



EMPLOYMENT TRIBUNALS

Claimant: Dr A Sutton

First Respondent: Health Education England

Second respondent: Worcester Acute Hospitals NHS Trust

RECORD OF A PRELIMINARY HEARING

Heard at: (in private; by CVP)

On: 5 November 202

Before: Employment Judge Dean

Appearances

For the claimant: Mr Daniel Northall, of counsel

For the first respondent: Mr Michael Wright, solicitor

For the second respondent: Ms Emily Skinner, of counsel

RESERVED JUDGMENT

1. The claimant at all material times was disabled by the impairment of autistic spectrum disorder and attention deficit hyperactivity disorder.

2. The Tribunal does not have jurisdiction to entertain the claimant's complaint that she was unfairly dismissed by the Second Respondent. The claimant's complaint of unfair dismissal is struck out for want of jurisdiction.
3. The claimant's complaints of unlawful discrimination by the Second Respondent are presented out of time and within such further period as is just and equitable in the circumstances of the case. The Tribunal has jurisdiction to consider the claimant's complaints of unlawful discrimination against the Second Respondent.
4. The application of the Second Respondent that the claimant's complaints of unlawful discrimination against them should be made subject to a deposit Order does not succeed.

REASONS

Background

1. The claimant in this case was employed by the second respondent Worcestershire Acute hospitals NHS Trust ("the Trust"). The claimant was placed at the trust as part of her training programme with Health Education England (West Midlands) ("HEE") the first respondent in order to complete her obstetrics module. All junior doctors working in the NHS in England are required to take part in an accredited training programme. In the claimant's case the training programmes were delivered by HEE and junior doctors rotate through various different NHS trusts on a series of fixed term contracts. The claimant's employment with a trust was conditional on her continuing to hold a place as a trainee as part of the speciality training programme managed and run by HEE.
2. In this case, in July 2019 the claimant was given an outcome at the Annual Review of Competency Progression ("ARCP") outcome 4 which confirmed the claimant would be 'released from training programme with or without specified competencies'. The claimant appealed that decision made in July 2019 and as a result the claimant's employment with the Trust was terminated on the 4th of August 2020 when her appeal to HEE had been determined.

3. Initially the claimant made a reference to ACAS for a period of early conciliation which began on 8 October 2020 in respect of HEE. An early conciliation certificate was issued on the 27 October and the claimant presented a complaint to the employment tribunal on the 27 November 2020 in case number 1310821/2020 against HEE only. The claimant brought complaints of unfair dismissal, discrimination in relation to the protected characteristic of disability and in particular the prohibited conduct of direct and indirect discrimination, discrimination arising from disability, failure to make reasonable adjustments and a claim of unlawful harassment.
4. Subsequently a second complaint was presented on 19 January 2021 case number 1300242/2021 in respect of the Trust who were named in that application as the first respondent and HEE as the second respondent. The complaint alleged unfair dismissal and disability discrimination.
5. On 7 July 2021 before Employment Judge Connelly the two complaints were consolidated and the case was listed for an open Preliminary Hearing to determine the Preliminary Issues as described by EJ Connelly, in her order.
6. For the purposes of this hearing the First Respondent is identified as HEE and the Second Respondent as the Trust.

Issues

7. Three issues fall to be decided pursuant to the direction of Employment Judge Connolly dated 12 July 2021 [**128-129 (Orders) and 145 (Notice of PH)**]:
 - a. **Jurisdiction (discrimination)**: whether the Claimant's discrimination claims against the Trust should be struck out for lack of jurisdiction due to being presented out of time,
 - b. **Deposit order (discrimination)**: in the alternative whether they should be subject to a deposit order for the same jurisdictional reasons, and
 - c. **Disability**: if time, whether the Claimant is a disabled person within the meaning of s6 Equality Act 2010.
8. The Respondents no longer pursue strike out of the discrimination claims pursuant to Rule 12(2ZA) of the Employment Tribunal Rules 2013.

9. On 2 September 2021, when serving its Amended Grounds of Resistance, the Trust raised three additional preliminary issues which it respectfully asked to be determined at the Preliminary Hearing:

a. **Jurisdiction (unfair dismissal)**: whether the Claimant's claim of unfair dismissal against the Trust should be struck out for lack of jurisdiction [167], and

In the event that the claims against the Trust are not struck out,

b. **Further particulars**: for the Claimant to provide further particulars of the dates of the acts of alleged discrimination and the individuals involved [163], and

c. **Relisting of final hearing**: for the final hearing to be relisted due to the unavailability of key Trust witnesses [163].

10. In considering the applications I am asked to determine the issues in the following order:

- a. Jurisdiction – whether the unfair dismissal complaint against the second respondent the Trust should be struck out for lack of jurisdiction;
- b. Jurisdiction – discrimination whether the discrimination claims against the Trust should be subject to a deposit order;
- c. If the claims against the Trust the second respondent are not struck out an order for further particulars to be made;
- d. Disability.

Legal framework

Disability

11. An individual is disabled for the purposes of the Equality Act if:

“6 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

12. In considering the statutory meaning substantial means more than minor or trivial. Long terms means that the adverse effects have lasted or are likely to last 12 months or more or the rest of a person's life, meaning that the circumstances to be likely are such that they could well happen.

13. The Guidance on the definition of disability 2011 and the Code of Practice on Employment 2011 are helpful sources of information to assist my consideration of disability and the effect of an impairment. In particular I have had regard to Appendix 1 of the Code of Practice and the Guidance B12 – 17 – Effects of Treatment; C1-2 – Long-term effect; C3-4 Meaning of 'likely'; C5 – 8 Recurring or fluctuating effects; C9-10 Likelihood of recurrence; D2-7 'normal day-to-day activities.

14. The Appendix to the Guidance provides a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which are of particular significance to the Claimant's case.

15. Of particular further assistance is the recent decision of HHJ Tayler in Elliott v Dorset County Council UKEAT/0197/20/LA (V) where His Honour stated:

“18. ... Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not

significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute ...

22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do...

32. There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter ...

59. [On the relevance of the Guidance] On an overview of that part of the Guidance, it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity ..."

16. In considering whether the disability has a substantial effect the tribunal should focus on what the claimant cannot do and not what they can do. In considering the question of whether the effects are at a certain point in time "likely to last a year or more" the tribunal must interpret "likely" as meaning "could well happen". SCA Packaging Ltd v Boyle [2009] ICR 1056. The question needs to be asked at the date of the discriminatory act and not the date of the hearing of the tribunal. All Answers v W [2021] IRLR 612 at para 26

17. In determining whether the impact on day to day activities is “substantial” it is necessary to compare the difference in how the individual carries out those activities because of the conditions relied on, using his coping mechanisms albeit without any medication or aids.

Jurisdiction – time limits and continuing acts

18. Section 111(2) Employment Rights Act 1996 provides that a tribunal shall not consider a complaint that an employee was unfairly dismissed unless it is presented to the tribunal

(a) before the end of the period of three months beginning with the effect of date of termination or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for a complaint to be presented before the end of that period of three months.

19. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal’s enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA.

20. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In

discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

21. The statutory wording of section 123 of the EA10 is slightly different than in the SDA and RRA and, arguably, may be wider. However, for these purposes, we have assumed that the test is the same and that the well established principles apply.

22. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434 . The guidance provides:

“An Employment Tribunal has a very wide discretion in deciding whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time of just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. On the contrary, tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of this discretion is thus the exception rather than the rule.”

23. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 may be of assistance, though its requirements are relevant in considering actions relating to personal injuries and death and while a useful check list should not inhibit the wide discretion of the Employment Tribunal. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:

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

- c. the extent to which the party sued cooperated with any requests for information;
- d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
- e. the steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

Of particular import for an Employment Tribunal considering the exercise of its discretion will be the length and reasons for any delay and whether delay prejudiced the respondent for example in preventing or inhibiting its investigation of the claim while matters are fresh.

24. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

25. Failure to adopt a “checklist” approach carries the risk that a significant factor will be overlooked London Borough of Southwark v Afolabi [2003] IRLR 220 CA.

26. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay see Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

27. If the issue is determined as a preliminary issue, it is appropriate for the Employment Tribunal to form a fairly rough idea as to whether the complaint is strong or weak Hutchison v Westward Television Limited [1977] IRLR 69 & Anderson v George S. Hall Limited UKEAT/003/05 .

28. If a claimant establishes it was not reasonably practicable to present the claim in time, they must then satisfy the tribunal that they presented it within such further period as was reasonable. This means that the Employment Tribunal will want to hear evidence about the period prior to the expiry of the time limit and evidence about the period between that date and the date the claim was presented.

Deposit applications

29. In relation to applications to Deposit order the rule is detailed at Rule 39:

Deposit orders

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal’s reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

30. In addition, tribunals are entitled to have regard to the likelihood of the party being able to establish the facts essential to his case and, in doing so, which provisional view as to the credibility of the assertions put forward – Van Rensburg v Royal Borough of Kingston-upon-Thames UK EAT/00954/07.
31. In considering the amount of any deposit to award, should the Claim be one that is considered to have little reasonable prospect of success, a tribunal must make sure that the order “*does not operate to restrict disproportionately of a fair trial rights of a paying party, or to impair access to justice*” Hemdan v Ishmail [2017] IRLR 228.
32. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.
33. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd EAT/0235/18.**

Evidence

34. The parties have prepared and presented to me an indexed electronic bundle of documents extending over 590 pages together with additional documents from the claimant.
35. The claimant has submitted additional documents which are:
- a. Witness statement on the time jurisdiction issue;
 - b. First Impact statement and attachments
 - i. Neurodiversity assessment of Victoria Mandrall chartered psychologist 3 August 2017
 - ii. Autism assessment by the Adult ADHD and Autism Service Dudley and Walsall Mental Health Partnership NHS Trust 13 March 2020.
 - c. Second impact statement with list of appended letters;
 - d. Email of Dr Glenys Jones, Autism Centre for Education and Research; University of Birmingham 28 February 2018 and attachments;
 - e. Extract from Equal Treatment Bench Book – Disability Glossary: Impairments and reasonable adjustments
36. The claimant has given sworn evidence and been subject to cross examination.
37. I have been referred by the parties to key documents within the Preliminary Hearing bundle as identified in the Second Respondent the Trust's Opening Statement [para 7 - 10] that have been read in advance of hearing evidence from the claimant in this case

Findings of Fact

38. The complaints are against the first respondent Health Education England ("HHE") and against the second respondent Worcestershire Acute Hospitals NHS Trust ("the Trust").
39. In August 2016 the claimant was appointed to the position of core anaesthetics trainee, under the West Midlands Deanery (Health Education

England, West Midlands). This training programme comprised of three distinct modules, specifically theatre anaesthesia, intensive care medicine and obstetric anaesthesia, over the course of 2 years as standard.

40. On a day to day basis, the claimant undertook practical based training and procedures and learned theory in order to achieve the required competencies to be signed off for each module, working towards the qualification of core anaesthesia.
41. Having successfully completed the theatre anaesthesia and intensive care medicine modules, in July 2019 the claimant was informed at her Annual Review of Competence Progression (“ARCP”) that she would be released from training without specific competencies, having already had her core training period extended by the maximum 12 months additional training period in exceptional circumstances. The claimant appealed the decision taken by the ARCP and that appeal process was progressed until a decision was finally confirmed which led to the termination of the claimant’s employment at the Trust on 4 August 2020. The claimant began working for the Trust on the 1st of May 2019 and her employment there as a speciality registrar in anaesthetics continued until the 4th of August 2020.

Impact of impairment on normal day to day activities

42. In her two impact statements the claimant refers to the neuro developmental disorders of autistic spectrum disorder and attention deficit hyperactivity disorder and suggests that the detail of the adverse impact of the impairments, both of which are described as being lifelong conditions present from childhood, is best explained in detail in each of the reports to which the claimant refers. The claimant maintains that the documents to which she refers provide a comprehensive information relevant to day-to-day activities and that what she experiences is all that she has ever known and therefore she finds it difficult to explain what is different and to what extent, when one doesn't know what it is like for other people, how she seeks to explain the impairments and their effect on what is her ‘normal’.

43. The Neurodiversity assessment of Victoria Mandrell 3 August 2017 [482-514] reports:

“Amy displays strengths in:

Verbal Comprehension

Reading comprehension

Word reading

Spelling

Processing sounds

Writing speed

Relative to her verbal comprehension abilities, Amy displays personal weaknesses in:

Perceptual Reasoning

Working Memory

Processing Speed

Amy also reports a large number of attention-related difficulties.”

44. The report confirms :

“It is very important to note that this is not a formal diagnosis which would need to be provided by a specialist in ADHD assessment (see NICE Clinical Guidelines CG72), however the difficulties that Amy reports are likely to have a significant impact on her learning and performance in work.

45. The report identifies throughout the areas where the claimants performance in test was seen to place to her advantage in the workplace. I remind myself that the issue in determining is an impairment has a substantial disadvantaging effect is to consider the normal day to day things that the individual cannot do. In this respect I consider not the generic traits of a person with a neurodiverse condition in general but how it impacts on the claimant in actual practice, in this regard the report is less clear it refers :

“Interestingly, despite showing strong abilities in the area of inductive reasoning with verbal information, and deductive reasoning on the ‘Matrix Reasoning’ task; Amy’s supervisors have noted that she

sometimes struggles in these areas at work. They note a tendency to learn by rote, rather than developing a general understanding of concepts, and then reasoning and applying this information to solve a problem. Amy has noted that she can find it so hard and time consuming to focus on the basic administrative and menial tasks, like reading records; that her clinical reasoning and awareness “has never got going”. This might explain the difference between her ability on these tests, and her experience in the workplace.”

46. In addition in considering working memory Ms Mandrell observes that the claimant had scored in the competent range for working memory however it was a significantly lower score than on the verbal comprehension measure and that indicated an imbalance in her profile which is likely to cause some difficulties for her personally which was observed to be consistent with her reports of difficulties with tasks that are associated with working memory in her everyday life. The report identifies that when an imbalance occurs, it is as if the brain is generating more ideas than can be accommodated within the working memory space and that a weakness in working memory is therefore recorded if working memory capacity is much lower than the level required to balance with verbal comprehension.
47. While the report makes observations as to how the claimant may be affected by limitations in the workplace it does not record what the claimant reported at the time were things that she could not do either in her day to day activities or in her tasks at work.
48. In terms of processing speed the report [496] observes:

“She has identified from her work history that she has performed well and been better received in roles that were relaxed in terms of time demands and deadlines, and allowed her to work at her own pace. In roles where she cannot relax the time demands, she would benefit from strategies to improve her speed of processing, and suggestions for these strategies are included later in this report.”

With reference to the working memory and operating on a day-to-day basis with planning and organisation the report suggested the tactics and adjustments that might be employed to assist at the claimant.

49. Considering the speed of processing it was identified that:

“This may mean that it takes her longer to process information and complete tasks quickly and accurately. This is particularly the case with detailed tasks which she may find tiring and may need longer time to complete. The history the claimant reported in relation to processing tasks was consistent with the difficulties she described as being encountered in the workplace [503].”

50. The report goes on to consider the claimant’s abilities in relation to reading and writing. The claimant had Reported difficulties with organising and structuring written work and the fact that she struggled with administrative tasks and that was likely to be related to difficulties that the claimant encountered with attention [504]

51. In its conclusion the report makes similar comment in relation to attention and concentration and distractibility and makes a number of suggested strategies the claimant could employ to work more effectively [505-507].

52. In the second version of the report sent to the claimant additional information explores the impact of ADHD on the claimant. It identified the day to day difficulties the claimant in practice encountered:

“Amy reported that she very often has difficulty getting things in to order when she has a task that required organisation. In anaesthetics, there are very clear checks, processes and monitoring procedures that need to be completed in a structured and ordered way. She reported that it has taken her much longer than her peers to learn to complete these in the correct order. She advised she specifically chose to pursue anaesthetics because she finds organisation and prioritisation of tasks very difficult. In a ward based role, she would accumulate jobs that required constant organisation and prioritisation which she finds very difficult. In anaesthetics, there is one patient at a time and one job at a time – with little need to switch between or organise tasks and she therefore felt this would suit her better.

She also has difficulty outside of work with planning activities of daily life.

She advised she sometimes has problems remembering appointments and obligations. She has forgotten medical appointments and missed supervision meetings at work. She has tried to be diligent with using a calendar to record her appointments, but this involved concerted effort, and she found she “lapsed” after a while and found this system difficult to maintain. She finds it hard to make notes or lists of things she needs to do

or remember, and when she does make them, she does not use or look at them afterwards.

Amy reported that she very often avoids or delays getting started with a task that requires a lot of thought. She provided an example of coursework and assignments; stating that she has an “extremely low tolerance for applying myself to it”. Work was always completed at the last minute. She noted that when she was younger at school she felt she had a better capacity to “force” herself to do it. We discussed whether this might have been because there was more structure in her schooling (from teachers, parents etc) than in later studies, where there is more emphasis on independent study. She agreed this may be the case.”

53. The second report to which the claimant refers is that contained in an email and email attachment (‘ Amy ideas’) from Dr Glenys Jones, chartered psychologist, Autism Centre for Education and Research, Birmingham University, and Specialist Adult Autism Assessment Resource Centre Birmingham, 28th February 2018 which provides information from Dr Jones based on her meeting with the claimant [claimant’s separate document] . Like the assessment report of Ms Mandrell the previous year the report does not seek to make a confirmed diagnosis and is not a full assessment. The e-mail from Miss Jones has a title “follow up ideas from our meeting last night”. It attaches a document in which Ms Jones seeks to explain to the claimant the differences between autism/Asperger Syndrome.
54. In giving her evidence to the tribunal in relation to her disability the claimant relies in large part on the observations made in the various assessments of her condition of autism and ADHD. What is evident in her clarification of her evidence is that consistent with the impact on the day to day effect of her conditions the claimant is prone to procrastinate and she had a poor sense and appreciation of time. In terms of practical strategies which she uses to mitigate the effects of her conditions the claimant referred to the fact that sometimes has required her supervisors to prompt her to keep up to date with charts and report writing and she sometimes uses lists to identify tasks to be done.
55. The claimant in her grievance sent to HEE 29 August 2020 [461] detailed in respect of autism comments:

“I had a neurodiversity assessment performed in 2017 at the Deanery’s request and a diagnosis of autistic spectrum disorder has been made.

Autism means that I am not as naturally adept at reciprocal social interactions and social communications. I have to work harder at the things that come naturally to others. It can take me longer to learn than the average trainee, and I have to learn in a different way. However once learned, my ability is comparable to other trainees. Despite my learning differences, I have a graduate entry Medicine degree and a 2:1 Natural Sciences (biochemistry and biology) degree, and also won the Natural Sciences Dissertation Prize. Therefore my capacity to learn is not in doubt.”

35. While the claimant may be able to manage aspects of her conditions, both of ADHD and autism the claimant had not received a formal diagnosis of her condition until March 2020 however the assessment undertaken from 2017 leads me to conclude that the conditions have been life long. The strain of managing her condition and adopting strategies to engage as effectively as she has been able are a significant adverse impact on her ability to undertake normal day to day activities.
36. In terms of the issue of disability the respondents accept that the claimant has the conditions of both Autism and ADHD however are not in a position to accept that the diagnosed impairments have a disabling impact on her ability to undertake normal day to day activities.
37. The claimant has given her account of the impact on her ability to undertake normal day to day activities both in respect of her personal and her working life. The impact is not in the least insignificant and notwithstanding the strategies adopted by the claimant the impairments on her normal day to day activities are substantial and long term.

Timeliness

38. The claimant has provided a witness statement in which she addresses the reasons why her complaint to the Employment Tribunal against the second

respondent, the Trust was presented when it was and the reasons why it was not reasonably practicable for her to present her complaint of unfair dismissal sooner than she did and why it is just and equitable for time to be extended to allow jurisdiction to entertain the complaints of discrimination.

39. The claimant, when commencing her training programme, was recruited to the anaesthetics core training programme through a selection process administered by HEE. During the claimant's training programme the claimant worked at Russells Hall Hospital, part of the Dudley Group NHS Foundation Trust from August 2016 to July 2018, then at Hereford County Hospital, part of the Wye Valley NHS Trust and from May 2019 to 4 August 2020 at the Worcestershire Royal Hospital part of the Worcestershire Acute Hospitals NHS Trust the Second Respondent.
40. The claimant initially presented her complaints against the First Respondent HEE believing them to be her employer. The claimant has suggested that she laboured under the misunderstanding that HEE, who administered her training, and the hospitals at which she was trained were all part of the NHS in which she always worked. The claimant asserts that she believed the HEE were in charge of her training and therefore her employment.
41. The claimant has confirmed that she was paid her salary by each individual trust at which she worked. The claimant has been referred to a Contract of Employment with the Trust [358] issued to her by email on 19 February 2019 confirming the offer of employment and a contract and new starter information. The claimant stated that she has not been able to find that email and I note there is no copy of the contract of employment been produced signed by the claimant. I am mindful that the claimant has stated that she had not read any of the employment documentation the Trust say was sent to her.
42. I have considered the documentation sent to the claimant by previous Trusts for whom she had worked on her training programme. On 30 June 2016 Dudley Trust wrote to the claimant further to notification from Health Education, West Midlands, to offer her the post of Core Trainee in Anaesthetics with The Dudley Group NHS Foundation Trust [247] the claimant expressed the view that although the letter did not state that she was employed by HEE she acknowledged that she was sent a contract of

employment with the Dudley Trust [250] and the contract clearly stated that she was employed by that trust. The claimant acknowledged that when she was offered a post at Wye Valley NHS Trust in July 2018 [341-345] on a core trainee appointment she was sent pre- placement information. At this hearing the claimant has acknowledged that she now sees that the appointments as core trainee were for employment with the trusts however, she explains that she did not appreciate that distinction at the time, the claimant asserts that she had believed simply that she was on the training programme. It is also apparent that the contract of employment terms issued to the claimant on each occasion confirmed to the claimant that for the purposes of certain NHS conditions of service previous service with other NHS Trusts was reckonable.

43. Although the claimant asserts that she had not received the email from the Trust on her placement to work at Worcester I find it highly unlikely that the claimant would not have been required to comply with the usual pre-employment checks that hospital trusts are required to undertake before employing a trainee. I do observe however that the communication from the various NHS Trusts to the claimant in relation to the training placements refer interchangeably to 'appointment' 'placement training' and 'pre-employment checks' and her attention was always focused on the need to comply with the standards for her training as overseen by HEE and in particular the need to pass the scrutiny of the ARCP. It was the claimant's understanding that HEE controlled how long and where the training programme placements were to be.
44. The claimant was originally on a fixed term contract to work at the Trust to expire on 6 August 2019 however, the decision of the ARCP was that she would be released from training without specific competencies, having already had her core training period extended by the maximum 12 months additional training period in exceptional circumstances. The claimant appealed the decision taken by the ARCP and that appeal process was progressed until a decision was finally confirmed which led to the termination of the claimant's employment at the Trust on 4 August 2020.

45. The claimant was given an early indication that the ARCP was likely to uphold the original decision and on 11 May 2020 the claimant wrote to Professor Russell Smith, Post Graduate Dean of HEE [434-400] setting out her concerns, including regarding the training programme in which she wrote:

“I am writing to you concerning my core anaesthetics training programme. I have been signed off for all modules except for obstetric anaesthesia. For this module I have completed the necessary requirements without incident, however, I have recently been informed that I will not be signed off for obstetric anaesthesia at my current placement. Regrettably, my treatment in relation to this has been unfair and discriminatory, as outlined below. I would be grateful if you would review my situation at your earliest possible convenience, in order that a way forward can be found.”

46. The communication detailed the background to her complaints, the background to her concerns and in particular the Obstetrics training she received at the Trust, her autism and the exams and practical requirements and less favourable treatment due to her being autistic. The communication concluded:

“In order to break the impasse I would be grateful for your advice as to how we may resolve the problem of my obstetric module not being signed off, in order that I may qualify and move on to putting to good use my substantial training for the benefit of those for whom it was intended. I would also be interested to know what training the panel and other assessors have in respect of doctors with autism.”

47. Professor Smith responded to the claimant on 2 June [442-443] and indicated that the ARPC hopefully to be held before the scheduled end of her then current placement with the Trust on 4 August 2020.

48. During the latter part of the claimant’s employment at the Trust the claimant was certified unfit to work from 19 March 2020 and did not return to work before her placement was terminated following an email to that effect from HEE on 20 July 2020:

“Your current placement will come to an end on 04/08/2020.”

Which was followed by clarification:

“This is to confirm that following an ARCP Appeal hearing, the panel have upheld the original decision from July 2019 - ARCP Outcome 4 – Released from training programme with or without specified competences. Therefore, Dr Sutton’s training placement ends on 04/08/2020.”

49. The claimant received a final pay advice from the Trust on 27 August 2020 [457] and, although it has not been produced to me, the claimant has confirmed that she received a P45. The pay advice slip does not specifically identify the name of the claimant’s employer other than generically NHS and the department as Anaesthetics and the location as Worcestershire Royal Hospital and the pay scale description as a Specialty Registrar CT2. I find that viewed through the lens of an autistic person, absent any written confirmation from the Trust of termination of employment the claimant not unreasonably raised her concerns about the determination of the ARCP and the termination of her specialty training programme with the HEE and did not write to the Trust. The response Professor Smith sent to the claimant on 11 May had not sought to identify to the claimant that her employer was not HEE but instead the Trust.
50. The claimant raised a formal grievance on 26 August 2020 addressed again to Professor Smith [458-464] in terms almost identical to her earlier concerns on 11 May. In response Professor Smith wrote to the claimant on 11 September [466-468] :

“Dear Dr Sutton,

I write in response to your letter dated 26 August 2020, in which you have outlined concerns regarding your training on the Core Anaesthetics Training Programme. As you know this was concluded, on appeal, by upholding the ARCP Outcome 4 on 14th July 2020. You will also know from the Gold Guide that the appeal panel’s decision is final. However, having considered the matters you have raised in your letter I undertook to review three components:

1. *The support you received during training, cognisant of your diagnosis, which is listed below.*
2. *The Appeal Panel's considerations and letter to you.*
3. *The Quality of training data held by my office for Anaesthetics at Russell's Hall Hospital including GMC and other survey data.*

Having considered the above, I have concluded that appropriate and reasonable support and interventions were offered to you in an attempt to facilitate successful completion of the programme but this was unsuccessful."

51. The claimant responded on 29 September [469] suggesting to Professor Smith that the matter should be dealt with:

"I respectfully suggest that the contents of my letter are treated as formal grievances and are therefore subjected to the appropriate grievance procedures. I understand that you may wish to obtain advice on how to proceed with this."

52. Unfortunately Professor Smith did provide a substantive respond to the claimants request that the matter be dealt with as a formal grievance until 24 November 2020 [470] when he wrote inter alia:

"HEE does not have a formal grievance process for postgraduate medical and dental training. This is because trainees in such programmes are not employed by HEE. Trainees have an employment relationship with their employer, and issues such as misconduct and grievances are subject to their employing organisation's policies and procedures."

53. This is a matter in which the claimant has evidenced her clear view as early as 11 May 2020 that she felt she had been subject to less favourable treatment because of her autism and Professor Russel Smith had responded on behalf of HEE in a manner seeking to address her overarching concerns relating to her training and the impact of her autism. Professor Smith did not explicitly explaining to the claimant that she was employed by the Trust. It was

- of course right that in relation to the actions of HEE and the decision of the ARCP panel the first respondent had a liability to answer the claimant's concerns and to address the concerns in relation to less favourable treatment.
54. In her cross examination of the claimant Ms Skinner has referred the claimant to the provisions of the Gold Guide [580] to which Professor Smith had referred the claimant. The claimant confirmed that although she had not read the Gold Guide she accepted what Professor Smith had said that she had no right to appeal a grievance decision was correct. The claimant has accepted that, as at 24 November 2020, she was told in clear and unequivocal terms by HEE that she was not employed by them but by the Trust when her employment was brought to an end on 6 August 2020. By extension the claimant was aware when she presented her compliant to the tribunal in claim number 1310821/2020 that the first respondent HEE was not her employer in relation to any complaint of unfair dismissal. The claimant when she began early conciliation in respect of her first claim against HEE began the reference to ACAS on 8 October and the Early Conciliation Certificate was issued on 27 October. The claimant left presentation of her complaint until the last minute on 27 November. The claimant has confirmed that she was aware of the need to present a claim within the time limits proscribed by the tribunal within three months of the act complained of, as extended by the period of early conciliation.
55. I am mindful that the claimant when presenting her complaints to the Employment Tribunal is a litigant in person. The claimant has confirmed that she took advice from a solicitor shortly after presenting her first complaint and resolved to bring a second complaint against the Trust and began early conciliation through ACAS on 9 December 2020 [30] and the claimant subsequently presented her second complaint 1300242/2021 [50-64].
56. The claimant, in clarifying the evidence she has given to the hearing, has explained that as a result of her autism in completing administrative tasks she has a tendency to procrastinate and leaves matters to be done until the last minute and she has given her account that the reason why she did not present her compliant to the Employment Tribunal. It is accepted by the first

respondent HEE that the complaint against the first respondent is presented in time.

Argument and conclusion

57. I have been asked to reach my decisions taking the issues in the order:

- a. Jurisdiction for unfair dismissal
- b. Jurisdiction for discrimination complaints
- c. Deposit
- d. Disability

58. I have considered the issue in respect of the tribunal's jurisdiction in respect of claims against the second respondent informed by my view of the impact the claimant impairment of autism and ADHD has upon the claimant in bringing a complaint in the Tribunal. I deal with each of the jurisdictional issues in turn

Unfair dismissal jurisdiction

59. Ms Skinner for the Trust argues that the claimant is required to present a complaint within three months of the act complained of namely the dismissal on 4 August 2020 and the complaint against the Trust was not presented until 19 January 2021. Early conciliation was entered into on 9 December and the prima facie case is that the claim is presented out of time, the primary time having expired on 3 November 2020.

60. It is the second respondent's case that the claimant was aware of the identity of her employer to be the Trust throughout her period of employment with them. While the claimant plainly is a well educated and intelligent litigant in person she is not legally qualified and the evidence she has given is that the relationship she had with the first respondent HEE and the Trust who provided the training was seen by her to be the overarching relationship with HEE which she identified as the controlling relationship and one of employment. I find that the claimant was not unreasonable in her misunderstanding of the identity of her employer. Although she was told her contract with the Trust ended on 4 August 2020, she was not sent any written confirmation of the termination of her employment.

61. I conclude that in light of the claimant's autistic characteristics and traits she took a literal approach to her relationship with the first and second

respondent. I have found that the claimant viewed the relationship to be that it was HEE who directed the locations at which the claimant worked to gain her core experience and she considered herself to be in the employment of HEE within the NHS. I have found that it was not until the clear and unambiguous statement of Professor Smith in his communication of 24 November 2020 [470] that the claimant was informed that the correct identity of her employer was the Trust.

62. In the particular circumstances of this case I find that the first time the claimant was directed to the fact that she was employed by the second respondent was 24 November 2020. It is for the claimant to satisfy the burden of proof that it was not reasonably practicable to present the complaint to the tribunal in time. To the extent the claimant seeks to rely on her ignorance of the identity of her employer Ms Skinner reminds me such ignorance must be reasonable Walls Meat v Khan [1979] I.C.R. 52. What is reasonable in this case has to be judged by reference to a person in the claimant's position with an autistic disorder. The Trust would seem to acknowledge that the claimant's autism made it harder for the claimant to understand that HEE was not her employer however refers to the documentation and to the resources available to the claimant to research the internet and that had the claimant read the documents available to her, including her contractual documentation with the Trust and her predecessor employing Trusts she ought reasonably to have identified the Trust the second respondent as her employer. I have been reminded by her that the claimant had access to the Gold Guide which clearly relationship between HEE and the Trust and that the claimant had appealed the ARCP panel decision in July 2019. Furthermore the claimant has confirmed that after received the communication from Professor Smith and being told the Trust were her employers she sought legal advice. The claimant has acknowledged by presenting her complaint against the first respondent that she was aware of the time limits that apply to present a complaint to the Employment Tribunal. The position of the Trust is that before the claimant presented her first complaint to the employment Tribunal she was already expressly aware that the Trust and not HEE was her employer.

63. The claimant has explained that she presented the first complaint against the first respondent because the alleged discrimination was because of the things that HEE had done in their alleged less favourable treatment of her and early conciliation had been commenced against them.
64. In the normal course of events when a claimant is told that her employer is correctly identified as someone other than who she had previously thought then the litigant acting reasonably ought to present a complaint, if out of time, then as soon as reasonably practicable after the expiry of the time limit.
65. Mr Northall for the claimant accepts that the claimant's reference of her complaint against the Trust was presented out of time however he characterised the delay as being one from 24 November 2020 some 2 months and 16 days not as the respondent seeks to say five and a half months after the effective date of termination on 4 August 2020.
66. In determining what is reasonably practicable in this case I conclude that for all the reasons I have found to be the case the claimant viewed the relationship she had with the first respondent to be the overarching relationship which she considered to be of employment and viewed through the lens of autism and in a clearly stressful set of circumstances that were pivotal to her career progression the claimant may be forgiven for her rigid focus on that view.
67. Mr Northall in his submissions takes me to the assessments of the claimant and her need to take a longer period of time to process information and complete tasks. I am invited by Mr Northall to conclude that the claimant when informed that the Trust were her employer she took advice on the merits of a claim against the Trust and that within 15 calendar days she began early conciliation through ACAS as she had previously done in respect of HEE. It is the claimant's argument that once she was informed of the correct identity of her employer she began the early conciliation process as she was required to do and she waited for the Early Conciliation Certificate to be issued.
68. I conclude that it was not reasonably practicable for the claimant to have presented her complaint to the tribunal in time. In determining whether the claimant presented her complaint to the Employment within such further period as was reasonable in the circumstances of the case I find that was

reasonable for the claimant to take advice and that the time it took the claimant to refer her complaint for early conciliation through ACAS was not unreasonable. Although the claimant may have chosen to inform ACAS that there was no merit in conciliation with the Trust neither she nor the Trust gave ACAS that indication and the Early Conciliation certificate was issued on 21 December 2020.

69. The claimant did not immediately upon the issue of the certificate present her complaint to the tribunal against the Trust which was delay until 19 January 2021.
70. On the most generous interpretation of what was such further period as is reasonable to present the complaint I can contemplate, having regard to the claimants disability that she may have felt obliged to follow early conciliation until the Certificate was issued in the name of the Trust to be able to present a complaint to the tribunal including details of the certificate number as is required on the form. However by 20 December 2020 the claimant had been aware that the correct identity of her employer was the Trust and that a complaint of unfair dismissal can only be brought against an employer.
71. The claimant was aware of the strict time limits for presenting complaints to the employment Tribunal and that she was already presenting a complaint out of time. While the claimant might have taken a few additional days to organise her thoughts and to identify the full extent of the claims she sought to bring against the Trust the claimant has offered no clear explanation of the reason why she delayed until 19 January 2021 to present her complaint against the second respondent. I am reminded by Ms Skinner of the guidance given by the EAT in Cullaine v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10 in which Underhill said :

“The question at stage 2 is what period that is, between the expiry of the primary time limit and the eventual presentation of the claim is reasonable. That is not the same as asking whether the Claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted having

regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months.” [paragraph 16]

72. Similarly in Nolan v Balfour Beatty Engineering Services EAT 0109/11 in relation to the equivalent time limit provisions in s 139 of the Trade Union & Labour Relations (Consolidation) Act 1992 said:

“These provisions demonstrate a legislative intention that claims should be presented promptly – reflecting the general principle that it is in the public interest that litigation should be progressed as efficiently as possible - and that claimants should not be permitted to delay in presenting them once whatever the obstacle was that prevented timeous presentation has been removed.” [paragraph 23]

In this case the complaint has not been presented within the three month time limit and in the particular circumstances of this case I conclude that in this case the claimant was blindly focused on her relationship with HEE being that of the controlling party and her employer so that it was not reasonably practicable for her to present the case against the Trust in time. Though a neurotypical litigant informed of the identity of the employer may have been expected in the three days before the deadline have been expected reasonably to have submitted her grounds of complaint naming the correct employer as respondent employer the claimant is not neurotypical in her thought process and organisation.

73. In circumstances of this case the claimant had to process the fact that she complains not only about her employers decision to terminate her employment but also about the process adopted by the first respondent HEE in their management of her core speciality training and the appeal as well as the failure to make adjustments in their assessment of her performance by her day to day managers at the second respondent, the Trust, to ensure she was not treated less favourably because of her various impairments. I find that it was not in the circumstances of this case reasonably practicable for the claimant to present her complaint of unfair dismissal against the second respondent within the primary time limit.

74. Having concluded that it was not reasonably practicable for the claimant to present her complaint against the Trust within the three month time limit I ask whether the claimant presented her claim within such further period as was reasonable. At this point Mr Northall invites me to conclude that it was reasonable that the claimant waited until after conclusion of early conciliation and that the period between 20 December 2020 and 19 January 2021 was a further reasonable period of delay after which the claimant presented her complaint.
75. I conclude that, making an adjustment to accommodate the claimant's autistic view of procedure, that it was reasonable in this case to delay until the issue of the Early Conciliation certificate by ACAS to commence a complaint of unfair dismissal against the Trust. In my deliberation on the issue of whether the claim was then presented in such further period as was reasonable I conclude that the claimant was in possession of all the facts of her case and was aware of the application of the time limit as at 20 December 2020. Whilst the claimant has a tendency to procrastinate the claimant was nonetheless aware of the rules. All possible technical obstacles to her issuing a complaint against the second respondent having been removed on 20 December 2020 the claimant's failure to present her complaint for a further thirty days until 19 January 2021 was not a reasonable further delay. The claimant provides no explanation for the further delay other than that it was consistent with the fact she was neurodiverse.
76. I conclude that the claimant presentation of her complaint against the Trust was not done within such further period as was reasonable in the circumstances. Once the obstacle which prevented her presenting a timely presentation had been removed, namely the identity of her employer being confirmed and her having been issued with a Certificate of Early Conciliation the further delay was not reasonable. The claimant has confirmed that once she had learned something though slower in doing so she is as capable as any other person. To the extent the claimant took time to process the fact the Trust and not HEE were her employer and having been aware of the strict time limits in the Employment Tribunal to present a complaint the claimant

within reasonable time made a reference to ACAS however delayed too long after the issue of the certificate to present her complaint.

77. The time limits within which complaints of unfair dismissal must be presented are strict. I have balanced the public interest in the primary time limit being observed against the need to present a complaint within such further period as is objectively reasonably allowed. The claimant delayed a further thirty days after the issue of the early conciliation certificate and the delay was not reasonable in the case.

78. I conclude that the Tribunal does not have jurisdiction to entertain the claimant's complaint of unfair dismissal against the second respondent the Trust.

Unlawful Discrimination – Jurisdiction

79. I turn next to the complaint of unlawful discrimination and whether the complaint was presented in time and if not whether it was presented within such further period as is considered by me to be just and equitable such that the Tribunal at a final hearing may consider the merits of the complaint.

80. The test to be applied at s123 of the Equality Act 2010 is very different to that contained at s111 of the Employment Rights Act 1996. For all the reasons that are set out above in my consideration of the claimant's late presentation of her complaint I have found that it was not reasonable for the claimant to have presented her complaint within the primary time limit and I do not repeat them here.

81. The complaints of discrimination by the Trust are as detailed in the list of issues [153-162] in particular at 17-23 [159-162]. Ms Skinner argues that the matters complained of extend beyond the termination of the claimant's employment on 4 August 2020 and that in relation to the allegations of the claimant performance within the obstetric module working at the Trust the claimant was told of the shortcomings in her performance in February 2020 and thereafter was certified unfit from 12 March 2020 and she did not return to the workplace before the termination of her contract. In particular the claimant's allegations of failure to make reasonable adjustments and

harassment were, save for dismissal, things that it is argued did not continue beyond the 12 March when the claimant became unwell.

82. Ms Skinner suggests that in the event time is extended to allow the complaints of discrimination in relation in particular to matters other than dismissal would prejudice the respondent, a public body. The Trust refer to the fact that number of senior members of the obstetrics and anaesthesiology departments will need to take time away from the demands of their roles to prepare and appear at Tribunal. I am referred in particular to the need to make an assessment of the likely merits of the complaints. I a referred to the respondent's defence to the s15 complaint in relation to discrimination arising from disability and the justification defence as pleaded at paragraph 47 of the grounds of resistance [173]. In respect of the alleged failure to make reasonable adjustments I am referred to paragraphs 54 to 58 of the grounds of resistance [174-178] and the suggestion that a number of the PCPs applied were not in the gift of the Trust and that the suggested adjustments were not reasonable.
83. In response Mr Northall for the claimant asserts that in the absence of hearing evidence of what steps were taken in the review of the claimant's performance in her appointments the tribunal in making any assessment should avoid making any findings of fact that there was a continuing act of discrimination beyond February 2020 until the termination of her contract of employment.
84. I have not been referred to anything other than the pleadings in this case and not to any evidence or documentation that may assist my assessment of the merits or otherwise of the claimant's complaints against the respondent. I am led to the conclusion that on the bare pleadings in the case it is not possible to state that the complaints of discrimination have little reasonable prospect of success. It is the claimant's case that even while certified unfit to work from 12 March 2020 the failure to make reasonable adjustments was a continuing failure and state of affairs the end point of which was the outcome of the ARCP and ultimately the termination of the contract on 4 August 2020. The complaints of discrimination against the Trust are not fanciful and the

assessment of them can only be concluded based upon evidence to be presented to a tribunal hearing all the evidence.

85. In considering the application to extend time on the grounds of it being just and equitable to do so on the basis of the claimant's application and the pleaded response there is the need to hear all the evidence to assess the merits of the complaints. I have considered the provisions of s 33 of the Limitation Act subject to the guidance given in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23 as they apply to this case. In this complaint the Trust has not suggested that the cogency of the evidence will have been affected by the passage of time. A large part of the reason why the claim is presented against the Trust when it has been relates to the fact that the Trust had not acted to write and confirm to the claimant that her employment with them had terminated on 4 August 2020, rather all information sent to the claimant in relation to the end of her training assignment was sent to her by HEE. The claimant when told clearly and unequivocally that the Trust and not HEE was her employer in respect of whom concerns about the training and termination of the contract ought to be raised the claimant promptly on 9 December made a reference to ACAS for early conciliation having obtained legal advice. Although the claimant did not after the issue of the Early Conciliation Certificate present her complaint as soon as reasonable thereafter I have considered the reason why the claim was not presented until 19 January 2021.
86. I have found that the claimant exhibited a tendency to procrastinate, especially when required to complete administrative tasks and I observe that the claim was presented on 19 January, the last date by which, in a timely complaint, time is extended by.
87. Were time extended to consider the complaints of discrimination brought against the respondent the respondent will have to explain the reasons why they acted as they did in the supervision of the claimant's performance while on her assignment to them. The claimant says that the assessment of her conduct and performance was influenced by her disability and that was less favourable treatment in respect of her disability and a failure to make reasonable adjustments and in respect of certain behaviours harassment.

Although the respondent says that in respect of the s15 claims there was a justification it is appropriate and just that the tribunal has the opportunity to scrutinise the decisions taken by the respondent and whether the respondent's reliance on the justification defence was proportionate in the circumstances of the case. The balance of prejudice in the case is weighed heavily against the claimant who has lost the opportunity to qualify in her chosen career path.

- 88.** In the circumstances of this case I find that it is just and equitable that time is extended to allow the merits of the complaint brought by the claimant against the second respondent the Trust to be considered by a tribunal hearing the evidence.

Deposit application

- 89.** The respondent has made an application that if the complaints against the Trust are allowed to proceed that they should be allowed, subject to the claimant being required to pay a deposit as a condition of progressing her application. At the hearing time was against the parties and it was agreed that in the event I was minded to order a deposit to be paid as a condition of the claimant being permitted to pursue some or all of her discrimination complaints that I might be asked to take account of the claimant's ability to pay a deposit if so ordered. Directions were given that the claimant would have the opportunity to provide evidence of her means within 14 days of the hearing and the respondents would have 72 hours after receipt of a statement of means to raise any questions of the claimant in response to the statement.
- 90.** In the event no evidence of means has been presented to the Tribunal as directed. In assessing the prospective merits of the claim in balancing the prejudice to the parties of agreeing a just and equitable extension of time, I have found that there are within the claimant's complaints some prospect of a full tribunal at final hearing finding the acts complained of to be part of a continuing course of conduct. It will only be on hearing all of the evidence in this case that a Tribunal will be able to make findings of fact as to whether a

course of conduct extended over a period of time in relation to the complaints of unlawful discrimination.

- 91.** The fact that the claimant raised concerns about the treatment she received in relation to her performance and conduct while working at the Trust was and the proportionality of the respondent Trust's response will need to be considered. The claimant in her concerns raised to HEE has identified her concerns in relation to her performance and conduct being in relation to her neurodiversity and autism.
- 92.** I have scrutinised the documents to which both parties have referred. I have taken particular care to review the key documents as described by Ms Skinner in her Opening Note and I am not able to discern from the documentation anything that greatly assists in assessing the respondent's substantive response to the allegations against them in respect the discrimination complaints. I conclude that there is some and more than a little reasonable prospect of the claimant being able to succeed in her complaints to the tribunal. I emphasise that my view is only a provisional one of the credibility of the claimant's assertions and reached without hearing all the evidence that will be before a final hearing of the merits of the case. I determine that this is not a case in which the respondent persuades me that the claim is one having little reasonable prospect of success and the application that the claimant be required to pay a deposit in respect of whole or part of the complaint does not succeed.

Disability

- 93.** Finally, I turn to the remaining issue to be determined at this Preliminary hearing, whether the claimant is disabled by the conditions of Autism and ADHD. I have made a number of findings of fact and have considered the substantial adverse effect of the conditions on the claimant's normal day to day activities as they have impacted her ability to present her complaints against the Trust in a timely fashion. I do not repeat those findings here. The claimant has adopted a number of coping strategies to manage the impact of her condition. I have found that claimants conditions are life long and have a substantial adverse effect on her normal day to day activities. The claimant is

and was at all material times disabled by the conditions of Autism and Attention Deficit Hyperactivity Disorder and is a disabled person within the meaning of s6 of the Equality Act 2010.

Employment Judge Dean
31 August 2022