alternative work once it was clear working in the prison sector was unsuitable (at least as early as August 2005) due the claimant's disability and* ***effectively forced*** *the claimant to TUPE transfer to unsuitable employment despite the respondent being in the full knowledge of the unsuitable nature of the employment."* As Counsel for the claimant pointed out, an employer may fail to comply with the duty to make reasonable adjustments by either deliberate conduct or inadvertent omission. Then, as now, the legislation deals with both.

2.19. If "conduct" includes omissions/failures when is it "*done*" or "*treated as occurring*"? S. 123 (3) allows for evidence as to when the employer **decided** on a deliberate omission but, in the absence of such evidence, s.123 (4) defines when it is to be **taken as** having decided upon the omission.

The alternatives are (a) when it does **an act inconsistent** with doing the omitted act showing it was irrevocably omitting to do it, and it is understandable time runs from that moment and (b) which presupposes the employer has done nothing inconsistent with doing the omitted act, and requires consideration of the period within which it might reasonably have been expected do the omitted act if it was to be done. In such a case, it is to be **treated as** having decided upon the omission at the time when it might reasonably have been expected to have done the thing omitted. Lloyd L.J. added *.., even if the employer was not deliberately failing to comply with the duty, and the omission to comply with it was due to lack of diligence, or competence, or any reason other than* ***conscious refusal****, it is to be treated as having decided upon it at what is in one sense an artificial date. Certainly, it may not be a date that is readily apparent either to employer or to employee."*

2.20. The ET had treated the failure to make adjustments for Mr Matuszowicz as a series of **acts** running from August 2005 to August 2006, which Lloyd L.J. said was not the correct analysis. A failure to make adjustments is an omission, not an act. There may be positive acts inconsistent with the duty but the failure itself is, in its nature, an omission. His Lordship approved HHJ Reid Q.C. in Humphries-v-Chevler Packaging EAT/0224/06 in which the employer, after lengthy dealings with the employee or her representatives, replied on 11 April 2005 to a letter from her solicitors asking for its intentions in respect of the availability of suitable employment, by saying the only job available was as a cleaner, which had been offered, refused but was still open. The claimant contended that was not a compliance with the duty to make reasonable adjustments, so, on 16 May resigned and later issued in the ET. If time ran from 16 May her complaint was in time, but if it ran from 11 April, it was not. HHJ Reid held because on 11 April there had been a **definitive** refusal to offer anything other than the cleaner job, a deliberate omission had been decided on as at that date, which set time running, **understandably on those facts**.

2.21. Counsel for Mr Matuszowicz submitted it would be unsatisfactory to impose a start date which employer and/or employee may not realise had occurred. The employer might still be trying, even if not diligently, to make adjustments, and the employee might be waiting for that. **Lloyd L.J. saw force in that but held a policy of the legislation is to impose relatively early cut off dates for claims which may be brought when the employment is ongoing, which both s20 and s26 claims can.** He accepted the issue of uncertainty is real but **considerably alleviated** by the opportunity for a longer time if it would be just and equitable, thus accommodating situations in which the employee **does not realise** the start date has occurred or the employer **lulls him into a false sense of security** by appearing still to consider what adjustments it ought to make.

2.22. Lloyd L.J. viewed Mr Matuszowicz's allegation as one of a **continuing** omission until 1 August 2006 to find alternative employment, **so the claim was in time**. An occupational health report dated 13 April 2006 concluded he should be assessed with a view to redeployment to a post more suitable than one in prisons. A document dated 11 May 2006 appeared to show the respondent had not come to a final conclusion. On 28 July 2006 an employee of the respondent telephoned the claimant saying she had been told not to take any further steps and it was too late to do other than transfer him. Lloyd L.J. said there might be a case for saying the respondent **then** decided, shown by its inconsistent act, it was not prepared to make any further efforts so time started to run, but added " *It is ironical, in the context of time limits, it would be in the interests of the respondent to allege it might reasonably have been expected to have dealt with the position much earlier than it actually did, whereas it would be in the claimant's interests to assert that it would have taken as long as it in reality did, so as not to give rise to an earlier date as the starting date".* If the respondent could rely on a start date on 28 July, the claim was out of time by a few days. Lloyd L.J. said there was a good chance of extending time **where the delay was that short**.

2.23. Sedley L.J. agreed, adding the purpose of the legislation was to **prevent a situation of neglect from dragging on indefinitely** and, where no **overtly inconsistent** act had set time running, put the onus on the claimant to decide when something should have been done and to bring a claim within 3 months of that date. His Lordship continued "*For obvious reasons this can create very real difficulties for claimants and their advisers….**when deciding whether to enlarge time tribunals can be expected to have sympathetic regard to the difficulty** ..As Lloyd LJ points out, its effect is to give the employer an interest in asserting it could reasonably have been expected to act sooner, perhaps much sooner, than it did, and the employee in asserting the contrary. Both contentions will demand a measure of poker-faced insincerity which only a lawyer could understand or a casuist forgive".* Unlike failure to make reasonable adjustments, harassment may occur through a combination of positive acts and omissions, deliberate or otherwise, or simple failures, but for the start of the time limit points, the analysis in Matuszowicz is very helpful.

3. Extracts from the Conclusions in our First Judgment (included for ease of reference)

*4.7. Working in a prison like Frankland is a demanding job for which an officer must be of sufficiently good physical and mental health not to be absent frequently or for long. It appears Governors at all levels at Frankland do whatever is necessary to run the prison well, which is laudable. The HR officers, particularly Ms Liddell, appear to aim to deliver whatever the Governors want and CM's and SO's obey orders and follow policy. If an officer says he cannot cope for mental health reasons, some think he must be making an excuse, whilst others think, if he is genuine, he is of no use to the prison service. Either way, the claimant was **pushed down the IHR option** which clearly "relates to" disability as anyone who satisfies the eligibility criteria for IHR would .. be a disabled person.*

*4.8. The Disability advisor, Ms Butler, was viewed as only useful to advise on aids and adaptations for physical impairments. Managers at all levels showed no sign of having absorbed any training on equality, if any, they may have received. **In many respects information was not shared when it should have been hence SO Nutton did not know the claimant was not attending his capability hearing for medical reasons. The SLE application was a fiasco.***

*4.9. Society expects prison officers, like members of its armed forces, the police and other emergency services, to put themselves at risk. If they are so injured in the line of duty that they are permanently incapable of work they may qualify for IHR. The fact the claimant was later given IHR and his civil case for compensation has been settled does not detract from the harm done to him by **writing him off as a hopeless case for rehabilitation to some work long before he or any medical advisors were ready to do so. It is that which violated his dignity and created a hostile environment for him and it is entirely reasonable it would.***

*4.10. Mr Tinnion argues the claimant's attitude to being asked to complete an IHR application changed over time, from (i) an initial period in 2012 and part of 2013 when he was opposed to making one, to (ii) a period starting **no later than early September 2013** when he accepted (following advice he trusted) it was in his own interests to do so. Since harassment relates only to unwanted conduct, Mr Tinnion says the only acts complained of can be in the earlier period, which since it predates 20 September 2013 means it is out of time. Ingenious though this argument is, we are not convinced acceptance of his union's advice makes the conduct "wanted", but even if this claim is out of time, it is only by a few weeks at most.*

4.11. He adds it is not just and equitable to extend time because....(c) there is prejudice to the respondent in having to answer in February 2020 complaints about matters which occurred in 2012 and 2013

4.12. We reject these submissions. … On point (c) it is the short delay in bringing the claim to which we must have regard not the delay in it being brought to trial which is the fault of neither party. This case passes all the tests in Keeble for extending time.

4. The basis of our decision on time limits in our 2020 Judgment

4.1. Incompetent or insensitive conduct can be harassment, even no harm was meant or there may be valid reasons for it, see Chawla-v-Hewlett Packard 2015 IRLR 356. Malicious motive towards a claimant is certainly not a requirement but benign motive does not save a respondent if the necessary elements of unlawful conduct are shown. An analogy is Amnesty International-v-Ahmed where a lady wishing to work in Somalia was refused because her race and religion put her at risk there. The respondent had still directly discriminated.

4.2. Some managers may have thought, **benignly**, IHR was the best option for the claimant, but the respondent called no evidence to that effect. **We found** Governors and HR had **written the claimant off** as unsuitable for work in Frankland **or any prison**, so even **exploring** transfer was a waste of effort. **The people who dealt with him had neither the medical knowledge nor equality training to do so properly.** Their lack of knowledge of what the claimant may expect to achieve by way of recovery coupled with the common misconception that someone who has been off work with PTSD for months will never become well enough to work in a prison, may have caused them to "write off" the claimant. Section 26 makes them guilty of harassment even if it was not their intention, or even a conscious decision. Section 26 is concerned with how the process was handled, the overall context and the effect it reasonably had on the claimant, not with why the respondent acted as it did or whether steps taken would have been effective.

4.3. Was there a **conscious** decision that if he was not able to overcome the effects of seeing the mutilated body of a murder victim, he was no use to any other prison? Obviously, the respondent did not say there was. We have to infer the answer from the primary facts.

4.4. One view would be some Governors and HR were deliberately engineering a situation in which the claimant would be given IHR because that was **easier and safer for them**. If he was given IHR, he would not have been "dismissed" so its position on an unfair dismissal or s15 claim would be stronger. Ms Bennett's report at OB 178 identifies and assesses these as "risks" of dismissal. Also, IHR would reduce his losses, in an ET or civil claim, at the expense of the pension fund. The chances of IHR would be reduced if a post could be identified where he may be able to work. No-one gave evidence to explain why in his case steps which normally would be taken were not. **Not even looking for transfer opportunities may have been a plan**.

4.5.A more likely possibility was subconscious stereotyping of mental illness. Some jobs require people to cope with pressures most people never have to. Paramedics, police officers, fire fighters and soldiers see awful carnage but have to carry on. Other officers saw the murder victim and did not have as severe or long term a reaction as the claimant, maybe due to him being first on the scene. In any prison, violence may erupt and all officers must act as trained to safeguard each other as well as inmates and the public. It may be the claimant could not have overcome his PTSD to the extent needed to work in any prison environment, but medical evidence, at least until Professor Martin's report in late September 2013 was that, given time and treatment, **he might have**. We would have understood a Governor's reservations about having an officer who, due to PTSD, may do the wrong thing, panic or "freeze". **The respondent called no evidence to that effect.**

4.6. Another possibility is incompetence and blind adherence to "policy". Ms Liddell was right to say this case was hard for SO Nutton to manage but he was left to be the one communicating with a claimant. Why were trained HR advisors who would to do a much better job of discussing options with the claimant not used? From reading the documents, and hearing Ms. Pickering, the answer may be that is how things are done in the prison service whatever the special circumstances of an individual case. Several people in HR dealt with the case. Some documents are addressed to SO

Gartside and SO Nutton at "HMPS Shared Services Centre" in Newport, South Wales. Our original reasons described the sick leave excusal (SLE) issue about pay as a fiasco. It was. There are calls from SO Nutton saying he had received an email from Ms Lillian Stone regarding SLE saying '*policy was policy'*. We said "*On this point, we accept SO Nutton was doing his best to help. No-one of robust mental health could fail to be baffled and annoyed by the contradictions and bureaucracy these pages contain.*" Julie Bennett of HR who prepared the briefing note for Governor Fox does not appear to have had previous involvement with, let alone spoken to, the claimant. All this led to confusion, mis-communication and no-one doing what may have avoided any harassment.

4.7. We have seen many examples of large public bodies, eg. Government departments, local authorities, NHS Trusts adopting a standard, policy-driven approach to cases which are crying out for individual attention. We cannot believe anyone would **consciously** arrange a capability hearing on the second anniversary of the murder, but it is all too believable it was arranged by someone who either did not know, or simply overlooked, the fact. Governor Fox's decision on compensation shows he did not understand the effects PTSD had on the claimant's behaviour though some were set out in medical reports. Mr Vince, throwing the letter into the bin, clearly did.

4.8. At paragraph 4.5. of our original reasons we quoted one of Mr Tinnion's "*broad submissions*" "*First, the Prison Service is a large organisation with thousands of employees, and tens of thousands of prisoners to care for. It is inevitable an organisation of that scale and public importance will create policies and procedures which it will then try to apply in practice - an 'ad hoc' approach is plainly neither workable nor desirable. This matters because many of C's complaints about the support he was provided during his period of sickness absence appear to relate to the fact they were 'box ticking' exercises and not personalised to him. To some extent, this was unavoidable"*. **We said and now re-iterate** "*It was **not** unavoidable. Had the input offered by Ms Butler not been rejected as irrelevant, it would have produced a very different outcome. Had Ms Liddell, as Head of HR, responded to the claimant's attempts to contact her and taken a grip of a situation which was not normal, the respondent, as an organisation, may not stand accused of harassment*". What was needed, as we originally said, was someone in HR, preferably Ms Liddell, to take "ownership" of an untypical and serious case.

4.9. Instead, the claimant was treated as being of no importance, not worth the effort of trying to retain. It dealt with him as a burden not a person. A "message" can be conveyed by acts and omissions as well as words. In context, the totality of the respondent's conduct sent the message:" *if you cannot overcome seeing the mutilated corpse of a murder victim, you are no use to the prison service and must be retired or dismissed, rather than transferred to another prison where you might go sick again or not perform well*". That "relates to" his disability and violates his dignity. Had the respondent assigned someone competent to look for vacancies elsewhere, found none which posed no risk to others, met the claimant at somewhere of his choice, accompanied by his wife, CM Redford and/or Ms Butler, then explained to him there was no viable alternative to IHR, he may have accepted it, and his responses to the CAPITA doctor been different to the extent IHR would have been given without the need to appeal. Had he still not accepted how ill he was, we may have found him to be unreasonable not to. Instead of **persuading** him IHR was the best option **for him**, the respondent "compelled" him to a course he neither wanted nor understood.

4.10. With insufficient basis to infer any omissions were "decided upon", we find stereotyping and/or incompetence is the more likely reason for the wholly insensitive way in which the claimant was treated. We would have to decide when the respondent was to be "taken to" have decided upon a continuing omission to explore options for an alternative role? For this Matuskowicz is very helpful. We start by looking for an act inconsistent with any outcome other than IHR or dismissal. Although we found everything except dismissal was inevitable after IHR had been refused **because** there

was no "alternative role", he had been on sick for 15 months and showed no sign of getting well enough to do his original job, we did not find any "inconsistent act" by the respondent showing they would not be looking for any alternative role.

4.11. The final question is when the "penny should have dropped" that if managers at Frankland had done nothing to find a role he might be able to do, they never would. On that date time would start to run. The letters of 2 and 11 September indicated the respondent may still to consider at the capability hearing adjustments it may make right up to 18 October. **In that case, the claim was in time.** Alternatively, if the letters are read as an indication no other role would be offered, we thought this claim was **at most** was 18 days late and considering it was "just and equitable".

4.12. We recorded Mr Tinnion's submissions on time limits and our rejection of them only briefly in 2020 because, when an advocate for a respondent has no factual answer to the allegations against their client they often, and rightly, turn to Chapman-v-Simon and time limit points as a means of winning. Six years two months from presentation to a liability hearing is the worst delay EJ Garnon has known in 25 years as an EJ during which he has dealt with countless time limit arguments. He accepts our original reasons may have sacrificed detail for brevity and speed of promulgation, but in 2020 such points appeared to have little merit. We are not alone in that view. HHJ Barklem said on initial consideration of the grounds of appeal "*The prospective appeal is concerned with the ET's acceptance the single claim which succeeded was validly in time. I am sceptical the appeal is well-grounded, and concerned the grounds are an overly technical analysis of a wide-ranging decision .. on whether it was just and equitable to extend time- manifestly a matter for the ET. However, given the complex factual situation I am -just- persuaded the Appellant should be given the opportunity to amplify the grounds .. in an oral Preliminary Hearing".* **Today, the situation differs greatly**.

5. Today's developments

5.1. HHJ Tayler wrote **"*The claimant accepts*** *after the application was submitted there were no specific additional* ***acts*** *on the part of the respondent that forced him to continue with the application, although it is contended the original pressure put on him to make the application* ***continued in some way*** *until the application had been determined".* We had anticipated the claimant, who could have refused to see the CAPITA doctor but went **because he was told he had to** by SO Nutton on 28 June 2013, would argue that was one way in which the pressure to see it through **was maintained**. If that was the last act relied upon the claim was nearly 3 months late. He may also have argued pressure was exerted by the respondent **doing nothing** to find any viable alternative. That appears to us to be the possibility HHJ Barklem and HHJ Auerbach saw. We now understand why HHJ Tayler wrote what he did.

5.2. Mr Tinnion said today, and Mr Brien did not challenge, that when asked by HHJ Tayler, Mr Brien was unable to identify in the evidence before the ET a single act (or omission) by a single person (named or unnamed) on a single occasion (dated or undated) after 20 February 2013 which compelled the claimant to continue his application for IHR. The claimant's new evidence did not identify a post-20 February 2013 incident either. Mr Tinnion says if the claimant had sought to withdraw his application after 20 February and the respondent put pressure on him not to, such allegations (i) are not part of his pleaded case(ii) are not in his witness evidence (iii) were not put to at the 2020 final hearing (iv) have never formed part of his case. We agree, but see no reason why the claimant seeking to withdraw his application should be a requirement of the respondent's conduct not being viewed by him and us as pressure to continue with it. Mr Tinnion also says the schedule of loss includes "*The claim was issued on 19 December 2013 with the tribunal finding that the last act of discrimination took place in September 2013*" but fails to mention precisely what **act** of discrimination took place in September 2013 – the EAT found it was not in the ET judgment. He

invites us to "*infer the obvious*" that the respondent did not engage in conduct after 20 February which "compelled" the claimant to complete an IHR assessment application ; the claimant knows this but is unwilling to admit it and is clearly hoping the ET will "***do his job for him***" by finding something in the evidence (which he has been unable to identify) justifying a conclusion the respondent engaged in conduct after 20 February 2013 which "compelled" him to continue.

5.3. Today, the case Mr Brien presented was unambiguous. His written submissions include
On 28 August 2012, the Governor of the prison told SO Nutton to ask C to complete consent to a report for Ill Health Retirement (IHR).
C was first spoken to by SO Nutton about IHR on 10 September 2012. He was asked to complete the IHR form on 17 October 2012.
*C **completed** the IHR application on 20 February 2013*
The parties agree that there was no further conduct by R after 20 February 2013. Regrettably, neither party made this clear at the time of the original hearing.
In any event, C accepts that this aspect of his harassment claim was pleaded on the basis that the 'conduct' was being compelled to complete the IHR assessment application.
Although the effect of this remained until 20 September 2013 when C accepted that it was in his own interests to complete the IHR form (though advice from his union rep), ***C cannot point to any acts/omissions by R in relation to the pleaded claim of completing the application.***
*In those circumstances C does not advance an argument the conduct extended over a period of time. It is however argued the pressure C **felt** under as a result of R's conduct up to 20 February extended until C accepted the need for the IHR and is relevant to the question of extending time.*
The parties agree that in light of the above, the primary 3-month limitation period for presenting the claim expired on 19 May 2017. The Claim was therefore presented 7 months out of time. The sole issue for the tribunal is whether it is just and equitable for C to be permitted to present the complaint 7 months out of time.

5.4. Rule 2 of the Employment Tribunal Rules of Procedure 2013 says their **overriding objective** is to enable ET's to deal with cases fairly and justly which includes *(a) ensuring the parties are on an equal footing (c) avoiding unnecessary formality and seeking flexibility in the proceedings (d) avoiding delay.* Rule 41 says "*The tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair having regard to the principles contained in the overriding objective. . The tribunal shall seek to avoid undue formality and may itself question the parties or any witness so far as appropriate **in order to clarify the issues or elicit the evidence**.*

5.5. In East of England Ambulace Service NHS Trust-v-Sanders, Langstaff P. held an ET confused assisting litigants in person to give the best evidence they would wish to give to make their case with making for them a case they have not tried to make. The ET "descended impermissibly into the arena", its job is to adjudicate impartially on a dispute between the parties in the case before it. It is not to advocate the case for either. Counsel for the Trust argued principles, though expressed in relation to the civil courts, "*where there are forensic gladiators acting for both sides who can trade blows with equal force and knowledge*" are nonetheless the approach which should be taken in ET's Langstaff P. said ET's are familiar with people who have no legal training and may find the whole process of going to law distressing and difficult to navigate without any experienced person to turn to. Inevitably they are at a disadvantage when confronted by the legal team instructed by another party. An ET has to be sensitive to that. This may, however, lead to a fudging of the boundary which must be kept between that which it is obliged to do, that which it is not obliged to but can do, and that which it has no right to be doing at all. Its role is to ensure the questioning by one side or the other is appropriate, and, by asking its own questions, that a witness gives the best evidence he would wish to give. However, ET's which should be careful to avoid making a case for either party. It should begin with the complaint before it, understand why it has been made, and ensure clarity.

5.6. The claimant is disabled, a factor we must take into account to ensure the parties are on an equal footing, but he has been legally represented throughout. We must give the effect to the overriding objective without "taking the claimant's side".

5.7. We have no difficulty identifying in SO Nutton's own log him telling the claimant on 28 July seeing the CAPITA doctor was "mandatory" - a positive act. As in Matuskowicz, the continuing omission to provide any viable alternative role **effectively forced** the claimant to appeal the refusal IHR by as a better option than dismissal without it. We had anticipated an argument, along the lines in 4.11. above, the pressure to see through to a conclusion his assessment application for IHR continued beyond 20 February by the respondent's omission so the complaint **was in time, or** late only by a short period. **That argument must come from the claimant and his representatives not from us**. As we explain later, it may have made no difference, given what we heard today.

5.8. The claimant had made two short statements for this hearing. The first includes that the ET **found** "*the last act of discrimination took place in September 2013. The claim is therefore a few weeks out of time*". **We did not find that as such**. The first statement says in the last 4 months of 2013 *"I was not the same person as I am today, or even as I was before the tribunal in 2020… The simple answer for the delay would be that I was mentally incapacitated so was therefore unable to submit a claim within the prescribed time limits. Even had I wished to pursue such actions my wife had power of attorney over all my affairs as I was deemed mentally unable to manage my life's most basic of matters. The power of attorney was awarded to my wife by the mental health team / social services against my will and I had absolutely no say in the matter. So even had I have wished to pursue a claim, in the eyes of the law, I couldn't …" It was my wife and my union who did the work to get the claim issued in December 2013.. I was diagnosed with increased PTSD on 16 October 2013 [230] In light of my condition at the time and the support that I was being provided by my wife and my union, and in consideration of the fact that if the claim is out of time it is out of time by a matter of weeks with no other prejudice to the Respondent, I would ask the tribunal to find that it was just and equitable to extend time".*

5.9. The claimant recently was given extra time to submit this, his solicitor having told the ET he had a relapse in his mental health. He now appears to be relying **solely** on his ill health at the time **and** pursuit of internal means to resolve his issues to obtain an "extension". The second statement, which we saw for the first time today at NB142-143, says his case was about being "*treated like shit*" –"*they were throwing me away like a piece of garbage in the gutter*"---"*they could not be bothered to help me*"—and he was "*bullied into trying to take retirement*". This is closer to what we thought and found his case was in 2020 and seems to be an allegation of conduct extending over a period. We asked the claimant, who gave evidence, a few "open" questions. His answers tended to show he instructed his solicitors, and they had instructed Mr Brien, knowing the implications. We cannot, and would not, "take his side" and remind readers we found for the respondent on 4 of 5 allegations.

6. Submissions on "extension" of time

6.1. Mr Brien submits

C makes the following points in support of its claim that it would be just and equitable to extend time on this claim:

1. C's evidence as to his reasons for the delay are that he was 'mentally incapacitated at the time. This is supported by the ET's findings at §2.45 that he had PTSD in April 2013 and was unfit for work . C was formally diagnosed with PTSD on 16 Oct 2013.

2. *Shortly after C accepted the need for IHR in September 2013, he was invited to attend the capability hearing on 1 October 2013. This was heard in his absence on 18 October 2013, with the appeal heard on 23 December 2013. C was still trying to return to work and* ***deal with issues internally at this stage***

3. C also refers to his wife having power of attorney over his affairs which would undoubtedly have affected the time for C to present a claim;
4. In the present claim, any extension of time will result in consideration of matters seven years old at the time of the original decision, and the tribunal is required to consider this in its determination of whether to extend or not, the effect on R in the present case is significantly mitigated by the fact C's complaint and the meetings surrounding it were all recorded in a written record. In addition, there is little factually in dispute between the parties on this specific allegation that the tribunal needed to resolve. Though the period may be long, the effect on R is limited; it is not wrong for the ET to take into account the lengthy delay between the events happening and the trial was the parties' agreement to stay the employment claim pending the PI claim. The seven-month delay by C (from May-Dec 13) is in large part explained by his medical condition at the time and the fact he was still trying to reach an agreement with R to return to work.
It is clear from Adedeji and Abertawe the tribunal has a wide discretion and it is for the tribunal to consider in any particular case the factors that are most relevant.
In light of those factors, C submits that it is just and equitable to extend time in the present claim.

6.2. At the first hearing Mr Tinnion said it was not just and equitable to extend time because (a) the claimant had trade union advice throughout at the time he was trying to reach a solution before issuing proceedings (b) it is necessary his witness statement should put forward grounds for us to extend time because the burden rests on him to show it is just to extend time, not on respondent to show it is not, and (c) there is prejudice to the respondent in having to answer in February 2020 complaints about matters which occurred in 2012 and 2013

6.3. We rejected these submissions saying: "*4.12 On point (a), for many years Parliament has tried various means to ensure before employees rush to a Tribunal, they try to resolve problems internally. That is what the claimant and Mr Redford were doing. The claimant was in no fit mental state to be making fine decisions on when to issue and even if, which we do not accept, Mr Redford should have pressed him to, applying Chohan-v-Derby Law Centre we are not willing to say there were not good reasons for any delay. If we do not exercise the discretion, patience before bringing proceedings to allow the respondent the opportunity to remedy the situation would result in a decision that great wrong was done to a claimant but he can have no remedy because he waited too long.That is not just or equitable. On point (b) the discretion is for us to exercise and our decision may be made based on the facts we have found and submissions without the point being in a witness statement. On point (c) it is the short delay in bringing the claim to which we must have regard not the delay in it being brought to trial which is the fault of neither party. This case passes all the tests in Keeble for extending time*

6.4. Today Mr Tinnion submits it is not just and equitable for the ET to exercise its discretion to extend time, because: (i) 7 months is very substantially late (ii) throughout 2012 and 2013, the claimant had the support of his wife and trade union who were able to present an ET1 in December 2013 and he has not identified any reason why he (or they on his behalf) could not have presented his ET1 by 19 May 2013 (iii) earlier than 14 May 2013 the claimant had instructed a solicitor, who was giving legal advice about what he should/should not do. At OB306 SO Nutton's log of a phone call with the claimant on 14 May 2013) includes "*I tried to arrange a meeting with Officer Johnson but **he** said that he had sought advice from **his solicitor** who had advised him not to have the meeting as I would be accompanied by another person from the prison and this was in breach of medical confidence as only Officer Johnson and myself should discuss his medical issues*" and , at OB320 on 23 July 2013):"*Spoke with Officer Rayfield* (the claimant changed his name to this from, and later back to, Johnson) *this morning and we discussed his emails and the disability act. I explained the policy and said I would put it in writing what he had asked for. Officer Rayfield informed me that **he had spoken to his solicitor** about his claim against the Governor and that the*

prison service solicitor had asked for an extension of time to the set date to respond which was originally 30th May; this has now been extended to 30th July." The claimant said today **he** had not received advice from a solicitor but CM Redford may well have relayed advice the union's solicitor had given to him. Although we accept the claimant himself was not in a fit state to be weighing up legal advice, those helping him were.

6.5. Mr Tinnion submits the claimant's new witness evidence, seeking to explain his delay, alleges "*I was mentally incapacitated so was therefore unable to submit a claim within the prescribed time limits. Even had I wished to pursue such actions my wife had power of attorney overall of my affairs as I was deemed mentally unable to manage my life's most basic of matters*" Mr Tinnion cites 39 items of contemporaneous documentation contradicting the claimant's case that he was not fully capable of rational thought, expression, and action at the time. He points out the power of attorney the claimant mentions has not been disclosed and he was never, as he accepted, "sectioned".

6.6. Mr Tinnion also submits the claimant's harassment claim is extraordinarily stale: in April 2019 when the ET stay was lifted, it concerned matters already 6/7 years old; in February 2020 at final hearing, it concerned matters then 7/8 years old; now it concerns matters which occurred 9/10 years ago. He says, through no-one's fault, the evidence has been materially adversely affected by the stay while the court claim was progressed/ resolved and the absence of witness evidence from Governors Lamb, Finlay, Fox and Jobling, Ms. Liddell, Ms. Robinson, Ms. Wetherell.

7. Relevant Law and our Decision

7.1. Guidelines on when it is "just and equitable" to hear a case presented after 3 months were given in British Coal Corporation-v-Keeble 1997 IRLR 336. The length of and reasons for the delay, whether the claimant was being advised at the time, if so by whom, and the extent to which the quality of the evidence is impaired by the passage of time are all relevant considerations. On 15 January 2021 in Adedeji Underhill L.J. said Keeble only suggested potentially relevant factors, but rigidly applying them could lead to a mechanistic approach to what is meant to be a broad general discretion. **We have never thought otherwise.** This is not "new" law. Leggatt LJ said in Abertawe Bro Morgannwg University Local Health Board-v-Morgan 2018 ICR.1194 " *.. Parliament has chosen to give the employment tribunal the widest possible discretion. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent* ***(for example, by preventing or inhibiting it from investigating the claim while matters were fresh).***

7.2. Adedeji was submitted a few days outside the time limit but allowing it to proceed would have resulted in consideration of matters that went back over a considerable period. Well before Hendricks, Sir John Mummery in the EAT in Quereshi-v-Manchester Victoria University, extensively cited with approval by Sedley LJ in Anya-v-Oxford University, explained ET's have to deal with background events from years earlier and try to keep the evidence within reasonable bounds. **There is nothing new about this either**. In 2001 EJ Garnon chaired Rihal-v-London Borough of Ealing. The claimant, a Sikh immigrant, had worked as a surveyor in London for many years, had not been given as many "acting up" opportunities as British colleagues and repeatedly failed to secure promotion to higher managerial grades. His claim was brought **within 3 months** of two promotions he had been refused but his evidence covered historic failures to give him the "springboards" for promotion of "acting up". The respondent argued it was **hard** in 2001 to give as good an explanation as they may otherwise have been able to of why the claimant had not been given such opportunities many years earlier due to passage of time and senior managers having left. The ET said it had to make allowances for that, but as Mr Rihal's pleaded claim was in time, it was right to consider the historic evidence. The EAT and Court of Appeal upheld our decision.

7.3. Underhill LJ held the EJ in Adedeji was right to be concerned evidence of old events was likely to be less good than if a claim about them had been brought nearer the time, but added: "*Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less undesirable in principle. As part of the exercise of its overall discretion, a tribunal* ***can*** *properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be* ***to open up*** *issues which arose much longer ago*" and later" *the fact the grant of an extension will have the effect of requiring* ***investigation*** *of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose the evidence may be less cogent than if the claim had been brought in time.*"

7.4. HHJ Tayler said para 4.12 of our original reasons gave the impression delay in coming to trial was of **no** relevance, but that was never our view, though we see how what EJ Garnon wrote could give that impression. Our reference to "*the fault of neither party"* was an observation that a long line of authority says where there is factual overlap between what a Court and Tribunal have to consider, the court case should go first, but if there is some claim, like harassment, which ET's have been given exclusive jurisdiction to decide, the Court cannot deal with it and it must then come back to the ET. That this would be better avoided was a feature of Lord Justice Briggs' report into civil justice in about 2015, but the problem remains. Were it not for the claimant's ill health the civil claim would have been tried or could have been settled and the ET case heard much earlier. It appeared to EJ Garnon necessary to record that neither party, nor the ET, should be blamed for that.

7.5. Time limits are short because discrimination cases are fact sensitive so it is necessary for witnesses to be able to remember what was said or done, why, and the context in which it was. The sooner an employer is made aware a claim may be made, the sooner enquiries can be made of witnesses and recorded in writing, whilst events are still as fresh as possible in their memory. Leggatt LJ in Abertawe Bro Morgannwg and Underhill LJ in Adedeji spoke of prejudice to a respondent having to **investigate** matters which occurred years ago. The effect of the passage of time in this case is hugely different to Rihal where people who had taken **routine** decisions about "acting up" years earlier had moved on or retired or died **before it was known a claim may be made** and their decision would have to be explained. There is nothing routine about a prisoner being brutally murdered in a cell. It beggars belief extensive investigations into what happened, and why, were not made and evidence reduced to writing as soon as the respondent became aware claims against it would be made in the ET and civil courts which it was in 2013. Mr Tinnion submitted in 2020 prejudice to the respondent in having to **answer** then complaints about matters which occurred in 2012 and 2013 was clear and obvious. We disagreed then and now.

7.6. Mr Tinnion broke the harassment claim down to five points, all but the second of which concerned acts or omissions on which the three witnesses we heard **could** give an explanation **and did**, so we found for the respondent. Passage of time did not prejudice it at all, because those **who took decisions** refreshed their memories from broadly contemporaneous notes and documents. In contrast, on the IHR claim, we heard two SO's who were obeying orders and following HR advice, and a fairly low ranking HR officer who had **no direct involvement** with the case and could not answer for those whose conduct caused harassment. We heard no Governor or Ms Liddell, who was still with the prison service and had been promoted. Mr Tinnion rightly says the ET was informed at the liability hearing **some** people had retired/left the service, but we were not told who had or when. We were not told which were not traceable. He adds "*even if witness evidence had been* ***sought*** (indicating it was not) *from these 7 potential witnesses after the stay was lifted in April 2019, all 7 would have had to base their recollections on events already more*

than half a decade old". As we have said they, like those who were called, would have notes and documents to rely upon.

7.7. It is up to a party to decide who to call but the effect of s136 EqA is that explanations for why acts and omissions occurred need to come from as many of those who took decisions or omitted to do something as can give evidence. As any advocate will know, not calling witnesses who are obviously from the pleadings and the claimant's witness statement needed to answer his allegations may be a conscious decision that the witness is likely to do more harm than good to one's case under cross examination **or may be for other reasons**. Whatever the reason, key people were conspicuous by their absence. Recently the EAT decided a second appeal in Department for Work and Pensions-v-Boyers. Mr Tinnion appeared for DWP. The EAT commented it is more difficult for a respondent to show it acted proportionately if, as happened in the case, it provided **no evidence on how its decision-makers thought their actions would serve legitimate aims or had considered other, less discriminatory, alternatives.** What caused the respondent to lose the one claim before us was not prejudice caused by passage of time but not calling the very people who **may** have explained why efforts which would normally be made to keep an experienced officer in the prison service were omitted and IHR was the single minded course senior prison managers and HR followed. We see exactly why the EJ in Adedeji decided as she did. She had a discretion and exercised it on the facts of that case because she could take into account the prejudice to the respondent of avoidably having to meet historic background evidence. **Nothing in Adedeji causes us not to exercise the broad discretion on the facts of this case.** There are other reasons we are not willing to exercise our discretion in the claimant's favour.

7.8. First, Mr Brien having accepted there was no harassing conduct after 20 February we are being asked to to excuse a 7 month delay, not, as we thought in 2020, 18 days at most.

7.9.1. Second, a significant difference between what we know now and what we knew in 2020 relates to the help the claimant did have at relevant times. In 2020 we knew prison managers shunned the attempts of Ms Butler to advise them what they should do but did not appreciate Ms Butler had been assigned to a role which enabled her to take the claimant's side and "advocate" for him as well as advising the respondent. CM Redford is a representative of the POA with access to advice from its full time officials and Thompson's solicitors. The claimant said CM Redford would have been taking such advice if only on the court claim. A personal injury claim must be brought within three years from the injury and by 2013 it should have been underway. Even a solicitor specialising in that would know time limits in an ET are much shorter and, in the absence of evidence from CM Redford, we would be surprised if no-one at Thompsons alerted him to that. Ms Butler as a disability advisor must have known of it.

7.9.2. Fault of an advisor is not of itself fatal (Chohan-v-Derby Law Centre) and using an internal process is not **in itself** an excuse for not issuing within time(Robinson-v-The Post Office) but both are relevant factors. What we were told in 2020 did not convey the claimant had as much skilled advice as we now know he had. In the stricter test for hearing late claims under the Employment Rights Act 1996 Dedman-v-British Building held it may be enough that a claimant was **reasonably** unaware of the time limit. However, Wall's Meat Company-v-Khan and Riley-v-Tesco Stores held if a claimant's advisors were **not reasonably** unaware their fault is to be attributed to him. We have more discretion under the EqA but cannot ignore what his advisors should have realized.

7.10. The claimant's health issues at the time is one reason argued for it being just and equitable to consider this claim. Mr Tinnion, rigorously but fairly, challenged the claimant saying he was at all times "compos mentis". As on other occasions in this case, Mr Tinnion's instructions placed him in the unenviable position of having to pursue contradictory lines of questioning. In 2020, he put to the

claimant he was not being realistic about the gravity of his condition even in 2013, a valid question, but hard to reconcile with the respondent not admitting disability until 2019 and him now saying the claimant was himself well enough to make judgments. While we do not accept Mr Tinnion's view the claimant's "*lack of candour is to be deprecated*" but agree with his characterisation of the claimant as an "*unreliable historian*". We believe he was severely impaired in his understanding and decision making at relevant times. Knowing how ill he was makes it important his advisors at the time should have taken the initiative of acting in his best interests, even without his express agreement.

7.11. The claimant told us himself today he was, at the time, desperate to get back to work, not retire, and not focused on making **any claim** in the ET or Courts. He was raising grievances written with help from others, which contained all manner of objections to the way he was being treated. In December 2011 he tried to speak to Ms. Liddell without success. Soon after,he suggested a temporary secondment to another prison or some post in the civil service to Ms. Robinson and asked for a meeting with Ms Liddell to discuss his options. Despite many calls, she never rang back. On 23 February 2012 he emailed her about an advertised post in the prison service webpage and had no reply. After he went sick, months went by without him being offered an alternative role. Ms Butler and CM Redford would know how the prison service works, so even if the claimant and his wife, naïvely, reasonably did not "read the signals" the respondent's actions sent out as showing nothing would change, they should have known better. We do not criticise them as we know it is hard to tell a person one is representing what you know they do not want to hear, but sometimes such advice has to be given. As early as 11 March 2013 (see para.1.27. above), they should have realised internal processes were getting them nowhere and told the claimant to issue a s.20/21 and/or s.26 claim. Another reason time limits are short in discrimination cases is an early claim can make the employer deal with it before matters reach a "point on no return" like dismissal. As Lloyd L.J. and Sedley LJ said, set out in 2.21 and 2.23 above, a policy of the legislation is to impose relatively early cut off dates for claims which may be brought when the employment is ongoing, which both s20 and s26 claims can, to prevent a situation of neglect continuing. We would not wish the claimant, who has been through so much, to think Ms Butler, his union or its legal advisors had culpably "let him down" ,though errors of judgment, in difficult circumstances, may have been made.

7.12. HHJ Barklem, allowing the appeal to proceed to a preliminary hearing, said "*The judgment under appeal is an excoriating indictment of the treatment of a prison officer who suffered PTSD after witnessing the aftermath of the mutilation.. and murder of a prisoner by two other inmates. It catalogues a disbelieving and mechanistic approach applied by senior officers, a refusal to engage properly a disability adviser, who was viewed as of use only to deal with aids and adaptations for physical disabilities. The ET held the fact the Claimant was later given ill health retirement and his claim for damages settled did not detract from the harm done from writing him off as a hopeless case for rehabilitation to do some work long before he and his advisers were ready to do so…* We agree entirely the claimant was treated very badly due to a disbelieving approach by Governors and a mechanistic one by HR. But we cannot ignore the law as to time limits just because we fell sympathy for him the question for us is whether there is enough to make it just and equitable to consider a claim seven months, or even if only three months, out of time when it could, and should, have brought in time. We find there is not.

EMPLOYMENT JUDGE T M GARNON

JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 14 JULY 2022