Case No: 2602287/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr S Wawrzyniak (a.k.a. Mr S Stanford)

Respondent: Unipart Group Limited

FINAL HEARING

Heard at: Nottingham, in public, partly via CVP **On:** 31 October & 1 November 2022

Before: Employment Judge Camp Members: Mrs JC Rawlins
Mr J Purkis

Appearances
For the Claimant: in person
For the Respondent: Mr S Willey, solicitor

REASONS

1. Judgment with reasons was given orally at the hearing, on 1 November 2022, and the written version of the Judgment was sent out shortly afterwards. These are written reasons, subsequently requested by the Claimant.

Introduction & claims

2. The Claimant was an agency worker employed by Pertemps Recruitment, which was, but no longer is, a respondent to this claim. Throughout this decision, we will refer to Pertemps Recruitment as "Pertemps" and to the remaining respondent, Unipart Group Limited, as the "Respondent".

3. The Respondent was the end user in what could be described as the conventional worker / agency-employer / end-user relationship. The Claimant worked for the Respondent as a Forklift Truck Driver in an NHS Supply Chain warehouse in Alfreton, from 3 April 2020. His placement with the Respondent was brought to an end, at the Respondent's request, on 4 February 2022.

4. Because the Claimant was employed by Pertemps and not by the Respondent, the Respondent could simply, and did simply, tell Pertemps that it did not want the Claimant to work for it any more. We note that even if the Claimant had been the Respondent's employee, he had no right to be treated fairly in relation to dismissal because he had been continuously engaged working for the Respondent for less than 2 years. However, the Claimant did have rights against Pertemps and against the Respondent under the Agency Worker Regulations 2010 ("AWR") because he had been working for more than 12 weeks.

5. The Respondent accepts that the reason it instructed Pertemps that the Claimant was no longer welcome was that the Claimant had posted an uncomplimentary and potentially reputationally damaging review of the warehouse on Google, which we will refer to as "the review". He did this sometime between 1 and 3 February 2022. Anyone – prospective employees, general members of the public, the Respondent's customers, and so on – who did a Google search of the warehouse had access to that review.

6. What we have been dealing with over the last day or so is what remains of what was originally a more substantial case with two Respondents: the Respondent and Pertemps. The Claimant went through early conciliation with Pertemps between 25 and 31 August 2021 and presented a claim form naming Pertemps as the only Respondent on 16 September 2021. The original claim – the one in the claim form – was a claim under the AWR, principally for breach of regulation 5. The intricacies of that claim against Pertemps are set out in the written record of the preliminary hearing that took place on 11 February 2022 before Employment Judge Clark. They do not directly concern us because, as a result of various judicial decisions and of (as we understand it) a settlement agreement of some kind between the Claimant and Pertemps, all complaints against Pertemps have either been struck out, or withdrawn and dismissed.

7. What we do note is that the claim form is clear and coherent and that the Claimant, notwithstanding linguistic and other potential obstacles, was able to find out about his employment rights and about Employment Tribunal practice and procedure and act upon that knowledge.

8. The Respondent came into these proceedings as a result of an amendment application. We will give more details about exactly what happened later in these Reasons, but, in summary:

    8.1 at the preliminary hearing on 11 February 2022, Employment Judge Clark raised the possibility of joining the Respondent as a respondent and made case management orders in relation to a possible future joinder application;

    8.2 the Claimant made a joinder application by letters of 20 February and 28 March 2022. The Respondent was added as a respondent by order of Employment Judge Broughton on 28 April 2022, albeit she did not, when ordering that the Respondent be added as a respondent, specify which complaints the Respondent was a party to, nor did she decide any time limits issues that arose in connection with her order;

    8.3 there was then a hearing in front of Employment Judge Blackwell on 28 June 2022. Following that hearing, the Claimant was left with two complaints only against the Respondent.

9. The Claimant's two complaints against the Respondent are, first, a claim for breach of regulation 5 of the AWR ("regulation 5"). It is about the following (taken from section 8.2 of the original claim form):

> *2. Recently my mum died and I had to take 5 days off work to deal with the overall situation. I did inform and send even my mum's death certificate but I was told that I can eventually take 5 days of my 28 days holiday pay because I am not given compassionate leave/pay. I did ask my colleague who works there before DHL and he said that they have written in contract described 5 days compassion leave pay for the same circumstances.* [sic]

10. The other claim that the Claimant was left with following Judge Blackwell's decision was a claim relying on regulation 17(2) of the AWR about the termination of the placement with the Respondent on 4 February 2022. We shall refer to this as the "regulation 17 claim".

Issues

11. The great majority of the relevant facts are not in dispute and very few issues were left for us to decide by the end of the hearing.

12. In relation to the regulation 5 complaint, it is accepted by the Respondent that the Claimant took five days leave following the death of his mother and that those five days leave were taken from around 4 May 2021. It is also accepted that around 8 or 9 May 2021 the Claimant asked about whether he could take those days as paid compassionate leave, something that he would have been able to do had he been an employee of the Respondent. He was told by Pertemps, which was the company that he asked about this (he didn't ask the Respondent), and was told that he couldn't do that and that he would have to take those days as normal annual leave. It is also in effect conceded by the Respondent that this set of facts was a breach of regulation 5.

13. It is accepted by the Claimant that he brought an identical regulation 5 claim against Pertemps and that that claim was compromised earlier this year, on terms that Pertemps paid him five days' pay. That may not have been the whole of the compromise, but it was, as we understand it, the relevant part of it. The only defence to that claim that the Respondent is raising that is not a remedy issue is time limits.

14. In relation to the regulation 17 claim, the critical issue is whether the reason the Respondent instructed Pertemps that it did not want the Claimant to work for it any more was that he alleged that the Respondent had breached the AWR in the Google review he posted in early February 2022.

15. There is also an amendment issue, relating to a potential complaint of victimisation, that we shall come to later in this decision.

The law

16. So far as concerns the law, putting the amendment issue to one side it has not been necessary for us to do more than consider time limits and the parts of regulations 17 and 18 of the AWR themselves that apply to disputed issues:

> *Unfair dismissal and the right not to be subjected to detriment*
>
> *17.—*
>
> *(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act, or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).*
>
> *(3) The reasons or, as the case may be, grounds are—*
>
> *(a) that the agency worker—*
>
> *….*
> *(iv) alleged that a temporary work agency or hirer has breached these Regulations; …*
>
> *Complaints to employment tribunals etc*
>
> *18.—(1) In this regulation "respondent" includes the hirer and any temporary work agency.*
>
> *(2) Subject to regulation 17(5), an agency worker may present a complaint to an employment tribunal that a temporary work agency or the hirer has infringed a right conferred on the agency worker by regulation 5, 12, 13 or 17 (2).*
>
> *(4) Subject to paragraph (5), an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months beginning—*
>
> *(a) in the case of an alleged infringement of a right conferred by regulation 5, 12 or 17(2), with the date of the infringement, detriment or breach to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the infringement, detriment or breach, the last of them; ….*
>
> *(4A) Regulation 18A (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of paragraph (4).*
>
> *(5) A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*
>
> *(6) For the purposes of calculating the date of the infringement, detriment or breach, under paragraph (4)(a)—*
>
> *(a) where a term in a contract infringes a right conferred by regulation 5, 12 or 17(2), that infringement or breach shall be treated, subject to sub-paragraph (b), as*

taking place on each day of the period during which the term infringes that right or breaches that duty;

(b) a deliberate failure to act that is contrary to regulation 5, 12 or 17(2) shall be treated as done when it was decided on.

17. The time limits issues that arise do so in the context of one or more amendments to the claim. In accordance with Galilee v The Commissioner of Police of The Metropolis [2017] UKEAT 0207_16_2211 and Sheikholeslami v University of Edinburgh [2018] UKEAT 0014_17_0510, if a new complaint is added by a claimant being given permission to amend, time limits apply to that complaint as if it had been presented to the Tribunal when the claimant applied to amend.

18. So far as concerns the discretion in AWR regulation 18(5) to extend time on a "*just and equitable*" basis, we have sought to apply the law as summarised in paragraphs 9 to 16 of the EAT's decision in Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283.

19. As to amendment issues, we are looking at the overriding objective and deciding whether giving or refusing permission to amend would be in the interests of justice. When making that decision, we are assisted by the well-known Selkent guidance (see Selkent Bus Company Ltd v Moore [1996] ICR 836). We need to take all the relevant circumstances into account; particularly important factors will be the type of amendment (whether a substantive new complaint is proposed or something less significant), time limits, and the balance of prejudice between claimant and respondent; but no one factor is necessarily determinative.

The facts

20. The Claimant had not prepared a witness statement for this hearing. His evidence in chief consisted of him confirming the truth of the relevant part of his claim form – the bit that we just read out – and of a letter to the Employment Tribunal of 9 February 2022 in which he complained about the termination of his placement with the Respondent on the 4th of that month. Also, without opposition from the Respondent's solicitor Mr Willey, the Employment Judge asked the Claimant questions relevant to time limits issues, e.g. about why there was no claim against the Respondent sooner.

21. So far as concerns the facts relevant to the time limits issue that arises in connection with the regulation 5 claim, these begin with the [effectively admitted] breach of regulation 5 occurring in May 2021, seemingly on or around the 9th of that month. The claim in respect of that breach that was made against Pertemps was made in September 2021. Taking into account the dates of early conciliation, even that claim against Pertemps was probably brought outside the primary time limit of 3 months plus early conciliation extension.

22. On 25 November 2021, the Claimant wrote to the Respondent complaining about his lack of success in applications for permanent roles and promotions into permanent roles. In that letter, he complained, albeit not in so many words, about being disadvantaged in his applications because he was an agency worker. That letter was construed by Employment

Judge Blackwell as potentially being some kind of application to amend to add the Respondent as a second respondent to his claim against Pertemps. However, Employment Judge Blackwell's decision to construe it in that way, which came into his thinking to do with time limits issues, is not a decision that is binding on us and we respectfully take a different view. We do not see how that letter can possibly be construed as an application to add the Respondent as a respondent to the claim alleging breach of regulation 5. It was not addressed or copied to the Employment Tribunal, it does not threaten a claim of any kind, let alone this particular regulation 5 claim, and it doesn't even mention the regulation 5 claim in any way, shape or form.

23. We should add, because it is relevant to things other than this regulation 5 claim, that this letter of 25 November 2021 doesn't mention any concerns the Claimant may have had about anything other than opportunities for advancement within the Respondent and his difficulties in this respect.

24. On 9 February 2022, just before the preliminary hearing heard by Employment Judge Clark, the Claimant wrote to the Tribunal saying he wanted to add to his claim against Pertemps an additional claim in respect of what he labelled his unfair dismissal on 4 February 2022. At the hearing on 11 February 2022 there was some discussion about adding the Respondent as a respondent to the claim. In the written record of the Preliminary Hearing, Employment Judge Clark wrote:

> *The claimant may seek to add Unipart Group as a respondent. He has not done so in respect of the original claim and, whilst it could have been named, it is not essential that it was. … As to the amended claim, so far as the proposed amendment sought to add a claim of unfair dismissal, Unipart would still not be a proper respondent as they are not the employer. However, I have identified that the claimant's proposed amendment also alleges detriment and victimisation. Unipart could be a proper respondent to either of those claims. I have not added them today but have left the parties with an opportunity to reflect on whether it is necessary and, if so, the basis of that necessity to add Unipart as a respondent.*

25. Judge Clark also made the following orders:

> *3.1. Should either party wish to add an additional respondent, they must set out their application in writing by no later than 11 March 2022.*
>
> *3.2. Any such application must clearly set out the following two matters: -*
>
> *3.2.1. the basis on which they are required to be added and why that would be in the interests of justice.*
> *3.2.2. Whi[ch] of the claims before the tribunal the additional respondent is said to be liable for (alongside the existing respondent).*

26. On 20 February 2022 the Claimant wrote to the Employment Tribunal applying to add the Respondent as a second respondent. The relevant part of what he stated when doing so is:

> *I have brought [a] claim against the employment agency, Pertemps Recruitment Partnership Limited, but the whole circumstances also relate to the hirer, Unipart Logistics Limited. The both of them did take an active role in breaching of AWR 2010. I will provide evidence that the hirer was obliged to reduce the pay gap and as well that they and the Employment Agency didn't inform me about the employees working there that have different rates of pay for the doing the same job. Unipart Logistics Limited has played a major role in my unfair treatment, victimisation or even discrimination.*

27. An application to add a new respondent is an application to amend to add a new claim. We take that letter, of 20 February 2022, as the relevant amendment application for time limits purposes in accordance with Galilee and Sheikholeslami. What that means is that this regulation 5 claim against the Respondent is deemed to have been presented on that date, which is approximately 6 months outside the primary 3 month time limit contained in AWR regulation 18. We therefore have to decide whether it would be just and equitable to extend time.

28. As to the additional facts that relate to the regulation 17 claim, it is relevant that the Respondent operates in a heavily regulated environment and that in late 2021 / early 2022 the warehouse in Alfreton where the claimant worked had been inspected by the MHRA and found not to have a single 'non-compliance' in health and safety terms. The Respondent evidently prides itself on its health and safety measures. As we would expect, it has a number of practices and procedures in place that (from the point of view of senior managers, at least) are intended to encourage and facilitate the raising of concerns about health and safety.

29. On 31 January 2022, the Claimant's line manager, Mr L Bramwell, emailed one of his superiors, a Mr M Walker, expressing concerns about the Claimant. Amongst other things referred to in this email was the Claimant being argumentative, emotional, irate, not accepting responsibility for his actions and there allegedly being problems with his general attitude when challenged. The significance of that email does not depend on whether those allegations are correct or reasonable or fair or anything like that. What is significant is when it was sent, and that it shows the Respondent had serious concerns about the Claimant before he posted the review that led to the termination of his engagement with the Respondent.

30. Although we had no direct evidence about this, we think we can safely assume that when sending this email Mr Bramwell was escalating and formalising concerns he had had for at least a little while before 31 January 2022.

31. Mr Walker forwarded Mr Bramwell's email to a Miss C Harrison, General Manager of the Alfreton site and one of the Respondent's two witnesses before us. He did so on 2 February 2022 or thereabouts.

32. Precisely when the Claimant posted the review is not clear, but it was around 2 February 2022. It is worth quoting the review almost in full.

> *The warehouse is temperature controlled, so we are able to work in t-shirts all the time, bright, dry and relatively clean apart storage and handling of medical items which is below acceptance often or all the time you can see needles, syringes or bandages laying around the floor. This business unit is currently run by Unipart Group. I find that the Unipart treat employee really differently. Recently I applied for the Shift Manager position as I have some experience. I gained management and leadership qualifications in United Kingdom and also any BSOH occupational health and safety qualifications. I wasn't even asked to come for interview. Unfair treatment is just a tip of the iceberg. Discrimination especially to the age is quite often visible. Unequal pay there are four different pay and entitlements to the employee who do the same job. This was introduced gradually under different blankets. Note the Equality Act 2010 or AWR 2010 applied. Some employees can have 15 minutes break longer than others who do the same job. If you was involved in accident you will quickly realise it means blaming culture. Many dangerous things was raised but management do not introduce any changes. The cages are stored between the racking, working and storing pallets on driveway or on visible markings on floor. One person responsible for health and safety across multiple sites, Alfreton over 300 employees. This indicates how as so far as is practicable that Unipart can save money. There is much more to say but overall, I hope that soon this unaccepted proceedings will be find under the NHS Board scrutiny.*

33. The Respondent accepts that the review contained allegations that it had breached the AWR in accordance with AWR regulation 17(3)(a)(v). On the evidence before us, the Claimant had not previously raised any of the concerns detailed in that review with management, other than those about alleged breaches of the AWR.

34. The existence of the review quickly came to the attention of the Claimant's line manager and on or around 4 February 2022 it came to the attention of Miss Harrison. She spoke about the review and about the Claimant with Mr Bramwell, with her Operations Director, with someone whose job title is "Communications Champion" called Mr Lovell, and with Mr R Hind, HR Business Partner on the NHS Supply Chain Contract and the Respondent's other witness at this hearing. As part of this, a mini investigation was undertaken to see whether the Claimant had raised any of the non-AWR issues internally before posting the review. It was found that he hadn't. In light of these discussions and her mini investigation Miss Harrison decided to instruct Pertemps to end the Claimant's placement with the Respondent and they did so. All of this happened on 4 February 2022.

35. The factual dispute we need to deal with around the review and the instruction to remove the Claimant from working for the Respondent which are relevant to the regulation 17 claim are:

    35.1 at the time Miss Harrison took the decision, had she and/or Mr Hind seen some photographs that, at a later date at least, accompanied this review and are on page

75 of the bundle of documents for this hearing; and if so, what significance did they have to her decision making?

35.2 when Miss Harrison took the decision, are we satisfied that in no sense whatsoever was she influenced by the Claimant's complaints of breaches of the AWR?

36. In relation to the first of these factual disputes, the Claimant's recollection, which we and the Respondent learned about for the first time in his oral evidence at this hearing, was that he posted the photographs after his placement was terminated; indeed, that he did so partly in response to and as – this is our word not his – revenge for his placement being terminated. However, the Respondent has consistently said that the review included at least most of the photographs appearing in the bundle and that the photographs were significant in relation to its decision-making. That has been the Respondent's position since the response form was lodged at the Tribunal on 16 May 2022.

37. Both Mr Hind and Miss Harrison gave clear evidence to that effect, both orally and in writing. At the time of the response form and of the preparation of witness statements, the Respondent evidently had no idea that this was in any way in dispute and had no particular incentive or other reason to make it up or to believe it was so when it wasn't. Generally, Mr Hind and Miss Harrison gave candid, unguarded evidence; in part, their evidence does not reflect particularly well on them. Miss Harrison gave evidence to the effect that the photographs were of particular significance to her because she believed that they had been staged to some extent. She appeared embarrassed when she gave that evidence and seemed to us to be speaking frankly and honestly.

38. Mr Hind said that one of the things that was important to him was his belief that in the review the Claimant was making unfounded allegations of discrimination. That was a potentially damaging admission in the context of a claim where victimisation may have been in play, something we shall come on to later.

39. On balance, in light of their willingness to make admissions potentially contrary to the Respondent's interests and of the fact that the Respondent's position has been consistent from the outset, we prefer their evidence to the Claimant's in this respect. We are not suggesting that the Claimant was not telling us the truth as he now believes it to be, but he is giving us, for the first time at this hearing, his recollection of things from 9 months ago. The Claimant presumably took these photographs for a reason. It seems to us more likely than not that he posted them with the review, to bolster it, rather than that he initially did not bother with the photographs and then later, arbitrarily, decided he was going to bother with them. Also, we think it is more likely that he is mistaken about when the photographs were posted than that the Respondent's witnesses are mistaken or lying, given the centrality of these photographs to Miss Harrison's decision-making, as we shall explain now.

40. Miss Harrison told us that the bits of the review that were of concern to her were the part from, "*The warehouse is temperature controlled*" to "*bandages laying around the floor*" and the part from, "*If you was involved in accident*" through to "*Unipart can save money*". In

other words, it was the health and safety concerns that the Claimant raised rather than anything else that mattered as far as her decision-making was concerned. In addition, she told us something to the effect that the allegations around the AWR were of no importance to her at all.

41. Mr Hind also told us that the Claimant making allegations under the AWR did not concern him. In fact, the position was quite the opposite. The gist of his evidence was that he almost welcomed the claimant raising such allegations because the Respondent was involved in an ongoing process of ensuring that it was compliant with those Regulations. In relation to the Claimant's November 2021 letter, his substantially unchallenged evidence was that he had not ignored the claimant's allegations about compliance with the AWR but had instead referred them to Pertemps, rather than dealing with them himself. This shows to us that from the Respondent's point of view the Claimant's particular concerns about non-compliance with AWR were not something for it to worry about.

42. Pausing there, we note that the Claimant's claim could have been put forward as a 'whistleblowing' claim under the Employment Rights Act 1996. It never has been, though, and we note that any whistleblowing claim based on this review would face the significant obstacle of the Claimant having to satisfy the requirements of sections 43G and/or 43H of that Act. In any event, no such claim is before us, no application to amend to add such a claim has been made, and it would be far too late for the Claimant to make any such application now.

Decision on the issues – regulation 17 claim

43. If we accept Miss Harrison's evidence, the regulation 17 claim necessarily fails because that evidence is to the effect that in no sense whatsoever did the allegations of breach of the AWR figure in her thinking or decision-making. Of course, it could be said in relation to that evidence 'she would say that, wouldn't she'. However, what she said is inherently plausible; it has the ring of truth to it. In her role, she was responsible, amongst other things but of paramount importance, for health and safety on site. By contrast, issues to do with the AWR were nothing to do with her. This means that she was not in any way personally or professionally attacked by allegations of non-compliance by the Respondent with the AWR. She was, however, effectively personally and professionally attacked by allegations of breaches of good health and safety practices made in the review concerning a warehouse for which she was responsible.

44. One of the things that came through very clearly from both her and Mr Hind's evidence was that they were angry not so much by the Claimant raising his issues but by the fact that he had chosen to raise them publicly and that he had not previously done so internally. In other words, what was important was the way in which the Claimant had raised them rather than the fact that he had raised them. Given that the Respondent already had significant concerns about the Claimant (justifiably or otherwise), it is, frankly, of no surprise at all to us that the decision was taken to remove him from site. It was a legitimate management action in the circumstances.

45. Looking at this issue another way, we might ask: why would Miss Harrison be at all concerned about the Claimant making allegations of breach of the AWR; why would it matter to her at all? We can't see why it would.

46. In conclusion, we are satisfied that the Claimant raising allegations of breach of the AWR played no significant part in the decision to terminate the Claimant's placement with the Respondent. The complaint relying on regulation 17 of the AWR therefore fails.

Regulation 5 claim – time limits

47. It is for the Claimant to satisfy us that it would be just and equitable to allow the regulation 5 claim to proceed notwithstanding the time limits problems that it has. Our decision in short is that he has failed to do so.

48. The Claimant has explained why no claim was made against the Respondent sooner broadly on the basis of his ignorance of his ability to make it. We don't think that explanation is true. From the fact that the Claimant was able to bring a claim against Pertemps in September 2021, go through the early conciliation process and put together a coherent claim form referring to the AWR (amongst other things), and from the contents of the November 2021 letter, we are satisfied that the Claimant had sufficient knowledge to make this regulation 5 claim against the Respondent had he wanted to do so, by November 2021 if not before. We think that he did not make it because he chose not to do so and that he only made it at all because he was encouraged to do so by what had been said by Employment Judge Clark at the preliminary hearing in February 2022 and also because he was by that stage anyway wanting to make a claim against the Respondent about the termination of his placement. He would in all likelihood not have made any regulation 5 claim against the Respondent had his placement not been terminated.

49. Looking at the balance of prejudice, there is minimal prejudice to the Claimant by not being allowed to proceed with his complaint against the Respondent, given that he chose to bring the same claim against Pertemps and not against the Respondent in 2021 and has subsequently compromised that claim against Pertemps, presumably to his satisfaction, and that that compromise involved, to the best of our understanding, any financial loss being compensated for in full.

50. The prejudice to the Respondent caused by the lapse of time is significant. Everything that happened that is relevant to the issues in the claim (other than time limits issues) happened in May 2021; the relevant interactions were between the Claimant and Pertemps rather than the Claimant and the Respondent; the claim against Pertemps has been compromised meaning, we assume, that Pertemps is less interested in helping out Unipart than it might otherwise have been. Contrastingly, the Claimant has put forward no positive reason at all why it would be just and equitable to extend time. In these circumstances, the balance of prejudice comes down in the Respondent's favour.

51. Accordingly, the regulation 5 claim fails because of time limits.

Amendment & victimisation

52. There is a potential victimisation complaint. It is identical to the regulation 17 complaint we have just rejected but relies on parts of the review as a protected act in accordance with section 27 of the Equality Act 2010. The review contains allegations of age discrimination and expressly refers to that Act. In light of Mr Hind's evidence referred to in paragraph 38 above, such a victimisation complaint would be eminently arguable.

53. During the hearing, we discussed this potential victimisation complaint at some length. Where we ended up was a decision that there was no such complaint against the Respondent before the Tribunal. This meant that if the Claimant was going to pursue it, he would have to gain our permission to amend his claim to add it.

54. Our discussions in this respect began at the start of the hearing. At that stage, the claimant made no amendment application. He did not make one until the Employment Judge raised the potential for a victimisation claim again after the evidence but before closing submissions. He raised it then in light of Mr Hind's oral evidence relating to the importance of allegations of discrimination to his thoughts about terminating the Claimant's placement.

55. A victimisation claim along these lines was flagged up by Employment Judge Clark at the preliminary hearing on 11 February 2022. In fact, analysing the order Judge Clark made, we think that one of the things he did was to add not just a regulation 17 claim about the termination of the placement but a victimisation claim about the same thing too, both claims being made against Pertemps. We have already quoted from what he said in terms of adding the Respondent as a party and from the orders that he made relating to any application to amend to add the Respondent, specifically about the Claimant needing to specify which "*of the claims before the tribunal*" the Respondent "*is said to be liable for (alongside* [Pertemps]*)*".

56. The next relevant thing that happened was the Claimant sending his letter of 20 February 2022, which we have already referred to and quoted from. One part we haven't quoted is a part beginning with a sentence which starts, *"Unipart Logistics Limited*". That is simply a mistake, of no consequence. The Respondent's name, as everyone agrees, is Unipart Group Limited. The sentence in full is, "*Unipart Logistics Limited had played a major role in my unfair treatment, victimisation or even discrimination*." The letter goes on to say, *"Because of the above justification and the fact that the respondent, Pertemps Recruitment Partners Limited, during the preliminary hearing had also agreed that it would be good if the Unipart Logistics Limited could join as a second respondent, I would like to ask the employment tribunal to accept my application."*

57. The application to amend that resulted in the Respondent being added as a respondent was in two parts. That letter from the Claimant of 20 February 2022 was the first part but it was followed up by a more detailed letter of 28 March 2022. In that 28 March 2022 letter there is a heading, "*2. Which of the Claims before the Tribunal the Claimant wishes to bring against Unipart Logistics Limited*". What the claimant wrote under that heading was, "*All of the claims are related to both of them: Pertemps Recruitment Partnership and*

Unipart Logistics Limited." He then listed claims relying broadly on regulation 5 of the Agency Workers Regulations and then, in relation to "*Unipart Logistics Limited*", he wrote, "*the compensation for unfair treatment (discrimination or/and victimisation under Equality Act)*".

58. The Claimant was, then, on 28 March 2022 making an application to amend to make the Respondent a party to, amongst other things, a victimisation claim which was by that stage already being made against Pertemps.

59. The next relevant thing was Employment Judge Broughton's order. What she ordered was that Unipart / the Respondent – she referred to Unipart Logistics Limited but that does not matter – "*be added as a respondent to these proceedings under rule 34*". As we have already said, she did not say which complaints the Respondent was being made a party to.

60. The case was then listed for a further telephone preliminary hearing to determine the issues in the case and to consider the case management directions.

61. There was then an application to convert that case management preliminary hearing into a preliminary hearing in public to deal with preliminary issues: strike out and deposit order issues. Employment Judge Ahmed granted that application, but when he did so, when listing the issues to be dealt with at the hearing, he did not mention any victimisation claim, whether against the Respondent or against Pertemps.

62. We have already explained what Employment Judge Blackwell did at the preliminary hearing to deal with preliminary issues in June 2022. When that hearing started, the position vis-à-vis the Respondent and the victimisation claim was: the Respondent had been joined as a party; nobody had identified which complaints the Respondent was a party to; accordingly, no one had given the Claimant permission to amend to make any particular complaint against the Respondent.

63. In paragraphs 4 and 5 of Employment Judge Blackwell's decision, he stated: *"I am satisfied … that the amendments to the original claim he brings … against* [the Respondent] *a claim pursuant to regulation 17(2), the detriment being an instruction to* [Pertemps] *to remove him from the Alfreton site on a permanent basis.*" What the Judge was deciding there was what was the amended claim against the Respondent relating to the termination of his placement, his decision being that it was limited to a regulation 17(2) claim.

64. There is no mention anywhere in Employment Judge Blackwell's decision of victimisation. But that doesn't change what the Judge decided, which is very clear: the claimant had before the Tribunal only two complaints against the Respondent, namely the regulation 5 and regulation 17 claims that we outlined at the start of this decision.

65. On any sensible view, no one – none of Employment Judges Clark, Broughton, Ahmed or Blackwell – has given the Claimant permission to bring a victimisation complaint against

the Respondent. That is why if he wants to pursue such a complaint he has to apply to amend now.

66. In connection with that application to amend, it is noteworthy that: the Claimant made just such an application on 28 March 2022; he evidently did not pursue it before Employment Judge Blackwell or at any other time prior to this hearing; he has never challenged Employment Judge Blackwell's decision.

67. In relation to an amendment application, one of the factors we are bound to take into account is time limits. As we explained earlier, when considering an application to amend to bring a new claim or other substantial amendment – which is what we are considering here – the relevant date for time limits purposes is when the application to amend was made. We think that date here is not 28 March 2022 because the application to amend the claimant made then was in effect abandoned. Instead, the relevant date is yesterday: 31 October 2022. This is because the application to amend that we are dealing with is the one that was made yesterday – a new application, only made at our prompting.

68. We should add in relation to the Claimant's applications of February and March 2022 to make the Respondent a party, without criticising him, that it was very far from clear from his correspondence precisely what complaints he wanted the Respondent to be a party to. To ascertain that, there would have needed to have been discussions with him. It appears from the write-up of the preliminary hearing dealt with by Employment Judge Blackwell that the Judge had just such discussions, and that the result of those discussions was a decision that the Claimant had the regulation 5 and regulation 17 claims that were identified and no other type of claim.

69. The merits of the proposed victimisation claim are potentially relevant. A factor in the Claimant's favour is Mr Hind's evidence that the Claimant making what Mr Hind believes to be unfounded allegations of age discrimination which were not particularised was an important factor in his mind. However, this is not a case where one can say that if permission to amend is given and time limits are extended the claim is bound to succeed. (We shall come onto why we say this in a moment). Also, this part of Mr Hind's evidence was not a 'bolt from the blue'; this was not a witness giving unexpected and startling confessional evidence that completely changed the complexion of the proceedings.

70. Mr Hind's oral evidence about the importance of the allegations of discrimination to him wasn't a change of evidence. He had not previously said that those allegations were not in his mind. He simply hadn't mentioned them – an unsurprising state of affairs given that his statement was prepared to meet a regulation 17 claim rather than a victimisation claim. Perhaps more importantly, a victimisation claim had been flagged up previously, by Employment Judge Clark, and the possibility of such a claim, given the reference to age discrimination and to the Equality Act 2010 in the review, was obvious. The claimant knew of that possibility, and in March 2022 went so far as to seek to add such a claim, but he then abandoned it. There is no suggestion that he abandoned it because he thought it had no merit, and then raised it again when Mr Hind gave his evidence because he realised it had merit after all, or anything of that kind.

71. The reality seems to us to be more that the Claimant's newfound interest in the victimisation claim arose from a gradual realisation during the hearing that his regulation 17 claim was not going to succeed, that it was a (for the Claimant) lucky accident that Mr Hind gave the evidence he gave, and that the application to amend that the Claimant made just before closing submissions was opportunistic.

72. The reasons why, notwithstanding Mr Hind's evidence, we don't think the victimisation claim would succeed if we gave permission to amend are: time limits; there is a question mark over the extent to which Mr Hind influenced Miss Harrison's decision; the respondent has a strong argument that the reason for Mr Hind's concern about the allegation of age discrimination was not the fact that it was a discrimination allegation but was instead the fact that it was raised publicly having not previously been made internally; if such a claim had been made in the claim form, it might have been defended on the basis that the allegation of discrimination in the review was made in bad faith and therefore there was no protected act.

73. Given that the Claimant in effect made a choice not to pursue the victimisation complaint, that he did not challenge Employment Judge Blackwell's decision as to what his claim consisted of, and given that the Claimant has not since that decision, so far as we are aware, sought to raise this victimisation complaint before we raised it at this hearing, there would be obvious unfairness to the Respondent were we to allow the Claimant to amend now. Had it been raised before, the Respondent could have thought about it; its witness evidence would almost certainly be different, in that, at the very least, it would include things which the witness evidence we heard didn't include. The Respondent's entire preparation for this hearing would no doubt have been different; potentially points which the Respondent has not taken would have been taken; cross-examination would have been different and the evidence might have taken a different turn. The Respondent has been denied the opportunity to put its best foot forward.

74. An amendment to add a victimisation claim against the Respondent is a substantial amendment. It is substantial both in terms of it being a claim against what was a new party at the time it was originally made; and of it being about something substantially new so far as the Respondent is concerned. There is/was no claim under the Equality Act 2010 and claims under that Act do have substantial differences from claims under the AWR.

75. Finally, returning to time limits, the victimisation complaint would be nearly 6 months out of time. We repeat what we said earlier about extending time: in summary, the Claimant has not advanced any positive reason that we have accepted as to why it might be just and equitable to extend time. It is, moreover, hard to see why it would be just and equitable to extend time in circumstances where the Claimant made an application to amend in March 2022 and then effectively abandoned it, or at least did not pursue it, over the Summer. There would be no point granting permission to amend if the victimisation complaint were doomed to failure for time limits reasons.

76. Taking everything into account, it would not in our view be in accordance with the overriding objective to give the Claimant permission to amend to add this victimisation

complaint. As the Claimant's other complaints have already been dismissed, we are afraid this means his entire claim fails.

Employment Judge Camp

23 January 2023