



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Smith

**Respondent:** Transport for Wales Rail Limited

**Heard at:** Cardiff

**On:** 29 June 2022

**Before:** Judge MM Thomas

## **Representation**

Claimant: Ms K Swan, Solicitor of Swan Craig Solicitors

Respondent: Ms M Tutin, Counsel instructed by Hugh James Solicitors

**JUDGMENT** having been sent to the parties on 5 July 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## **Reasons**

### **Issues**

1. The claim has been listed for a preliminary hearing for the determination of two issues:
  - (i) As to whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act 2010 ('EqA 2010') at the time of the alleged discriminatory acts; and
  - (ii) As to whether the Claimant brought a claim originally for breach of contract for notice pay thereby permitting the Respondent to bring a breach of contract counterclaim.

### **Proceedings to date**

2. On the 15 February 2022 there was a previous preliminary hearing as a result of which case management orders were made. In short, following document disclosure/witness evidence exchange subsequent to that hearing, it was

determined that this preliminary hearing would be necessary to address the issues identified.

### Documents and Witnesses

3. The Respondent provided two bundle of documents for the hearing. The first bundle was the agreed bundle in regard the first issue, labelled as the 'Disability Hearing Bundle, it ran to 119 pages ('Bundle A'). The second bundle labelled the 'Employers Counter-Claim Bundle' ran to 114 pages ('Bundle B').
4. I heard oral evidence from the Claimant. No further witnesses were called. The Claimant gave evidence by affirmation. He relied upon the contents of his disability impact statement which was undated ('statement' - pages 86-87 Bundle A). The Claimant did not amplify upon the contents of his statement in oral evidence.

### The claim background

5. The Claimant was employed by the Respondent as a train driver from 15 August 2016 until his resignation on 16 June 2021. He was involved in a serious but non-fatal railway accident involving a member of the public on 9 February 2021.
6. The Claimant's claim has been to date premised on the basis that he was a disabled person for the purposes of section 6 of the EqA 2010 and as such, he was unlawfully discriminated against by the Respondent. In summary, as identified at the preliminary hearing on 15 February 2022, the Claimant's claims were of constructive unfair dismissal, failure to make reasonable adjustments, discrimination 'arising' and indirect disability discrimination.

### First Issue

#### Whether the Claimant was a disabled person within the meaning of section 6 of the Equality Act at the time of the alleged discriminatory acts

#### The Law

7. Section 6 of the EqA 2010 defines what is meant by disability.

*(1) A person (P) has a disability if—*

  - (a) P has a **physical or mental impairment**, and*
  - (b) the impairment has a **substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities**.*
8. I emphasize above, by bold print, the specific factors within the definition that must be considered when determining whether a person has or had a disability.

9. Section 6 of the EqA 2010 must be read together with Schedule 1 of it to establish who is considered as having the '*protected characteristic*' of disability. In short, Schedule 1 supplements the definition of disability set out in section 6 as it defines the majority of the terminology.
10. Both representatives reminded me that the assessment of whether the Claimant was a disabled person for the purposes of section 6 of the EqA 2010 is not determined on the basis of his circumstances at the date of this hearing but must be determined on the basis of his circumstances at the time of the alleged discriminatory acts (**All Answers Ltd v Mr W [2021] EWCA Civ 606**).
11. My starting point when considering the approach to adopt is that as set out within **Goodwin v The Patent Office [1999] ICR 302** to which both representatives referred within their submissions.
12. **Goodwin** provides guidance as to the approach that should be adopted and the four questions that should be asked.
  - (i) Does the Claimant have a mental or physical health impairment?
  - (ii) Does the impairment have an adverse effect on the Claimant's ability to carry out normal day-to-day activities?
  - (iii) Is the effect substantial?
  - (iv) Is it long-term?
13. Again, I remind myself that when considering these questions although I have set them out in the present tense, I must apply them to the Claimant's circumstances as at the time of the alleged discriminatory acts, which from hereinafter I refer to as 'the relevant time'. Further, when applying the **Goodwin** approach, although the questions can be addressed separately, what must be considered is the overall picture, an approach which reflects the legislation (**Mr A Elliott v Dorset County Council UKEAT/0197/20/LA**)
14. In regard the first of the **Goodwin** questions, it was not in issue that the Claimant has and had a mental health diagnosis at the relevant time. It was accepted, as set out in the Occupational Health Physician's report of Dr J Behr ('OHP') dated 26 May 2021 ('OHP's report'), that he had a diagnosis of anxiety, depression and '*potentially some elements of PTSD*'. In short, it was accepted that the Claimant had a mental health impairment in the relevant time.
15. The issue at hearing relates to the answers to the remaining three questions, that is, whether the mental health impairment was substantial, long-term and adversely affected the Claimant's ability to carry out normal day-to-day activities.
16. When considering normal day-to-day activities those activities should encompass activities relevant to the Claimant in both his professional/working and personal life. The focus should be on what the Claimant cannot do because of the impact of the impairment, as opposed to what he can still do. (**Paterson v Commissioner of Police of the**

**Metropolis [2007] IRLR 763 and Aderemi v London and South Eastern Railway Ltd UKEAT/0316/12**). Normal means what would be normal for most people and will include mobility, concentration, memory, incontinence, in short, the list is non exhaustive. The question is whether the disability prevents a person from undertaking ordinary tasks.

17. In regard long term, Schedule 1 of the EqA 2010 provides a statutory definition. Long-term means an impairment which has lasted for at least 12 months, one that it is likely to last for at least 12 months, or one likely to last for the rest of the life of the person affected.
18. When considering as to whether the impairment is substantial, I refer to paragraph 4 of Schedule 1 of the EqA 2010. Equally I refer to section 212(1) of the EqA 2010 which defines substantial as meaning '*more than minor or trivial*'.
19. I also refer to the guidance in **Leonard v South Derbyshire Chamber of Commerce [2001] IRLR 19**. In summary, **Leonard** states that when considering what is meant by '*substantial adverse effect*'
  - (i) focus should not be on what the employee can do easily but should be on what they cannot do or can only do with difficulty.
  - (ii) The decision maker should not attempt to balance what an employee can do against what he cannot do; he must consider the whole picture.
  - (iii) Because an employee can mitigate the effects of impairment, it does not prevent them being disabled.
  - (iv) The Guidance (then DDA guidance) should not be taken too literally, and the examples given in it are to be treated as only illustrative not used as a checklist.
20. In summary, when considering the cumulative effects of an impairment it is important to consider its effect on more than one activity, which if taken together could result in an overall substantial adverse effect.

### **The factual background**

21. It is not in issue that on 9 February 2021 when the Claimant was in the course of his employment as a train driver, that he was involved in a serious incident ('the incident').
22. Equally, it is not in issue that he was immediately absented from work as a result of the same, not on Respondent's ill health policy grounds but in accordance with the Respondent's '*chain of care support procedure*', which has been referred to at hearing as '*the chain of care process*', a procedure triggered following the involvement of an employee in a traumatic event.
23. Further it is not in issue that during the relevant time the Claimant requested that he be allowed to work as a volunteer for St John's Ambulance and as an NHS vaccinator.

**Medical evidence disclosed material to the relevant time.**

24. The GP notes and records confirm that the Claimant's first consultation with his GP following the incident was on the 23 February 2021 where the GP recorded what had happened. Thereafter followed further consultations with his GP on 23 March 2021, 5 May 2021 and 11 June 2021. All those attendances as stated by the Claimant in oral evidence were also because he needed to obtain a Fit Note (Med 3) for the Respondent for the purposes of his continued absence from work. The entries in the GP notes and records on those dates confirm that position. Further, the GP notes and records confirm that on the 5 May 2021 it was agreed by the Claimant and his GP that he would be referred onwards to the mental health services for further mental health input.
25. There then follows in the GP notes and records, a record of the discussion between the Claimant and the primary care mental health gateway worker ('mental health support worker') on 14 June 2021. What is set out refers to the incident, the Claimant's continuance to experience psychological issues, sleep disturbance, heightened awareness, difficulty relaxing and nocturnal enuresis since the incident. It also recorded that at that time the Claimant tried to structure his day, he went for a walk every day, and found time spent with horses relaxing. Further, it indicated that he had support of friends and family but found it hard to distract himself during the day. Thereafter it set out the treatment options discussed, options which effectively were considering the way forward for the treatment of the Claimant's mental health.
26. There was also then the letter from the Beard Medical Practice dated 15 March 2021. In oral evidence the Claimant explained that he consulted with Dr Beard on a private basis at that time, as his own GP was absent from the surgery. My understanding when asked about this was that he did so because he needed a medical letter in regard his mental health status to provide to the Respondent for him to be able to undertake the voluntary work with St John's ambulance at the vaccination centre.
27. The only other medical evidence that originated during the relevant time was the previously referenced OHP's report when the diagnosis of anxiety, depression and '*potentially some elements of post-traumatic stress*' was made. The OHP at that time in consultation explained to the Claimant the importance of him pursuing some form of treatment, as at that time the Claimant had neither independently, nor through the Respondent, availed of treatment. The OHP's opinion was that the Claimant was not fit for a return to work in any capacity and not fit for his then role, that is, his job as a train driver nevertheless, it was his opinion, that '*with the right therapy he could potentially return to that role*'. He concluded that there should be a further consultation in four weeks' and that '*hopefully*', in the intervening period that the Claimant would start counselling.

**The facts**

28. The Claimant relies upon what is set out within his impact statement dated 23 March 2022 ('statement' - page 86/87 Bundle A) which I have taken time to read and of which I have sought some clarification and amplification upon at hearing.
29. I would state at this juncture that the statement is somewhat generic in its approach, it sets out in general terms the overall impact that the incident had on the Claimant throughout the relevant period, that is, it describes his withdrawal from social engagement, his need to wear headphones when out, problems with his concentration, night-time sleep disruption and nocturnal enuresis in addition to suffering from palpitations. In short, it does not specifically address the impact of the mental health problems on his ability to undertake normal day-to-day activities and as such, it has been in regard to the latter that I have sought both clarification and amplification.
30. In summary, the Claimant's oral evidence identifies and establishes that despite the aforementioned issues that on a daily basis at the relevant time he was able to get up every day, dress himself, plan his meals, eat when he should, do his shopping, go out, travel on public transport, manage his affairs and effectively, get on with his life. He remained in social contact with friends and family. At the relevant time the UK was in lock down, therefore social contact was by remote means nevertheless, there was social contact which he confirmed in oral evidence, and which is also confirmed by the mental health support worker's record. Further, despite the mental health issues, he was proactive, he was very keen to join a volunteering program, I appreciate that he felt it would help his mental health because he was at home all of the time and as previously stated, the UK was in lockdown, nevertheless, he felt sufficiently motivated to complete an application and his DBS check to become a volunteer for St John's Ambulance at the vaccination centre.
31. I sought some clarification from the Claimant as to what his voluntary work would have involved. In oral evidence the Claimant explained that he had hoped to be placed at the vaccination centre in his locality, a centre to which he would be able to walk. His role would be that of '*meeting and greeting*', he would meet and greet the people coming into it. In short, despite the fact he referred in his statement to his withdrawal socially from others, he nevertheless was prepared to put himself forward to work as a volunteer at the vaccination centre in a role that would involve engagement with unfamiliar people. Also, a busy environment. Further, although I accept that during the relevant time this role never materialised nevertheless, the Claimant felt at that time that he was capable of undertaking it. I make the same observation in regard to the application he also completed in the relevant time to be a vaccinator for the NHS. Again, although this role never materialised the Claimant still felt that he was capable of undertaking it, all of which would have involved engagement with unfamiliar people in a busy environment.

32. The statutory definition of disability requires for the impairment to have a substantial and long term adverse effect on the Claimant's ability to carry out normal day-to-day activities
33. As identified in **Paterson, Aderemi** and **Leonard** focus should be on what the Claimant cannot do because of the impact of the impairment, as opposed to what he can still do. Further, the approach should be a holistic one with a consideration of the cumulative impact of the impairment. In summary, when considering all the evidence in the round in relation to the impact of the mental health impairment, the evidence indicates that at the relevant time, despite the issues the Claimant asserts he had, he was nevertheless, on a day-to-day basis, in control, he was functioning normally. He referred to having a structured day in the mental health assessment which is borne out in his oral evidence. There is no suggestion that there was self-neglect. He was looking after himself. He dressed, feed himself, and got on and did what he needed or what he was required to do on a daily basis.
34. Equally, he was able to attend appointments. I accept, as I can see from the GP notes and records that the Claimant's appointments with his GP were by telephone nevertheless, the UK was in lockdown and as such, face to face appointments were not taking place. In short, the appointments were made by the Claimant and albeit the Claimant's mental health status was discussed nevertheless, the reason for the appointments was also because, as the Claimant stated in oral evidence, he needed to obtain a fit note for the Respondent which is supported by the entries in the GP notes and records in the relevant time.
35. In regard to in person appointments, if there was such an appointment the Claimant was able to attend. In his oral evidence as confirmed in his statement, he stated that he was able to travel to his orthodontic appointments. Further, although he would normally have got the train to those appointments and instead travelled by bus, because he wanted to avoid going near the incident site, he nevertheless, was able to get there.
36. In short, when considering the evidence in the round, despite the asserted issues pertaining to social withdrawal and concentration, the evidence indicates that the Claimant was able to make and attend appointments and for the purpose of attending the orthodontic appointments, travel on public transport despite the issues he asserted to have with feeling the outside environment to be *'hostile'*.
37. It was not in issue, at the relevant time, that the Respondent did not consider the Claimant was fit to work as a train driver, and on the basis of what is set out in the OHP's report, the OHP did not consider that the Claimant was fit to do any other job, even one office-based. On the contrary, this was not the Claimant's view, the Claimant still felt that he was able to do work, albeit volunteer work. I refer at this juncture to the entry in the GP notes and records

of the 11 June 2021 (page 101). In oral evidence the Claimant stated that what is recorded in relation to his return to work was incorrect. In short, the entry did not relate to the Claimant's disappointment at not being fit to return to his job with the Respondent, but on the contrary, his being unable to work as either a volunteer with St Johns Ambulance, or with the vaccination program. In short, he was disappointed that the Respondent would not allow him to do any work '*outside the rail environment*'.

38. Both representatives refer to the EqA 2010 guidance and in particular, as to what is set out therein in regard to what would be considered normal day-to-day activities.

*'In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern'*

39. As such, normal day-to-day activities are to get up, get dressed, have something to eat and go to work. In short, the Claimant was doing all of this bar going out to work. As previously stated, it was not in issue that the Respondent at the relevant time did not consider him able to drive a train, or even undertake office work for it. In short, the Respondent did not consider the Claimant able to work at all within its environment because of the incident. Although I accept that to be able to go out and work is a normal day-to-day activity, on the contrary, I do not accept that driving a train would be a normal day-to-day activity, and further, considering the nature of the incident, that even office work for the Respondent at the relevant time would have been. Nevertheless, putting that aside, the Claimant felt that he was able to work albeit in a different environment and capacity. He did not identify any issue with his ability to be able to get up, get dressed and go to vaccination centre and be a volunteer meeting and greeting members of the unfamiliar public undergoing the vaccination process. In short, if that had been his job, he would have been able to do it, a job which I consider is more akin to what would engage normal day-to-day activities.
40. In summary, what must be considered is what then the Claimant could not do because of the impact of the mental health impairment, as opposed to what he could still do.
41. The Claimant identified a lack of concentration, in that he was unable to listen to audio tapes. He stated that he had nightmares, and sleep issues and night



time enuresis two to three nights a week. He also referred to suffering from palpitations.

42. In regard to the concentration issues, the Claimant referred to enjoying listening to audio books, an activity which he undertook prior to the incident. His evidence was that subsequent to the incident he would lose track of an audiobook whilst listening to it and would feel insufficiently motivated to rewind it back to relisten. Although I accept, that potentially this may have been the case nevertheless, the evidence does not support that his concentration was affected the majority of the time or in regard to any other normal day- to-day activity. This was one activity. Nevertheless, against that, the Claimant had the concentration to complete application forms to work as a volunteer both for St Johns Ambulance, and then to be an NHS vaccinator. In oral evidence, he confirmed that completing the DBS check took time, all of which was done online. There was and is no evidence of issues with concentration pertaining to his ability to complete activities such as washing, dressing, and cooking. In relation to the latter in particular, there was no evidence that he was at risk in the kitchen because of a lack of concentration. Further, there was no evidence to indicate that during that period of time he was incapable of managing his affairs.
43. The Claimant refers to wearing headphones when he went out to block out the noise around him. However, albeit undoubtedly this may have happened on occasion nevertheless, it is not consistent with his evidence pertaining to his desire to work within a vaccination centre as a volunteer where there would be a lot of unfamiliar people, noise and potentially difficult situations to deal with. In short, it was not consistent that he would have even considered himself able to undertake the role if he considered he would have been unable to work within such an environment. Equally, although understandably, he chose to travel by bus rather than train to avoid the incident area nevertheless, he was able to travel on public transport independently without issue. Therefore, again when considering the asserted social withdrawal, I find that this was not the majority of the time, and had little, if any impact, upon the Claimant's ability to undertake normal day-to day activities.
44. As to the night-time issues, that the Claimant was having nightmares in the relevant time was documented within the Respondent's OHP's report. Ms Tutin at hearing put to the Claimant what was set out in the entry in the GP notes and records dated 5 May 2021 where it recorded that the Claimant was '*still going on trains, no flashbacks, no nightmares*'. The Claimant did not dispute that he was travelling on trains at the relevant time although, not on trains which would have taken him near the incident. Equally, he did not dispute that he was not experiencing flashbacks, however, he did dispute that he stated that he was not having nightmares. In short, his evidence was that what had been recorded in relation to the latter was incorrect. I accept the

truth of the Claimant's evidence in relation to this. I noted from the GP's record that the GP with which whom he had the consultation was a different GP to his usual GP. The OHP's report three weeks later clearly identified the nightmares as ongoing, as did the entry on 14 June 2021 in the GP notes and records by the mental health support worker.

45. The Claimant's evidence was that the impact of the night-time issues, that is both the nightmares and the enuresis were that he would have to sleep late as he would be tired. When this was explored further in oral evidence, he stated that if he had had the role with St John's Ambulance, that on the days that followed the night-time issues, that he would have had to sleep late nevertheless, as it was a voluntary role, he would have assumed there would have been flexibility. The night-time issues, as previously identified, were on two to three nights a week, not every night. Further, although I fully understand and accept the embarrassment that the Claimant clearly had and has as result of, in particular, the night time enuresis nevertheless, the impact was, that potentially two to three days a week the Claimant would sleep later. This was not the majority of the time. Further, although the Claimant would sleep later when he did get up, his day would continue as normal. In short, he would wash, dress, eat and carry on with all the normal day- to- day activities.
46. I do not intend to recite any further of the evidence. My starting point has been the statutory definition and to consider, in short, in the first instance as to whether the impact of the mental health impairment was at the relevant time having a substantial adverse effect on the Claimant's ability to undertake normal day-to-day activities (**Goodwin**). I consider this aspect of the statutory definition before I go on to consider the long-term effect. I find that it was not substantial. In making this finding I do not seek to diminish or minimise the impact of the incident on the Claimant's mental health nevertheless, I find the statutory test is not met.
47. Although I accept that there were issues at night two to three times a week the impact of which meant that the Claimant slept longer, and that the Claimant may not have been able to listen to his audio books as he previously did, and at times he needed to wear earphones when out, or, had palpitations, nevertheless, the evidence when considered cumulatively does not support that in the relevant time, the impact of the mental health condition had a substantial adverse effect on the Claimant's ability to undertake normal day-to-day activities. I do not intend to repeat what I set out above however, the evidence does not support that there was any impact upon the Claimant's ability to undertake normal day- to- day activities other than, his ability to undertake his normal work, that of a train driver. Nevertheless, even though those were his circumstances, he still felt sufficiently motivated to apply for volunteer roles. In short, he felt able to leave home to undertake a volunteer role. In summary, when considering what the Claimant could not do during

the relevant time, taking into account the night-time issues two to three nights a week, the impact on his normal day to day activities was minimal. Not only was he able to undertake and perform all the normal day- to- day activities he had previously undertaken with the exception of a potential issue with concentration listening to audio books, he was also sufficiently motivated to try to find volunteer work. In summary, I find, that there was not a substantial adverse impact upon his ability to perform normal day- to- day activities.

48. Nevertheless, even if I am wrong on that, I find that the Claimant has failed to discharge the burden of proof in regard to the longevity of the impairment. What amounts to long-term as previously stated is clearly defined. When considering the long term impact of the impairment, again, as previously stated, the Claimant's position is considered as at the time of the alleged discriminatory acts. I have attached significant weight to what is set out in the OHP's report. The OHP's report cannot be read piecemeal, that is paragraphs in isolation, it must be read as a whole. The OHP did not identify any concerns in relation to the risk of self-harm in short, if anything, on the basis of what is set out within the report, the outlook in regard the Claimant's recovery at that time with the Claimant accessing appropriate treatment was quite positive. The Claimant accepted that this was the position at that time when it was put to him in cross examination. Although the OHP did not consider that the Claimant was fit to work at the date of the report, he was '*confident*' that with the right therapy that the Claimant would potentially be able to return to his job as a train driver, although identified that that would not be in the immediate future. In summary, on the 26 May 2021, a period of just over three months from the date of the incident, it was not identified, that the Claimant's mental health issues were likely to last 12 months.
49. In summary, for all the reasons identified, I find that in the first instance, that the impact of the mental health impairment was not substantial and did not adversely affect the Claimant's ability to undertake normal day- to-day activities and even if I am wrong in that, in the second instance, that it was not at the time of the alleged discriminatory acts, long term.

## **Second Issue**

### **Breach of contract claim**

50. In short, there was an error in regard the ET1s issued. The Claimant sent in two ET1s to be issued. He then requested that one of them be removed/destroyed and the other one issued. The copy on the tribunal file that I have before me, is the ET1 which the Claimant requested be retained and issued. How I know this is because on one ET1 the Claimant claimed for notice pay, and on the other he did not. The ET1 on the tribunal file makes no reference to a claim for notice pay, it simply identifies a claim of unfair dismissal and discrimination. In short, breach of contract for non-payment of notice pay is not claimed. On the contrary, the second ET1, the form which

the Claimant requested to be removed/destroyed was somehow sent to the Respondent. A copy is provided in the bundle (page 17 Bundle B). On that ET1, the box is ticked indicating that notice pay is claimed (page 22). In short, this is not the copy on the tribunal file, nor is it the copy that the Claimant received following issue. I myself have made enquiries of administration as to why this may have happened however, administration are definite that the ET1 retained on the hard copy of the tribunal file would have been the ET1 sent to the parties. In short, it is beyond me as to how, or why, the Respondent was sent the ET1 it retains however, I accept that whatever happened, it could potentially have been caused by an administrative error on the part of the tribunal office despite what I have previously set out, as how else could the Respondent have received that version of the ET1.

51. Both representatives refer me to Article 4 of the Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994.
52. In short, having heard submissions on this, I have no reason to doubt the truth of the Claimant's evidence in regard to the claim he sought to bring and as such, accept that it was never his intention to bring a breach of contract claim in regard to notice pay. I find that no such claim was brought. I accept that the Schedule of Loss prepared subsequent to the preliminary hearing on the 15 February 2022 included a claim for notice and holiday pay however, I also accept, that that was because at that time, the Counsel that the Claimant had instructed for the purposes of that hearing, included the notice pay claim unbeknownst to him within it.
53. I also query as to why this issue has been raised by the Respondent at this late juncture. I understand that the Schedule of Loss may have caused the Respondent to question as to whether the notice pay claim was pursued nevertheless, prior to then, I find it was never raised. I make this finding having read through the tribunal correspondence, the original ET3 response, and the case summary from the last preliminary hearing where the claims brought were clearly identified and specified (paragraph 38).
54. The alternative submission is to allow the amendment on the basis of the injustice that would be caused to the Respondent in not being able to pursue its counterclaim. Detailed submissions by both parties' representatives have been made both orally, and also in writing by Ms Tutin, in regard to this. I do not repeat the contents of those submissions but simply confirm that in making my decision I have taken fully into account their submissions and the case authorities referenced in particular, **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650** and **Selkent Bus Co Ltd v Moore [1996] ICR 836**. I do not intend to set out the guidance other than state having applied the factors as set out **Selkent**, I make the following findings
  - (i) I find that the amendment is not minor, the Respondent is seeking to introduce a counterclaim.

- (ii) The amendment is clearly out of time. The Respondent refers to the ambiguity of the ET1s. The Respondent has from the outset been legally represented. If there was ambiguity in what had been stated by the Claimant, the Respondent knew that it could seek clarification. It did not.
  - (iii) In regard the timing and the manner of the application, the tribunal should not be used as a vehicle to correct any errors made by legal representatives. I understand that the solicitor with responsibility of the claim may have been on absence nevertheless, that does not explain why it has taken so long for this issue to be raised. The Respondent has had ample opportunity to address this point if it was in any doubt as to the nature of the claims brought, or to address the '*ambiguity*'. It has not. As previously stated at the preliminary hearing on the 15 February 2022 at which the Respondent was represented by Counsel, and the Claimant's claims were identified and specified, it was not raised by the Respondent that there had been a failure to include a claim for breach of contract for notice pay.
  - (iv) Finally, the impact of the delay and the consequence of adjournments or additional cost, although I accept that the proposed amendment would be unlikely to cause any adjournment or have any significant impact on costs, this is only one factor to be considered.
55. In summary, although I find that the delay would be unlikely to cause any adjournment to the proceedings or incur any significant additional costs nevertheless, that factor on its own is insufficient to outweigh the weight I have attached to the remaining **Selkent** factors. In short, in deciding whether to allow the amendment I have taken into account all of the circumstances and the balance of the injustice and hardship in allowing the amendment against the injustice and hardship of refusing it. Nevertheless, when considering the **Selkent** factors, the factors weighing in favour of refusing the application far outweigh those for allowing it. In short, the Respondent has been unable to provide a reasonable explanation as why the application was made so far out of time, nor why the proposed counterclaim was not previously raised.

### **Conclusion**

56. On the basis of what is set out at paragraphs 7-49 I find that the Claimant was not a disabled person within the meaning of section 6 of the Equality Act at the time of the alleged discriminatory acts.
57. In regard the Respondent's application to bring a counterclaim for breach of contract. I refuse the application first, on the basis that the claim brought by the Claimant did not include a breach of contract claim for notice monies which thereby entitles the Respondent to bring its counterclaim. Alternatively,

even if I am wrong in that, I find that the application to amend is simply too late and the reasons identified for the lateness of it have not been justified for the reasons I have set out.

Employment Judge

Date 2 August 2022

REASONS SENT TO THE PARTIES ON 17 August 2022

FOR THE TRIBUNAL OFFICE Mr N Roche