EMPLOYMENT TRIBUNALS

Claimant: **Mr P Hall**

Respondents: **(1) Transport for London**
(2) Mr C Walker
(3) Mr H Carter
(4) Mr A Byford

Heard at: **East London Hearing Centre (in public)**

On: **17 November 2022**

Before: **Employment Judge Moor**

Representation
Claimant: in person
Respondents: Miss R Thomas, counsel

RESERVED JUDGMENT

1. **The allegation of unlawful victimisation at paragraph 27(b) of the particulars of claim (in claims 3201533/2021 and 3201877/2021) is struck out as an abuse of process and therefore unreasonable conduct of the proceedings.**

2. **The allegations of indirect disability discrimination in claims 3201533/2021 and 3201877/2021 are struck out as an abuse of process and therefore unreasonable conduct of the proceedings.**

3. **All claims against the Second and Third Respondent are struck out. They were brought out of the time and it is not just and equitable to extend time.**

4. **The remaining allegations of victimisation against the First Respondent were brought within the time limit.**

5. **The claim that there was a failure to make reasonable adjustments in relation to the refusal to provide special leave is dismissed upon withdrawal.**

REASONS

1. This judgment deals with the Respondents' application, dated 21 November 2021, to strike out certain allegations claims 3201533/2021 and 3201877/2021 (known as 'claim 3').

2. The Claimant is disabled, experiencing depression and anxiety. At the start of the hearing I checked whether any he needed any adjustments to the usual Tribunal day. He indicated not, but that he would inform me if he needed any as the day progressed. He asked for one break, which I allowed. Miss Thomas indicated the Claimant had asked that oral submissions be kept to a minimum and she did so. I progressed more slowly than I would normally have done at the hearing in order to ensure that the Claimant had time to follow what was being said without undue stress and in order that I understood his claims.

3. The hearing was interrupted for about an hour by a fire alarm. This meant that I did not have time fully to case manage claims 2 and 4. I lifted the stay in claim 2 and listed a further Preliminary Hearing (Open) on 22 February 2023, with a time estimate of 1 day, to deal with the Respondents' application to strike out claim 2 and any other issues I decided to raise on my own initiative. I made Case Management Orders for this hearing by consent. **The parties should note that I have added to those orders in writing**. They should read the separate Orders and follow them.

Procedural History of Claims

4. The relevant procedural history is as follows:

3 June 19	Claim 3201457/2019 ('**claim 1'**) v R1 presented: alleged public interest disclosure detriments; s15 disability discrimination; failure to make reasonable adjustments
28 May 20	Claim 3201450/2020 ('**claim 2'**) presented v R1 alleged deduction of wages. Stayed until today.
Unknown date	At a Preliminary Hearing the Claimant was found to be a disabled person from 1 November 2016. The impairment is anxiety and depression.
11-14, 18 Aug 20	Hearing of claim 1, part-heard due to illness
30 Nov 20 Before Xmas 20	C raised internal grievance. C started drafting claim 3
7-11 Jan 21	C in hospital with covid
21 Jan 21	ACAS EC began with R1

4 Mar 21	ACAS EC ended with R1
2 April 21	Claim 3201533/20 presented v R1 (rejected re R2 and R3) ('**claim 3**'): victimisation; indirect disability discrimination; and PID claims subsequently struck out.
8-9 April 21	ACAS EC with R2 and R3
10 April 21	Claim 3201877 presented v R1 R2 R3 the same content as claim 3 (also **'claim 3'**)
12, 13, 14 May 21	Resumed hearing of claim 1, C did not attend
3 June 21	Judgment in claim 1 sent to parties: all claims failed. None of the disclosures were protected.
10 Nov 21	Preliminary Hearing (EJ Reed) in claim 3. List of Issues clarified. Case Management Orders. Listed for final hearing May 2023. C ordered to give further information for indirect discrimination claim. PID claims struck out.
19 Nov 21	Further Information from C about claim 3.
21 Nov 21	Rs' application to strike out parts of claim 3.
14 Jan 22	Claim 2300144/22 presented ('**claim 4'**) v R1, R4. Not yet case managed: PID detriments; indirect disability discrimination; deduction of wages.
17 Nov 22	Preliminary Hearing (open) for strike out application in claim 3.
22 Feb 23	Planned Preliminary Hearing (open).
2-5, 9 May 2023	Final hearing listed for claims 2, 3 and 4.

Application to Strike Out Parts of Claim 3

5. A List of Issues in claim 3 was clarified at the preliminary hearing before EJ Reed. I set out the issues I must deal with today.

6. First, a victimisation allegation, based on the protected act of claim 1 on 3 June 2019, that the Claimant was subjected to the alleged detriment of the First Respondent '*not keeping detailed records of the fraud investigation interview with Mr McCurry … in January 2018*'. (Para 27(b) of the particulars of claim; Issue 2(a) of the current List of Issues.)

7. Second, an indirect disability discrimination claim based on two practices (PCPs):

7.1. A practice of '*consistently failing to provide resolution of grievances related to whistleblowing … in 2014, [20 August] 2017 and [30 November] 2020'* (Para 33(a) of the particulars of claim; Issue 5(a) of the current List of Issues.)

7.2. A *failure generally to provide feedback on the outcome of investigations*. (Derived from para 33(b) of the particulars of claim as clarified in the Preliminary Hearing at paragraph 51 of EJ Reed's summary; Issue 5(b) of the current List of Issues)

8. In relation to the first PCP (about grievances) the Claimant alleges a failure to resolve his grievance of 30 November 2020 by Mr Carter, the Third Respondent and First Respondent's General Counsel, closing it down. The Claimant alleges this was the third time that he had raised a grievance that was not investigated or concluded. He relies on two previous grievances, in 2014 and 2017, that he alleges were not investigated or concluded. (Paragraphs 21 and 22 of the Particulars of Claim.)

9. In relation to the second PCP (about investigations) the Claimant provided further information as follows:

9.1. In February 2015 by Mr McCurry failing to update him following 'disclosure' by the Claimant of his concerns (point 1);

9.2. In October 2017 by Ms Wright not answering his request to provide details of investigations as a consequence of 'my whistleblowing' (point 2);

9.3. In January 2018: by Ms Buchan not arranging a meeting after a request; and by Mr Walker not responding to a question whether there had been fraud investigations (point 3);

9.4. On 13 October 2020 by Mr Walker (the Second Respondent) not answering a question, based on his witness statement in claim 1, about what 'whistleblowing investigations' had been undertaken (point 4);

9.5. On 15 November 2021 (post-dating claim 3) a (then) very recent letter of 15 November 2021 requesting what investigations had been undertaken 'as a consequence of my whistleblowing'. It cannot be an allegation in the claim: having arisen after the claim was presented. I asked the Claimant whether he wished to apply to amend his claim to include this allegation. He did not wish to make that application at this time.

The Claimant's questions were about what investigations had taken place.

10. The Respondents apply to strike out these allegations because they say it is an abuse of process to bring them because of the rule in Henderson v Henderson. They submit the allegations could and should have been brought in claim 1 either initially or by amendment, and it is an abuse of process not to have done so. As a result they say they are harassed by the claims.

11. Miss Thomas also submitted that the victimisation allegation had no prospect of success because it came logically before the protected act. Thus, the alleged detriment could not have been because of the protected act.

12. In the alternative, the Respondents submit that the claims have been brought out of time; they do not form part of any continuing conduct; and it is not just and equitable to extend time.

13. A few days before the hearing, the Claimant wrote to the Tribunal with a specific disclosure request and contended that this should be decided before the Respondents' application, which ought to be postponed. I did not agree to this approach because documents that the Claimant had not yet seen were not required for me to decide the Respondents' application.

14. I first heard submissions about the abuse of process point. I then heard evidence from the Claimant about his health and the reasons why he put in claims 3 in April 2021 rather than earlier. I then heard submissions on the time point. Both parties provided outline written submissions.

Claim 1 and Judgment

15. It is necessary for me to set out, so far as is relevant, what claim 1 was about and what the tribunal decided in it.

16. In claim 1 the Claimant alleged that he had been treated badly by his employer because he was a whistle-blower: in legal language, that he had been subjected to various detriments for having made public interest disclosures.

17. An employee who raises concerns with his employer about wrongdoing and who says he was subject to detriments by his employer for having raised those concerns, must first show that what he said or wrote was a 'qualifying disclosures' under section 43B of the Employment Rights Act 1996 ('ERA'). In claim 1 the Claimant failed to establish this. The tribunal decided that he did not disclose information tending to show a breach of a legal obligation or criminal offence and/or that he did not have a reasonable belief that the information contained in the disclosure tended to show fraud. In normal language, he was judged not to have been a 'whistle-blower' and his claims failed, see the Judgment paragraphs 157-176.

18. In summary, the disclosures in claim 1 were about the same concerns the Claimant identified for me at this preliminary hearing: a potential conflict of interest and/or a suspicion of 'wrongdoing' and/or a risk of fraud.

19. Even though the Tribunal did not have to do so, it also reached conclusions about whether the Claimant had been subject to the detriments he alleged in claim 1.

    19.1. Detriment 5.1 was '*Ms Fearon-McCaulsky's alleged failure to provide details of the progress of the investigation following the Claimant's disclosure of his concerns to her in June 2014'*. At paragraph 178 of the judgment, the Tribunal decided that, '*while the Claimant's email to Mr Nurworgah asked for an investigation, we have found there was no*

investigation. There was therefore no failure … to provide details of the progress of any investigation.'

19.2. Detriment 5.2 was *'In July 2014, Mr McCurry failing to resolve the Claimant's grievance.'* At paragraph 182, the Tribunal decided Mr McCurry, an employee in HR, was not involved in the grievance but it had been considered by Mr Thomas and rejected. The Claimant had not appealed.

19.3. Detriment 5.4 was '*In February 2015, Mr McCurry failing to provide details of the progress of the investigation following the Claimant's disclosure of his concerns'*. At paragraph 183, the Tribunal found this to be a detriment. It decided '*on the balance of probabilities, it was an oversight by Mr McCurry not to get back to the Claimant on this issue*.'

19.4. Detriment 5.8 was '*Between August 2017 and January 2018 Ms Wright's inaction in addressing the Claimant's concerns'*. At paragraph 187 the Tribunal rejected this point because it did not agree that her responses were 'inaction'. She had referred the Claimant's concerns to internal audit for investigation. The Tribunal's full findings of fact about this matter at paragraph 71-73 are important: after Ms Wright's referral to internal audit, Mr Brooker, then Head of Fraud, the contacted the Claimant on 21 December 2017 asking for an outline of the issues and offering a meeting. (He also wrote to Mr McCurry asking for further information.) The two met on 18 January 2018 but the Claimant '*left the room when he was asked for details of the nature and extent of the wrongdoing and the people involved*. *Mr Brooker explained that without these details he would not be able to progress a fraud investigation*. The Claimant suggested to him this approach was '*aligned with preserving a cover up'*. Mr Brooker responded to the Claimant '*saying he was unable to proceed without any further detail and therefore considered the matter closed.'* Ms Wright confirmed to the Claimant there would be no investigation.

19.5. Detriment 5.13 was on 6 February 2019 Ms Buchan informing the Claimant that his grievance was closed when it had not been properly investigated or concluded. At paragraph 193 the Tribunal decided that this was a detriment. It stated, '*In late 2017 the Claimant had asked for his grievance against Mr McCurry to be suspended. He now wanted this grievance to be reactivated …*' The Tribunal held it was inappropriate for Mr McCurry to play any part in deciding whether a grievance about him should be continued or regarded as closed. Nevertheless the Tribunal found that '*it more likely that the only reason for the decision to close down the grievance was taken because of an erroneous belief that the matters had already been addressed'*.

20. In relation to <u>alleged investigations and feedback</u>, the Tribunal's findings of fact show that there was a general investigation into conflicts of interest <u>before</u> the Claimant raised his concerns (paragraph 39). It was this information that Mr McCurry had not fed back to the Claimant (paragraph 39). <u>No investigations</u> had taken place into the Claimant's concerns. This is unsurprising, given the Tribunal's decision that they were not qualifying

disclosures and the then Head of Fraud's explanation for why he could not progress an investigation. The Tribunal dealt with the facts on this in detail in its judgment:

20.1. On 13 January 2017, the Claimant asked for information about investigations. Mr McCurry said he had no knowledge of the public interest wrongdoing claim and suggested the Claimant follow it up with the original parties (paragraph 61).

20.2. There was the abortive Head of Fraud interview, see above. The feedback to the Claimant was that there would be no investigation.

20.3. On 30 July 2018, Mr McCurry wrote to the Claimant informing him in relation to the 'business ethics concern' he had previously raised that the First Respondent was unable to take it any further forward and in the absence of evidence he considered it closed, (paragraph 82). The feedback was that there was no investigation.

20.4. On 13 September 2018, Mr McCurry informed the Claimant about the general investigation prior to the Claimant raising his original concerns and he apologised for not feeding back about this one earlier, (paragraph 85). There was therefore no failure to feedback on this but a delay that had occurred prior to the first claim.

20.5. On 21 December 2018, Ms Buchan, now line manager, confirmed to the Claimant that the First Respondent was not prepared to do anything about the issues he had been escalating over the last few years, (paragraph 92). Again, therefore, the Firs Respondent told the Claimant that there would be no investigation.

20.6. In January 2019 the director of Risk and Assistance, Mr Walker, offered the Claimant a meeting with the new Head of Fraud, Mr Mulling, if he was able to share details of wrongdoing (paragraph 96), but the Claimant was unwilling or unable to do so (paragraph 97). Thus the Claimant did not progress the chance to be involved in an investigation. (This means, the Claimant will not be able to establish the facts as currently alleged at paragraph 9 of claim 3's particulars of claim.)

Overall therefore it is very obvious indeed that the First Respondent did give feedback to the Claimant that it had not investigated and did not intend to investigate his concerns.

21. In relation to grievances, the Tribunal made the following findings of fact:

21.1. On 18 February 2014, the Claimant raised a grievance. It was heard by Mr Thomas, Head of Engineering, and was rejected. The Claimant withdrew his appeal (paragraphs 18, 19, 30 and 31).

21.2. He continued with a complaint about the time it had taken to deal with the first grievance. This was handled by Mr McCurry. It was delayed because the person it was against was on long term sick leave. Later Mr McCurry told the Claimant there was little that could be done now

that the person had left (paragraph 48). Ultimately Mr McCurry wrote again in 2016 treating the matter as closed (paragraph 57).

21.3. On 20 August 2017 the Claimant raised another grievance with Ms Wright, HR Director. A manager was appointed but the Claimant wanted Ms Wright to hear it. She said she would deal with any appeal. On 23 November 2017 he asked for his grievance to be suspended. He did not take later steps to reactivate his grievance and the onus was on him to do so. On 6 February 2019 he asked Ms Buchan whether the business considered the grievance open or closed and, on Mr McMurry's confirmation, she informed him closed (paragraphs 65, 67, 70, 74, 98 and 99).

22. In claim 1 the Claimant raised two kinds of disability discrimination claim: a section 15 claim (being subject to detriments because of something arising in connection with his disability) and a failure to make reasonable adjustments claim. Both were rejected by the Tribunal. The Respondents raised time limit points that would have been successful (if it had been necessary to decide them) in relation to both claims. Thus, the Claimant knew about disability discrimination and Equality Act time limits.

Findings of Fact

23. Having heard the Claimant's evidence and having referred to the Judgment in claim 1, I make the following findings of fact.

24. The tribunal found as a fact in claim 1 that the Claimant told Ms Buchan in November 2018 that he held Mr McCurry accountable for his state of health (paragraph 91). In his Particulars of Claim in claim 3 the Claimant alleges that he wanted to convey to Mr Walker in early 2019 how 'whistleblowing had impacted upon my wellbeing' (paragraph 9). The Claimant therefore had in his mind, prior to the first claim, the impact on his health of his concerns and the Respondent's response to them.

25. The Claimant was too unwell, for reasons relating to his disability, to continue attending the hearing of claim 1 in August 2020.

26. On 30 November 2020 it is not disputed in the pleadings that the Claimant raised a grievance. This was about Mr Walker's refusal to respond to the Claimant's ongoing question about whether his concerns would be investigated. In their Response, the Respondents say this grievance was investigated by Ms Chapman, Director of Licensing, who gave the Claimant an outcome which was in summary that, in the absence of the Claimant providing detail, Mr Walker had been unable to deal with his concerns and that he had handled the matter appropriately.

27. In his evidence to me the Claimant explained it as follows: *'I was saying I had a grievance against Mr Walker because he wasn't answering my questions. A lady came back to me saying you have already had our response. End of*.' Thus on the Claimant's case he accepts he had a response from 'a lady' at the Respondent, who I find, given the Response, is likely to have been Ms Chapman.

28. It is clear to me from reading the Judgment in claim 1 and hearing this evidence, that the Claimant keeps asking the Respondent about whether there were investigations to his concerns. He repeats this question to various individuals in the First Respondent. It is equally clear that the First Respondent has replied to him repeatedly that, without more detail, there will not be an investigation. When the Claimant is refused in this way, he then brings a grievance.

29. Before Christmas 2020, and with the help of his son, he started drafting the claim that would become claim 3. He had formed an intention to present it. He told me it felt like a discrete claim, involving different people. Cross-examination in the first claim had already been completed and he thought it unlikely that he would be allowed to amend claim 1 at that stage in the hearing.

30. The Claimant then contracted Covid in early 2021 which caused him to be hospitalised between 7-11 January 2021. His mental health was not helped by seeing patients who fared worse than he did in hospital.

31. Nevertheless, on 21 January 2021 he was able to contact ACAS in relation to the First Respondent (40). Early Conciliation took some time: the certificate was dated 4 March 2021.

32. Medical evidence on 3 February 2021 (153) stated he was not well enough to attend a hearing because of covid. He told his GP he had memory issues (she did not confirm those issues) and was finding it difficult to cope with his ongoing anxiety and depression. I find, at this time, his health had not prevented him from progressing through ACAS EC. The GP letter stated there was hope for him to be recovered from Covid by April.

33. On 2 April 2021 he presented claim 3. It was rejected against the Second and Third Respondents for lack of ACAS Early Conciliation.

34. On 8 April 2021 the Claimant started ACAS EC for the individual Respondents and it ended on 9 April 2021. Very quickly he presented claim 3201877 in the same form as claim 3 but now accepted against those respondents.

35. For most of 2020, the Claimant's son had helped him with his first claim, while he had been living at home. But his son moved out. He then applied to the tribunal for a 'litigation friend' help. He did not hear back from the Tribunal about that. He could not explain to me why he had thought the Tribunal offered such a service. Nothing on the Tribunal website or authoritative advice websites would have suggested it offered such a service. It does not do so.

36. The Claimant did not provide up to date medical evidence to the Tribunal to seek an adjournment of the May 2021 hearing. It therefore went ahead.

37. When asked why allegation 27(b) was not included in his first claim the Claimant blamed his health and said he had only asked about this matter in 2020.

38. In relation to his grievance to Mr Walker he said the first hearing had raised more questions than it had answered.

Legal Principles

The relevant statutory provisions

39. Section 19 Equality Act 2010 provides:

> *(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*
>
> *(2) For the purposes of subsection (1) a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –*
>
> *(a) A applies, or would apply it, to persons with whom B does not share the characteristic,*
>
> *(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,*
>
> *(c) It puts, or would put, B to that disadvantage, and*
>
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim.*

40. Section 39(2)(b) of the Equality Act 2010 provides that an employer must not discriminate against an employee, by subjecting him to a detriment.

41. Thus to succeed in an indirect disability discrimination case so far as is relevant here, the Claimant must prove a practice of the First Respondent, which was or would have been applied to all; and that this practice put disabled employees to a particular disadvantage when compared with non-disabled employees; and that he experienced that disadvantage; and that he was subject to a detriment by it.

42. The Equality Act 2010 makes unlawful 'retaliation' by an employer against an employee raising a complaint by reference to it. This is called 'victimisation'. Under section 27 and section 39 of the Equality Act 2010, the Claimant must show that he was subjected to a detriment by the Respondents because had had done a 'protected act'. It is not in dispute here that the protected act was his bringing claim 1.

43. Section 123(1) of the Equality Act provides that proceedings on a may not be brought after the end of a period of 3 months (in addition to time added by ACAS EC) or '*such other period as the Tribunal thinks just and equitable*'.

44. Section 123(3) provides that '*conduct extending over a period is to be treated as done at the end of the period'*.

45. Sections 123(3) and (4) provide that '*failure to do something is to be treated as occurring when the person decided upon it'*. A person is to be taken to decide on a failure to do something when he does an act inconsistent with doing it or if he does no inconsistent act, on the expiry of the period in which he might reasonably have been expected to do it.

46. When I consider whether to extend time beyond the primary time limit in section 123(1), I must consider what is just and equitable (fair). The Claimant has the burden of persuading me. I take into account factors so far as they are relevant including: reason for and length of the delay; the merits of the claim; any impact of the delay on the cogency of evidence; the knowledge of the Claimant; the speed with which he acted once he was aware of the claim; and, importantly, the balance of prejudice.

47. I do not find helpful the comments of Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 (CA) that an extension of time is the 'exception rather than the rule' or that the time limits are 'strict'. I consider Sedley LJ in Chief Constable of Lincolnshire v Caston [2010] IRLR 327 (CA is correct that these are unnecessary glosses on the statutory language. (Counsel when acting opposite a Litigant in Person should not cite Robertson without also referring the employment judge to Caston.)

48. Rule 37(1) of the Tribunal Rules of Procedure 2013 provides that I can strike out a claim or part of a claim if (a) it has no reasonable prospect of success and/or (b) the manner in which the proceedings have been conducted by or on behalf of the Claimant … has been … unreasonable.

The Rule in Henderson v Henderson

49. There is a long established principle that there must be finality in litigation. As part of this principle the rule in Henderson v Henderson allows the court to strike out a claim as an abuse of process where it *could* have been and *should* have been brought in earlier litigation. It has been accepted that the same principles apply in the Tribunal, presumably as part of Rule 37(b).

50. It is not enough for the Respondents to persuade me that a claim *could* have been brought earlier. It must show it *should* have. It must also show that it is an abuse of process not to have been. The best expression in modern times is by Lord Bingham in Johnson v Gore Wood [2002] 2 AC 1 at p30H. I have separated out this paragraph of his speech for ease of reading and give a brief explanation after it in square brackets for the Claimant's assistance:

> *The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole.* [This is the policy reason for the 'rule'.]

> *The bringing of a claim … in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim … should have been raised in the earlier proceedings if it was to be raised at all.* [The basic test.]
>
> *I would not accept that it is necessary, before abuse may be found, to identify any additional element such as collateral attack on a previous decision … but where [that element] is present the later proceedings will be much more obviously abusive,* [If the third claim is a way of attacking the judgment in the first claim it is more likely to be found to be abusive.]
>
> *and there will rarely be a finding of abuse unless the later proceedings involves what the court regards as unjust harassment of a party.* [I must consider the effect on the Respondents of the claim and whether it is harassing.]
>
> *It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, the party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.* [It is not enough to say that the claims 'could' have been brought earlier: I must look at all the circumstances and interests.]
>
> *Properly applied … the rule has in my view a valuable part to play in protecting the interests of justice.*

Lord Millett at page 59A observed:

> *It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. … the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the Court from abuse and the defendant from oppression. …There is therefore only one question to be considered in the present case: whether it was oppressive or otherwise an abuse … for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the Company's action… Insofar as the rule in Henderson v Henderson suggests that there is a presumption against the bringing of successive actions, I consider that is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or*

> *an abuse of process for him to be subjected to the second action.* [The key question is whether this is an abuse and oppressive to the Respondents. There is not a presumption against bringing second actions.]

51. I look at the matter up to the hearing of the first claim, not its presentation, see LB Haringey v O'Brien [UKEAT/0004/16/LA].

52. I must consider the Claimant's reasons for not pursuing the claim earlier. I should also consider whether the parts of the claim allowed to continue will include evidence in relation to the claim alleged to be an abuse. For both points see James v Public Health Wales NHS Trust [UKEAT/0170/14/KN].

53. My decision must be an exercise of judgment rather than of discretion.

No reasonable prospects of success

54. I remind myself that the Rule for striking out a claim as having no reasonable prospect of success has a very high threshold. It must only be adopted in the clearest of cases, especially in the discrimination field where much usually depends on the facts and inferences to be drawn from them. But the case law allows the rule to be applied in an appropriate case: where, for example, there is incontrovertible evidence that means the case is not be possible to win.

Decision on Application to Strike Out

Victimisation allegation paragraph 27(b) of Particulars of Claim

55. In my judgment, the victimisation allegation at paragraph 27(b) of the Particulars of Claim in claim 3 could have been made in claim 1 because it could have been raised in an application to amend prior to the first hearing, after disclosure. The Claimant knew all of the facts he needed to know by then. Whether there had been an investigation in January 2018 was also part of the relevant evidence of the first claim because it was part of the alleged detriment 5.8 and clear findings were made about the internal audit investigation in the Judgment of claim 1 (paragraph 70-73).

56. The Claimant has not explained satisfactorily why this claim could not have been made in the claim 1 once he discovered after disclosure that there were no such records. He was aware of the provisions of the Equality Act 2010 and had the help of his son. I therefore consider the claim should have been brought by way of amendment, if brought as a claim at all.

57. In my judgment allowing this allegation to go forward in a new claim oppresses and vexes the Respondents because it is effectively required to go over the same evidence again in relation to a different alleged cause. This is costly in time and money. The facts will not need be heard in the remaining parts of claim 3: it is entirely discrete.

58. In my judgment this claim is also now an attack on the findings of the first claim: the Claimant does not appear to accept that there was no internal audit investigation. Nor does he appear to accept that he was told this. But this is

just what the Tribunal has found: the Head of Fraud did not begin a fraud investigation because the Claimant did not provide him with any details and he told the Claimant this at the time, (Judgment paragraph 72). These are all findings of fact that I cannot go behind. This makes the allegation that there was a practice not to give him feedback on investigations in claim 3 much more obviously an abuse of process.

59. If I am wrong, I would have found that this allegation should have been struck out as having no reasonable prospect of success. This is because the detriment complained of comes *before* the protected act (the presentation of claim 1 on 3 June 2019) and cannot therefore have been because of the protected act. A failure to keep detailed records of any fraud interview in January 2018 happened at the interview or very soon after it. This is because detailed records of such an interview can only have been made at the interview or very soon after it in order to preserve the detail before memories faded. Certainly before 3 June 2019, the date of the protected act.

60. I would also have struck out this allegation as having no reasonable prospect of success because not keeping detailed notes in a non-existent fraud investigation cannot on any case amount to a detriment.

Indirect Disability Discrimination Allegations

61. The Respondents argue that on both PCPs should be struck out in total. If so the whole of the indirect disability discrimination claim will be struck out.

PCP re grievance

62. I deal first with the PCP of '*consistently failing to provide resolution of grievances related to whistleblowing'*.

63. On its face, that is a practice, if it existed, about which the Claimant was aware prior to the beginning of hearing of claim 1 because the alleged failure to resolve grievances were alleged detriments 5.2 and 5.13 in claim 1, from 2014 and 2017.

64. The Claimant had in mind prior to the presentation of the first claim that his health had suffered because of the impact of the Respondent's conduct. The Claimant knew about disability discrimination and had included elements of it in claim 1.

65. All the elements of this allegation therefore *could* have been raised in claim 1 prior to the beginning of the first hearing.

66. I find also that this allegation *should* have been raised in claim 1. The Claimant could have raised this practice by way of amendment prior to the beginning of the final hearing. He would have been relying on facts raised in claim 1. By the time his second grievance was not resolved, he could have identified a practice, by which time he had been disabled and could have therefore complained that the practice put him to a disadvantage and he was subjected to a detriment by it.

67. It is vexing and expensive to the First Respondent to be required to face proceedings in relation to this first PCP when it will be required to go over

evidence of two grievances about which it has already given evidence in claim 1.

68. I have considered the argument (albeit that it was not made to me) that it was only when the third grievance was allegedly not investigated or resolved, that the Claimant observed a practice of not doing so. If so, the Claimant *could* have sought to amend his claim. I accept that this would have been at a late stage but it was in relation to a discrete issue: the alleged failure to resolve his 30 November 2020 grievance, to which Ms Chapman had given allegedly short shrift. This grievance related to the same subject matter as claim 1: whether his concerns about wrongdoing had been investigated. He was able prior to Christmas 2020, to draft a claim about it. Thus, he was equally able to apply to amend claim 1. I consider, too, the Claimant *should* have done so: it would have been quicker and easier: rather than going through a new set of ACAS Early conciliations. It was plainly relevant to claim 1. He was as capable of doing this as he was of bringing claim 3 and there was plenty of time to do so prior to the re-start.

69. In my judgment, the Claimant is now, through this allegation, relitigating the claims he lost in claim 1 using a different legal label. He lost his claim for unlawful detriments based on the grievances in 2014 and 2017. He is aiming to have a second bite at that cherry. It is oppressive to the Respondents for him to do so, for the reasons I have already given.

70. I do not consider evidence of prior grievances will be necessary in the remaining claims and therefore evidence in relation to this allegation will not be necessary in any event for the remaining claims.

71. I find that for all of these reasons the indirect discrimination claim based on the first PCP relating to grievances is an abuse and should be struck out.

72. Given the length and prolixity of claims, it was initially hard for me to grasp the Claimant's approach, It seems to me now clear that his third grievance is based on a repeat of his question (*Have there been investigations?*) to which he has already received an answer (*No*). This is an additional reason why this claim is an abuse of process: the Claimant could continue into infinity repeating his question, being dissatisfied with the answer, bringing a grievance about it and claiming a practice based on his dissatisfaction with the speedy closure of the grievance because he has been given answers to his question before.

73. If I am wrong, in any event I would have struck out this claim as having no reasonable prospect of success, because of the insurmountable hurdle the Claimant has in establishing the alleged practice relating to grievances. The Tribunal found as a fact that the Claimant was given an outcome to his grievance in 2014: it was rejected. This means it was resolved. The Tribunal found it was up to the Claimant to reactivate his second grievance in 2017. He did not do so until, in February 2019, he asked whether the grievance was open or closed. The Respondent told him, in error, that it was closed. The Claimant told me at the Preliminary hearing that he did receive a response to his third grievance from a lady (likely Ms Chapman) rejecting it as a repetition. The facts therefore do not establish the alleged practice of a failure to provide

resolution to grievances. There was one outcome (2014), one mistaken closure (of the suspended 2017 grievance in 2019) and one rejection. These three matters do not establish a practice of failing to provide resolution and, thus, the Claimant has no reasonable prospect of establishing the alleged PCP.

PCP re investigations

74. The second alleged PCP is a failure generally to provide feedback on the outcome of investigations. The Claimant's further information gives examples of that alleged practice:

    74.1. Point 1 of the further information is exactly the detriment he alleged at issue 5.4 in claim 1 albeit with a different legal label;

    74.2. Point 2 of the further information is a specific feature of the general detriment alleged at issue 5.8 in claim 1 and the same as the detriment alleged at issue 5.1 albeit at a different time and with a different legal label;

    74.3. The facts of point 3 of the further information arose before the presentation of claim 1. They are dealt with at paragraph 98 of the Judgment, so were part of the evidence in claim 1.

    74.4. Point 4 of the further information is a repeat of the questions already asked of the First Respondent by the Claimant and complained about in the first claim. This is a discrete point. It is, at its highest, an example of what the Claimant alleged had already become a practice.

    74.5. Point 5 is not currently proper further information, the Claimant has not applied to amend and I do not deal with it.

75. In my judgment, the Claimant had observed three alleged examples of a refusal to give information about investigations before he presented his first claim. Before the first claim, he knew his health was being impacted by the conduct of the Respondents that he complained about. He *could* therefore have made this allegation in claim 1.

76. In my judgment, the Claimant should have made this allegation in claim 1. I repeat that he knew the alleged facts upon which the claim is based. The pattern had been established, in the Claimant's view (albeit as I set out below, not in fact) that the First Respondent had set its face against telling him what was going on in relation to investigations. He knew it was having an impact on his health. Those are the makings of an indirect disability discrimination claim. The Claimant had claimed two kinds of disability discrimination in claim 1: he was therefore aware of the Equality Act scheme. If he had wanted to run these complaints as an alternative indirect disability discrimination argument then he should have done so at the time the evidence was being considered. This claim should have been raised with all of his other claims at the same time so as to save time and expense for both him, the Respondents and the administration of justice. What the Claimant is now doing is effectively saying, '*Ok I've lost on the original grounds, but here are some alternative arguments*.' It is oppressive to do so in the circumstances of this case. It

harasses the Respondents to do so and costs the Tribunal and therefore the public further expense. It is classically an abuse of the kind in Henderson v Henderson and under Rule 37(1)(b) it is unreasonable conduct of a claim.

77. I deal with Miss Thomas' further submission on the 2015 incident. The Claimant could argue that the 2015 example is evidence of the practice ('the PCP'), even though he was not yet disabled. (Though given the Tribunal's finding that this failure was an oversight, it would be hard to establish a practice from it.) What he could not do, if he established the PCP in this claim, is argue that the 2015 incident placed him at a comparative disadvantage, because he was not yet a disabled person.

78. If I am wrong about this as an abuse of process, I would have struck out this claim as having no reasonable prospect of success for the simple reason that the Claimant will certainly not be able to establish a failure to give feedback on the outcome of investigations. This is again one of those unusual discrimination claims that can be struck out at an early stage because there are irrefutable facts that mean it cannot succeed.

79. The Claimant tells me that he sees a 'cover up' in the absence of records about investigations of his concerns. But it is clear from the Judgment that there were **no** investigations of his concerns, thus obviously there would be **no** records. His claim about not being given feedback on investigations therefore hangs upon nothing at all. Further, the Claimant has not been kept in the dark about the fact of no investigations. It is very clear in the Judgment that the Claimant was **told** his concerns would not be investigated. It cannot be a disadvantage or a detriment not to be given feedback on investigations that did not happen when you were told they were not going to happen. If the First Respondent now refuses to respond to the Claimant's repeated questions, that is no surprise and perfectly reasonable. It is an abuse of process to generate a new claim by repeating the question about investigations to new personnel in the First Respondent. Sometimes persistence is admirable: here it is oppressive and misconceived.

80. I am concerned whether the Claimant has understood that it has been decided that he was not a whistle-blower in the legal sense. I urge him to read the Judgment and this one carefully to understand the legal difficulties in his approach.

Time Limits - Claims Against Individual Respondents

81. I go on to consider whether all of the claims have been brought out of time against the Second and Third Respondents, Mr Walker and Mr Carter.

82. The claim against the individual Respondents was presented on 10 April 2021. Early Conciliation took place between 8 and 9 April 2021. Adding the primary time limit to the time for Early Conciliation means that a claim about any act or failure before 10 January 2021 is out of time.

83. The latest complaint against Mr Walker relates to his letter dated 22 October 2020 in which he told the Claimant that he had made it clear it was not possible to investigate the matter. Thus the claim is 80 days out of time (around 11 weeks).

84. The latest complaint against Mr Carter relates to an alleged failure to investigate the grievance against Mr Walker dated 30 November. The Respondent states that at the last Preliminary Hearing the Claimant accepted that this shortcoming took place before the end of 2020. This makes sense in that a failure is taken to occur when action inconsistent with it ought reasonably to have taken place. A month for this relatively brief grievance is a reasonable amount of time within which to expect a response. Thus the claim against Mr Carter is about 10 days out of time.

85. The victimisation claims against the individual respondents are of individual acts or omissions. They are not acts extending over a period.

86. The burden is on the Claimant to persuade me to extend time. He was aware of the time limits. He had drafted a claim by the end of 2020. He should have started Early Conciliation in relation to Mr Walker by 21 January 2021. I take into account that he was in hospital but his ill health did not mean he was unable to start Early Conciliation (he did so against the First Respondent). I cannot find that it was a factor in the delay.

87. In relation to Mr Walker, the delay in presenting the claim was significant.

88. Finally, the balance of prejudice is against an extension in Mr Walker's case in that the Claimant still has his claim against the First Respondent, whereas Mr Walker will be put to the much more onerous work of being an individual respondent in the case rather than a witness.

89. Weighing up those factors they point away from it being fair to extend time. In my judgement it is not just and equitable to extend time to allow the claim against Mr Walker, the Second Respondent.

90. In relation to Mr Carter, the delay is much shorter, being ten days. But I can only extend time if I consider it just and equitable to do so and I have concluded that it is not. The Claimant was aware of his claim within time and had prepared it. He was able to take action despite his illness in relation to the First Respondent and could have done in relation to Mr Carter. The claim against Mr Carter appears to me to be weak, given that it is obvious, even on what the Claimant says, that Mr Carter must have taken action and passed his grievance to a 'lady' (Ms Chapman) who responded to him, appropriately in my view. There are no countervailing factors in favour of extending time. Finally the balance of prejudice is against an extension in that the Claimant still has his claim against the First Respondent whereas Mr Carter will be put to the much more onerous work of being an individual respondent in the case rather than a witness.

91. Weighing up those factors I also consider that they weigh more heavily against extending time. I find that it is not just and equitable to extend time to allow the claim against Mr Carter, the Third Respondent.

Time Limits - Claims Against Individual Respondents

92. Any act or omission before the 22 October 2020 is out of time. This means that all the remaining victimisation claims against the First Respondent are in time. Even paragraph 2(b) of the Particulars of Claim is in time because it is

about the response to the letter of 13 October, which response was on 22 October 2020. Therefore I do not strike out the victimisation claims against the First Respondent.

Further Case Management of Claims 2, 3 and Claim 4

93. It does not appear that there has been any dismissal judgment in relation to the failure to make reasonable adjustments allegation in claim 3. The Claimant withdrew this allegation at the Preliminary Hearing before EJ Reed. Rule 52 requires the Tribunal to issue a judgment dismissing it. I have included this in my judgment.

94. Now that I am familiar with the claims and the Judgment in claim 1, I have considered claim 2, the remaining victimisation claims in claim 3, and claim 4. On my own initiative, I (or another judge) will consider the following issues at the next Preliminary Hearing (in public):

    94.1. whether claims 2, 3 and 4 or any part of them should be struck out as having no prospect of success; or

    94.2. whether deposit/s should be paid as a condition of continuing with claims 2, 3 or 4 or any allegation within them.

95. The Claimant will find information about deposits orders at Rule 39 of the Employment Tribunal Rules of Procedure at this link: https://www.gov.uk/government/publications/employment-tribunal-procedure-rules If a judge considers any allegation has little prospects of success, then they can consider whether the Claimant ought to pay a deposit as a condition of continuing with that claim. If a deposit order is made and paid, there is a costs risk in continuing because, if the Claimant loses the claim for substantially the reasons given in the deposit order, then he will be treated as having acted unreasonably and risks having to pay Respondent's costs of defending that part of the claim.

96. I have not reached any conclusion on these points but, to give examples, it seems to me there are real questions:

    96.1. whether the unlawful deduction of wages claim has any prospect of success if it was to repay an overpayment. I referred the Claimant to section 14 of the Employment Rights Act 1996;

    96.2. whether the responses to the Claimant's repeated question and grievances can be said to be inappropriate or a detriment;

    96.3. whether a failure to investigate wrongdoing and/or refer the matter to a regulatory body can amount to a detriment where the allegation of wrongdoing has been found not to be a protected disclosure;

    96.4. whether, the failure to grant special leave, amounted to a detriment.

97. I have made other case management orders of my own motion in order that the hearing is effective. These are set out in a separate order.

Employment Judge Moor
Dated: 25 November 2022