EMPLOYMENT TRIBUNALS

Claimant: **Mr M Dickinson-Hennessy**

Respondents: **(1) Valunation Limited**
(2) Mr D Atter
(3) Mr P Lancaster
(4) Mr S Davies

Heard at: **East London Hearing Centre (by CVP)**

On: **21 November 2022**

Before: **Employment Judge R F Powell**

Representation

For the Claimant: Mr P Gorasia, of counsel

For the 1st Respondent: Ms Rokad, of counsel

For the 2nd, 3rd & 4th Respondents: Did not attend and were not represented

JUDGMENT

1. **The claim of unfair dismissal is dismissed.**

2. **The claim for breach of contract is dismissed.**

3. **The claims against Mr D Atter and Mr S Davies are dismissed.**

4. **The claimant's amendment application, to add a complaint of victimisation, is allowed.**

5. **The claimant's application to amend his claim by adding a complaint of discrimination arising from his disability is refused.**

6. **Whether any of the claims amount to acts extending over a period of time, for the purpose of section 123 of the Equality Act 2010, will be determined at the liability hearing.**

REASONS

Introduction

1. This case concerns the claims presented by Mr Dickinson-Hennessy to the employment tribunal on the 5th December 2021. The respondents to the claim are his former employer and three of its managers.

2. The claims relate to matters which occurred during the claimant's employment with the respondent between 8th April 2013 and 4th May 2021, albeit that the discrimination claims relate to events which commenced in January 2020, in particular the decisions not to shortlist the claimant for promotion on two occasions that year;17th February and 2nd March 2020.

3. The Claimant, who was over 71 years of age at the above times, asserts that the respondent's decisions to reject his applications amounted to acts of age discrimination.

4. The claimant also asserted that he had made a protected public interest disclosure within the content of a written grievance which he presented to the respondent around 20th October 2020.

5. Further he made a claim in respect of underpayment of wages and a failure to pay accrued holiday pay.

6. On the 22nd August 2022 Employment Judge Reid dismissed the holiday and public interest disclosure claims; upon the claimant's withdrawal of the same.

7. The ET1 form, in section 8.1, records that the claimant ticked the sections for unfair dismissal, age and disability discrimination.

8. In section 8.2 of the ET1 the claimant sets out his pleaded case and repeatedly stated that the alleged unlawful actions were; "because of my age". There are no equivalent assertions in respect of disability. There is reference to the claimant's physical impairment of asthma in section 12.1; and a reasonable adjustment is requested for the final hearing.

9. I do note that in the claimant's October 2020 grievance he complained, under the title "Disability and Health and Safety" as follows:

> *"I lost my footing on my ladder when descending from a difficult roof void. This led to a hair line fracture in one of my lumber vertebrae in my back and meant I could no longer undertake Survey work because of the potential dangers of further damage, and after my bone scan the result meant that even residential inspections had to be limited. This situation meant a further reduction in fee income."*

10. In short, the ET1 referenced, but certainly did not plead, a claim of disability discrimination and the claimant's grievance did not foreshadow a claim related to his condition of asthma.

11. On 9th April 2020, in response to the Employment Tribunal's correspondence with respect to the apparent delay in presentation of his claim, the claimant mentions asthma and thereafter details the aspects of his ill health (and that of his wife) subsequent to his resignation; to explain why it was not reasonably practicable to present his claims in time and why the time for presentation should be extended.

12. On 22nd September 2022 the claimant, with the benefit of professional advice, presented an application to amend his claim [47], which included a claim that, contrary to section; 15 of the Equality Act 2010, the respondent had treated the claimant unfavourably because of his stress and anxiety; something which arose from his disability of asthma.

13. The pleaded unfavourable treatment is a series of procedural omissions by the respondent in respect of the grievance and a grievance appeal. These factual assertions are identical to those set out in the list of issues with respect to the claim of constructive unfair dismissal and another proposed amendment of the claim; a claim under section 27 of the Equality act 2010.

14. At a Preliminary Hearing on the 22nd August 2022 Employment Judge Reid acknowledged that application to amend the claim had been made and the need to determine whether the tribunal had jurisdiction to hear the claims, as currently pleaded.

15. Employment Judge Reid directed that this hearing would determine whether all or any part of the claims were "in -time" and, whether the proposed amendments to the claim should be allowed.

16. Because this hearing commenced at around 12.30 it was not possible to determine whether, as a matter of fact, the claimant's assertion of a continuing course of conduct were proven or not. In these circumstances I concluded it was proportionate, and in accordance with the overing objective, for that decision to be made at the final hearing; rather than order a further preliminary hearing on that issue.

The Jurisdiction of the Employment Tribunal; which elements of the pleaded claim are within its jurisdiction

<u>The claim of constructive unfair dismissal</u>

17. Section 111 of the Employment Rights Act 1996 states as follows:

> "111 Complaints to employment tribunal.
>
> (1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

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

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

18. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his claim in time and the burden of proving this rests firmly on the claimant: Porter v Bainbridge Ltd *[1978] IRLR 271*.

19. Second, if he succeeds in doing so, the tribunal must be satisfied that the further time beyond the primary time limit within which the claim was in fact presented was reasonable.

20. In any assessment of whether it was not reasonably practicable to meet the primary time limit the first question is why that time limit was missed: *Consignia plc v Sealy* [2002] IRLR 624. The correct enquiry is; 'what was the substantial cause of the employee's failure to comply'; *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119.

21. The focus will then be on whether, in light of that substantial cause, it was not reasonably practicable to meet the time limit.

22. *Schultz v Esso Petroleum Ltd [1999] IRLR 488* identified that when asking whether it is reasonably practicable to lodge a claim within three months the overall limitation period is to be considered .

23. *Further the* tribunal must consider the surrounding circumstances and the end to be achieved in the particular context of the case:

> *"*The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the industrial tribunal, and that their decision should prevail unless it is plainly perverse or oppressive'

24. The test of whether the claimant should reasonably have known of the employment right or the time limit is an objective one: *Porter v Bainbridge Ltd [1978] IRLR 278*, *[1978] ICR 943* where the majority of the Court of Appeal approved an employment tribunal's finding that the claimant 'ought to have known' of his right to claim, even though he did not in fact know of it.

25. Ignorance or mistake may not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made. One question to be asked in ignorance or mistake cases will therefore be whether the claimant who did not engage an advisor acted reasonably in failing to do so. Consideration should be given to the reasonableness of failing to instruct a solicitor and also to the reasonableness of failing to seek advice from other sources such as the Citizens Advice Bureaux, pro bono charities, ACAS or, increasingly, sources of information available on the Internet. In *Dedman*, Scarman LJ explained that where a claimant says that he did not know of their rights, relevant questions would be:

a. ''What were his opportunities for finding out that he had rights?

b. Did he take them?

c. If not, why not?

d. Was he misled or deceived?

Findings of fact

26. It is agreed that the claimant's effective date of termination was the 4th May 2021.

27. It is agreed that , for the purposes of section 111 ERA 1996, that the relevant period in which a Tribunal Claim could be presented expired on the 3rd August 2021.

28. It is agreed that, at that date, the claimant had not contacted ACAS and had not presented his claim.

29. On 6th August 2021 the claimant contacted ACAS and commenced conciliation against the first respondent; Valunation limited.

30. ACAS issued an EC certificate in respect of the employer on the 17th September 2021.

31. On the 17th August the claimant commenced conciliation against three of the first respondent's employees; the second, third and fourth respondents.

32. ACAS issued EC certificates on each individual conciliation process on the 28th September 2021.

33. The claimant presented his ET1 on 5th December 2021, in respect of all four respondents.

34. Given the timing of the commencement of the EC process the time for presentation of the claim was not extended by virtue of those processes.

35. The claims under the ERA 1996 are therefore four months out of time.

Was it not reasonably practicable to present the claim of unfair dismissal by the 3rd August 2021?

36. Mr Dickinson-Hennessy gave evidence in accordance with his 23 paragraph witness statement. He was cross-examined and also answered questions from myself.

37. The claimant was employed to undertake surveys of properties and draft reports for the respondent. The claimant worked remotely from the respondent's main office and received instructions to undertake surveys on an irregular basis; he was employed on a zero hours contract. I note also that the claimant had been available for work since his period of furlough ended in August 2020 through to his resignation on the 4th May 2021.

38. He describes his caring responsibilities for his wife in the period prior to his resignation. And in particular her first diagnosis of cancer on 11th November 2020 and her operation in December of that year.

39. The claimant submitted a grievance in October 2020 and he subsequently attended a grievance meeting with the respondent on the 9th December 2020.

40. It is evident from his five-page grievance appeal document that, in early 2021, he contacted his managers on a number of occasions to question why the outcome of his 2020 grievance had not been forthcoming.

41. The respondent set out its findings and conclusions on the claimant's grievance in a document dated 29th April 2021; more than six months after it received the grievance complaint.

42. On the 4th May 2021 the claimant presented his grounds of appeal against the respondent's 29th April 2021 decision; which had not upheld any of his complaints.

43. The five-page appeal document is very thorough and sets out the claimant's criticism of the investigation process, the conduct of the grievance hearing, the inadequate rational for the respondent's decisions, the failure to articulate decisions on certain allegations and the failure to consider other allegations at all. It reflects the claimant's ability, at that time, to read and assimilate the content of the grievance outcome and his ability to formulate a response, draft that response in an electronic format and send his response to his intended recipient electronically.

44. The claimant's synopsis of the above [73] in his resignation letter is a cogent summary of the points which now form his pleaded claim and the proposed amendments to it.

45. During this period the claimant was the person responsible for his wife's care at home [paragraphs 7 to 11 of his witness statement] which was both emotionally and physically straining.

46. In June 2021 the respondent invited the claimant to attend a grievance appeal meeting on two occasions. In respect of both invitations, the claimant said he was unable to attend.

47. There was, on the evidence before me a period of inaction by both parties between late June and 6th September 2021; when the claimant commenced Early Conciliation with the first respondent.

48. The claimant started to notice problems with his vision and attended an eye clinic in mid-September 2021 which led to subsequent operations, on both eyes for cataracts. In cross-examination he stated that this deterioration was affecting his driving. He said he could read documents but would use a magnifying glass for very small print. He stated that he was able to write (on paper or a computer) throughout the periods of time with which I am concerned.

49. On the claimant's own oral evidence, the decline in his eyesight did not prevent him from reading, writing or communicating electronically.

50. It is evident, in my judgment that, as of the 4th May 2021, the claimant had knowledge of the matters about which he later pleaded, and the matters subject to his applications to amend this claim. I also find that he had the ability to communicate a comprehensive summary of his complaint's electronically on 4th May 2021 and thereafter.

51. It is also evident that, as of the 4th May 2020, the claimant had prepared a detailed document to set out his complaints of discrimination and unfair dismissal for his grievance appeal, and his resignation email.

52. It is evident that the claimant had researched the preparatory steps needed to present a claim to the employment tribunal because he commenced early conciliation on 6th August 2021. That demonstrates the claimant had, on or prior to that date, some knowledge of the employment tribunal process or, a sufficient ability to appreciate the need to investigate that process.

53. I note that the claimant's daughter was, and is, a specialist employment law solicitor who could have provided, in a matter of a few minutes, advice on time limits or guided the claimant to useful online advice on that subject. The claimant stated in evidence he made a conscious decision not to seek her advice due to her personal circumstances.

54. However, the above does indicate that the claimant had contemplated seeking expert advice, but having decided not to ask his daughter , he did not approach any professional or charitable provider of employment law advice such as a Citizen's Advice Bureau.

55. I take judicial note, from the number of cases in which "screen shots" of internet searches have been adduced in evidence , that if a person "googles" unfair dismissal the web pages generated direct the viewer to web sites which describe the process of presenting a claim and the time limits for presentation.

56. I note that the claimant was competent in the use of a computer and described using a computer to find out how to contact ACAS.

57. I find that, although affected by his own health concerns and those of his wife, the claimant was able to undertake the first procedural step toward the presentation of an employment tribunal, three days after the expiry of the time limit.

58. Whilst I have taken into account the claimant's evidence on the need to prioritise matters of health, I find it far more likely, based on his own evidence, that the reason why he felt he could prioritise health matters was his belief that he did not need to submit and ET1 until the grievance appeal process had produced an outcome.

59. In para 10 of his statement, he states:

> " I also believed at the time that I could focus on my health and my wife's health as I thought that any time limit would start once I had received an outcome to my grievance appeal. For this reason, I did not even think about seeking help from a free advice centre or a qualified lawyer as I did not think it was required."

60. In light of paragraph 10 of his statement, I do not accept that the health concerns of he and his wife were the reason for the delay. I find that the reason for his default, prior to 6th August 2021 was the belief set out in his evidence in chief.

61. I find that the reason the claimant did not present his claim before the 3rd August 2020 was because he thought that there was no need to do so.

62. Further, I do not accept that the claimant was ignorant of the need to undertake early conciliation by 6th August 2021; three days after the last date for a timely submission.

63. In my judgment it is beyond credible co-incidence that the claimant's commencement of early conciliation, so close to the time limit, was without some understanding of the need for early conciliation as a gateway to presenting a claim.

64. I do not accept the claimant's evidence that he was unaware of the time limits after the 6th August 2020.

Conclusions

65. Taking in to account the guidance which I have set out in paragraphs 18 to 15 above I find as follows:

66. The substantial cause of the claimant's failure to present his claim was his erroneous belief that he did not need to do so until the grievance appeal process had concluded.

67. Paragraph 10 of the claimant's statement demonstrates that, during the material period, he was aware that there was a time limit for presenting a claim.

68. I also note that the claimant's account before me was that his purpose, when first contacting ACAS, was simply to facilitate some form of mediation. I doubt that is true; I find that he had commenced early conciliation; because he had been contemplating bringing claims before the employment tribunal.

69. I then considered whether the claimant's belief, that the time limit did not start to run until he had received his grievance appeal outcome, made presentation of the claim by 3rd August 2021 reasonably impractical. Taking into account the guidance in *Porter v Bainbridge and Dedman* I find that:

70. The claimant's belief (as noted in paragraph 66 above) was incorrect and he took no steps to check whether his perception was correct or not.

71. In the period from 4th May to 3rd August 2021 the claimant had the time, the mental and physical ability, sufficient opportunity and the physical facilities to obtain advice, prepare an ET1 and submit it in a timely fashion.

72. I find that the claimant appreciated the need, or at least the benefit, of taking competent advice and he chose not to seek advice from his daughter, another professional or a lay advisor. Further, he chose not to investigate the procedure from the readily available information sources on the internet until August 2021.

73. He was neither misled nor deceived.

74. In the above context, the claimant was culpable for his lack of understanding of the time limit; he failed to take any reasonable step of investigating the time limits for presenting a claim form the sources which were available to him; a task of which he was capable of performing.

75. I find that it was reasonably practicable for the claim of unfair dismissal to have been presented on or before 3rd August 2021.

Such further period

76. Having reached the above judgment, it is not necessary for me to set out my conclusions on this point. However, for completeness I do so. To do so necessarily involves a hypothetical construct, contrary to my findings, that the claimant could not reasonably have enquired about, and understood, the three-month time limit and the effect of early conciliation before 3rd August 2021.

77. The test applicable to this determination is less strict; it is a matter for my objective assessment as to what further length of time would be reasonable in this case.

78. I first find that the process of completing an on line ET application is not of itself a lengthy or complex process, particularly to a person, such as the claimant who is familiar with the preparation of reports and is sufficiently computer literate. Further I find that, had the claimant chosen to do so, a "copy and paste" insertion, or attachment of his grievance appeal or his resignation letter would have been a sufficient account of his allegations to set out the character of his case.

79. The claimant commenced early conciliation with the first respondent on the 6th August 2021 and with the 2nd to 4th respondent's on the 17th. He concluded the conciliation with the individual respondents on the 28th September 2021. This was a cumulative total of seven weeks of early conciliation. A period in which the claim against the first respondent could have been submitted.

80. The claimant sought advice from his daughter on the 5th December 2021 [48, 2nd paragraph] and submitted his claim the same day. This speed reflects the claimant's ability to complete the online ET1 and present a synopsis of his claim; a matter of hours.

81. Whilst I accept that there were weeks, after the 5th October and then 9th November 2021 cataract operations, when the claimant was recuperating from the two operations (one for either eye), I do not accept the claimant's explanation in paragraph 20 of his statement. For the following reasons:

a. For the period up to the 5th October 2021 the claimant's evidence was that his eyesight was sufficient to read (with a magnifying glass), write and use a computer; as he had done to submit the early conciliation applications.

b. The cumulative periods of recovery after each cataract operation do not satisfactorily explain the delay of two months.

c. Paragraph 10 of his statement; his case was that he prioritised his own health and that of his wife because of his ignorance of the time limits. Not that his ability to present the claim was so inhibited so as to prevent him from doing so.

d. His case, as set out in his application to amend his claim states that he spoke to his daughter (an employment lawyer) on the 5th December 2021 and it was on this date, that he submitted his claim.

82. In light of the above, had the claimant acted reasonably in understanding his responsibilities to present his unfair dismissal case in a timely fashion, following his first contact with ACAS on 6th September 2022, such further period would have extended no further than the last date of early conciliation for the first respondent; 17th September 2021.

83. By reason of the above, I have reached the judgment that the claim of unfair dismissal is not within the tribunal's jurisdiction and is dismissed.

Breach of Contract

84. Article 7 of The Employment Tribunal Extension of Jurisdiction (England & Wales) Order 1994 states as follows:

> "Time within which proceedings may be brought
>
> 7. An industrial tribunal shall not entertain a complaint in respect of an employee's contract claim unless it is presented –
>
> (a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or
>
> (b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or
>
> (c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

85. The wording of Article 7 is materially the same as that of section 111 set out above.

86. For the reasons given above, in my judgment the claim of breach of contract is not within the tribunal's jurisdiction and is dismissed[1].

The claim of age discrimination

87. Section 123 of the Equality Act 2010 states as follows (my emphasis):

> Time limits
>
> (1) Subject to section] 140B proceedings on a complaint within section 120 may not be brought after the end of –
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.

[1] I have noted that a proposed list of issues refers to "Breach of Contract/Unlawful deductions". The reference to sections 13 to 27 of the ERA 1996 in not apparent on the ET1 nor in the summary of issues and has therefore not been addressed in the judgment. Had it been, then the effect of section 23(2) and (4), would have led to dismissal of such a claim; for the reasons set out in respect of the unfair dismissal claim.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of –

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something –

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

88. The claim concerns three broad themes:

a. The refusal of promotions in 2020.

b. The rejection of the claimant's grievances by 29th April 2021.

c. The failure to conclude the claimant's grievance appeal; to date.

89. The claimant avers that these amounted to a continuing course of conduct; an issue which I was not able to determine for the reasons set out earlier in this judgment.

Discussion and conclusions

90. Of the three themes above only the failure to complete the investigation and decision-making process on the appeal post-dates the claimant's effective date of termination.

91. On the parties pleaded cases it is not in dispute that the respondent accepted the claimant's grievance appeal and made two invitations to the claimant to attend an appeal hearing. On the respondent's case the claimant declined because on both occasions he was unable to attend. That last date was the 22nd June 2021.

92. It appears to be common ground that there was no subsequent invitation, and in any event the respondent has not, on its pleaded case, either determined the merits of the grievance appeal or provided an outcome to the claimant.

93. For the purposes of section 123(4), neither party has pleaded a specific act of the respondent which would fall within section 123(4)(a). Accordingly, the Final Hearing (which will have time to consider the evidence on this point, which I did not) must determine that.

94. For the purpose of this hearing, I address the jurisdiction of the tribunal based on the pleadings and whether it is appropriate to strike out this claim because it has no reasonable prospect of success.

95. I find as follows. The respondent's grievance process lasted from 20th October 2020 to 29th April 2021. I note that there was a one-month period of lockdown during the six months it took the respondent to complete its investigations and report.

96. For the purposes of this analysis of the claimant's reasonable prospects of establishing a "continuing act", I am of the view that he has a reasonable prospect of persuading the employment tribunal that the respondent was, absent the period of lockdown, likely to work at the same pace on the appeal as it did on the grievance; a period of four months after its interview with the claimant.

97. For the reasons noted above the claimant had not been interviewed by the 22nd June 2021. What is notable is that, on the parties' pleaded cases, no further invitation to an interview was offered.

98. For the purposes of section 123(4)(b); what would be such a further period?

99. The speed with which the respondent was able to offer interviews is indicated by the dates it did offer; two dates in June 2021. After that, on both parties' pleadings, the respondent took no further action.

100. In my view it is highly unlikely that the claimant will persuade an Employment Tribunal that it could be any later than a further six weeks' silence before it would be reasonable for the claimant to conclude the respondent had no intention of undertaking the appeal process; a period of three months since the appeal was presented to the first respondent and placed under the management of the third respondent.

101. Early conciliation with the fourth respondent commenced on the 17th August and concluded on the 28th September 2021; a period of six weeks.

102. If, the last act is construed (for the purposes of section 123(4)(b) as occurring on the 3rd August 2021, then it is arguable that the claim against the first and third respondents was presented in time.

103. In light of the above, I conclude that the claimant's case on the jurisdiction of the age discrimination claim is clearly arguable against the first (which does not dispute it is vicariously liable for the conduct of its employees) and third respondents.

104. In my judgment the claimant has a reasonable prospect of success in his argument that the age discrimination claims are in time accordingly, they are not struck out. The merits of the claimant's arguments must be determined at the liability hearing.

105. The claimant did not dispute that, with respect to the second and fourth respondents, they could not be responsible for conduct of other employees. The latest pleaded act or omission against either was March 2020; more than a year out of time.

106. As the first respondent is vicariously liable for the proven acts of these individual respondents the claimant suffers no material prejudice to his prospects of success or the amount of compensation he might be awarded, if the claims against these two individuals are struck out.

107. In light of the above, and the absence of disagreement from the claimant, I find that the claims against the second and fourth respondents were not presented in time and there is no reasonable argument, or evidence, for a just and equitable extension of time. Accordingly those claims are dismissed.

The Amendment Applications

108. The claimant seeks permission to amend his claim to add complaints under section s15 and 27 of the Equality Act 2010. The proposed amendments read as follows: (I have altered the format of the amendment which originally read as one continuous paragraph for each head of claim proposed):

> "I can only conclude that the Respondent has failed to consider, investigate or conclude my appeal. I get stressed and anxious as a result of my disability (asthma) and the Respondent failed to:
>
> deal with my grievance in a timely manner,
>
> failed to keep me updated during the grievance process,
>
> failed to allow me to be accompanied at the grievance hearing,
>
> failed to provide documentation in relation to my grievance and allow me to respond to it,
>
> failed to allow me to join the grievance hearing by telephone,
>
> failed to take account documentation I provided to them and
>
> failed to provide me HR support during the grievance process.
>
> The Respondent treated me unfavourably because of something arising in consequence of my disability, namely my propensity to get stressed and anxious.
>
> My grievance and grievance appeal amounted to a protected act as it complained of discrimination and I believe I was subjected to detriments in that the Respondent failed to deal with my grievance:
>
> deal with my grievance in a timely manner,
>
> failed to keep me updated during the grievance process,

> failed to allow me to be accompanied at the grievance hearing,
>
> failed to provide documentation in relation to my grievance and allow me to respond to it,
>
> failed to allow me to join the grievance hearing by telephone,
>
> failed to take account documentation I provided to them and
>
> failed to provide me HR support during the grievance process."

109. The above reflects paragraphs 1 to 18 of the claimant's grounds of appeal dated 4th May 2021. That document also makes express reference to being subject to victimisation because of his complaints of discrimination in his October 2020 grievance complainant.

110. The claimant's witness evidence did not explain why matters which he had set out in writing and sent to the respondent in May 2020 were not within the claim form on 5th December 2021 nor why the amendment was not proposed until counsel had advised the claimant in July 2022.

111. I also record that the claimant had access to his daughter's skill and experience as an employment lawyer conducting litigation and discrimination cases. I find that he chose not to ask for her assistance. I record that I find his explanation for not doing so (to avoid causing her stress because of matters arising from her personnel life) was not persuasive for the period after the date of presentation of the claim on 5th December 2021.

112. I also find that the issues in the amendment encompass a number of matters which the respondent had been asked to investigate in May 2021, and as yet, has not completed doing so; before me the respondent has not asserted that its investigation into those allegations, has been completed or closed.

113. In the claimant's ET1 form he expressly pleaded that the respondent's delay in completing the grievance process was "because of my age"; a claim of direct discrimination.

114. The claimant does not expressly plead any claim in respect of the respondent's conduct of the appeal. He stated, on 5th December 2021: "I appealed the grievance on 4th May 2021, but to this date I have not received a response."

115. Whilst the ET1 does not identify any claim in respect of the delayed appeal outcome, the above quotation immediately follows the complaint that Mr Paul Lancaster, the third respondent, had deliberately delayed the grievance process because of the claimant's age.

116. Taken at its highest, the pleaded claim is critical of the passage of seven months during which the appeal did not appear to progress, but does not go so far as to allege that it was an act (or omission) of discrimination.

117. The particulars of both proposed amendments fall into two parts:

a. Detailed particulars of a series of omissions within a process which is already pleaded as an act of age discrimination (the grievance process and outcome). The respondent has been on notice of the list of the alleged omissions since 5th May 2021, and had undertaken to investigate the alleged omissions following receipt of the grievance appeal.

b. An allegation which is not pleaded as a claim, and about which the claimant had not articulated any specific complaint prior to the Case Management hearing of August 2022. That complaint lacks particulars but the claimant cannot be criticised for that given the respondent has not, on the documents before me, provided the claimant with any information about the progress of the appeal since late June 2021.

The law

118. In *Chandok v Tirkey* [2015] IRLR 195 (which has been reported in relation to the different issue of "caste" discrimination), the employment judge decided part of the case before him by reference to what was said in a witness statement rather than the pleading. Commenting on that, the President of the EAT, Mr Justice Langstaff,(as he then was) stated:

> "The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so … I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication … However, all that said the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it … In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suite the moment from their perspective … That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

119. In *Remploy Ltd v Abbott and others* UKEAT/0405/14, the EAT, citing *Chandok*, went a step further, when allowing an appeal against a tribunal's decision to permit amendment to claims which had been professionally drafted by experienced solicitors and counsel. The EAT confirmed that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.

120. Critically, the EAT stressed that: "It is essential before allowing an amendment that it must be properly formulated, sufficiently particularised, so the respondent can make submissions and know the case it is required to meet." Without a properly particularised application for an amendment, the EAT held, an employment judge is "simply not in a position to consider the effect of the proposed amendments."

121. The key test for considering amendments has its origin in the decision of the of *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 at 657B-C:

> "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

122. In *Selkent Bus Company Ltd v Moore* [1996] ICR 836, at 843D, it was stated:

> "Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."
>
> "Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."

123. In *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 (6 June 2007), it was stated that the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise.

124. *Abercrombie and others v Aga Rangemaster Ltd* [2014] ICR 209 pointed out:

> "It is perhaps worth emphasising that head (5)1 of Mummery J's guidance in Selkent's case was not intended as prescribing some kind of a tick-box exercise.
> As he makes clear, it is simply a discussion of the kinds of factors which are likely to be relevant in striking the balance which he identifies under head (4)2."

125. In *Abercrombie* Underhill LJ went on to state this important consideration, at paragraph 48:

> "Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

126. Focusing on the practical consequences of allowing an amendment. Involves consideration of effect of the granting or refusing of the application; how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. What will be the effect on the duration of the case and the parties' costs?

127. No one factor is usually decisive; the balance of justice is key.

Analysis and Conclusions

The Victimisation Amendment Application

128. The claimant's complaint of victimisation is one of which the first and third respondents must have been aware upon reading the claimant's grounds of appeal against the respondent's 29th April 2021 grievance decision.

129. They are clearly aware of the delay in the completion of the grievance appeal, and their failure to communicate with the claimant about that appeal process since 22nd June 2021.

130. The complaint of victimisation is a matter which the respondent undertook to investigate as part of the grievance appeal process. The character of the alleged acts of victimisation largely relate to the conduct of a current third respondent; Mr Lancaster.

131. Paragraphs 40 - 42 of the ET3 response appear to deny any delay in the respondent's conduct of the grievance or grievance appeal.

132. The particulars of the alleged victimisation during the course of the grievance process, noted above, are very similar to the specific allegations which were set out in the claimant's draft list of issues regarding the unfair dismissal claim.

133. With respect to the grievance appeal, by the 5th December 2021 the claimant was aware that the respondent had taken no action to progress the grievance appeal for five months; a similar delay to that which occurred during the grievance process, but no claim was made about this repetition of unexplained delay.

134. The Claimant's witness statement does not articulate an explanation for the absence of such a claim in the ET1, rather it asserts that the claim is currently "in time" because the default is continuing to the date of this hearing; 18 months after the date of presentation of the grievance appeal.

135. In the argument on behalf of the claimant counsel suggested that the omission was due to the lack of representation. That was not a compelling argument given the claimant had, without representation, been able to articulate allegations of victimisation in his grounds of appeal against the grievance outcome.

136. I do find that, in light of my decision in respect of the unfair dismissal claim and breach of contract claims, that to allow the victimisation claim would have no adverse effect on the duration of the final hearing.

137. I further find that the witnesses and the issues on the constructive dismissal claim, as set out in the draft versions of the list of issues, are very likely to be the same.

138. The key additional element will be the determination of the degree to which, if at all, any proven detrimental conduct was because of any proven protected act.

139. That analysis, whilst distinct in law from the determination of the claims of ages discrimination and harassment related to age, is likely to be based on the same evidence and require a very similar intellectual process of determining whether the respondent's decisions or inactions were in anyway whatsoever affected by the claimant's protected characteristics or his proven protected act(s).

140. I do not believe that the respondent will be required to adduce a significant amount of additional documentary or witness evidence.

141. Lastly, I consider the balance of prejudice in the context of the matters set out above.

142. The respondent already faces a claim of age discrimination in respect of the events during the claimant's employment, and until this judgment, also faced a claim of unfair dismissal. The respondent's witnesses, given they should have been involved in a grievance appeal process which expressly alleged victimisation, should be in a position to recall their motivation of any proven act or omission. There is little, if any, additional prejudice to their ability to assert a non-discriminatory reason for any such proven behaviour.

143. The claimant, if the application is refused will lose the opportunity to assert a case which he first argued in May 2021 and expected to be determined during his appeal process.

144. It is a case, which on the face of the pleadings, is certainly arguable. It is also arguable that the conduct of the appeal process forms part of a continuing course of conduct.

145. In my judgment to deny the claimant the opportunity to advance the victimisation claim would not be just and equitable.

146. I allow the claimant to amend his claim to add the allegations of victimisation in respect of the respondent's alleged conduct of the grievance process and its alleged failure to undertake the grievance appeal process after the 22nd June 2021.

The claim of disability discrimination

147. The proposed amendment to the claim in respect of disability is set out above.

148. It is identical to the victimisation in its list of alleged actions and inactions .

149. Section 15 states as follows:

> "**15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if –
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

150. It is clear that the claimant has pleaded:

a. a disability

b. the "something" which arises from his disability; stress and anxiety and;

c. Unfavourable treatment.

151. The claimant has not pleaded, or identified in discussion with me, the factual assertion which he pleads might be capable of establishing a prima facies case that consciously or unconsciously the respondent's inaction after the 22nd June 2022, could possibly be "because of" the claimant's; "increased propensity to become stressed and anxious".

152. The claimant asserts that he mentioned his disability in his grievance and ticked the box for disability in the ET1.

153. Both of these assertions are correct but do not address the fact that the claimant did not plead a disability claim in the ET1, nor make reference to the matters now proposed as his section 15 claim. I do note that at section 12 of the ET1 he referred to "asthma and others" (impairments) and indicated he may need; "more time and regular breaks"

154. Further, as noted above, the reference to disability in his grievance was not a reference to asthma or something arising from asthma, it referred to a back injury.

155. Similarly, in the claimant's grievance grounds of appeal there is one reference to disability discrimination; the failure of the grievance process to determine the original grievance complaint regarding the claimant's back injury.

156. Unlike the victimisation claim, this proposed amendment is not foreshadowed in the grievance process and thereby and the respondents have not been aware of it.

157. Whether the claimant's stress and anxiety arises from the claimant's condition of asthma is likely to be a fraught issue given, for example the claimant's description of stress exacerbating a number of conditions:

> "I have suffered from asthma for most if not all of my life. I have been diagnosed with anaemia. I have also suffered from back problems and have a long-term back condition as a result of an injury I had at work in 2015. At work in 2015, I fractured my vertebrae coming out of a roof void. Since this incident, I was then diagnosed with anaemia. My conditions are heightened by stress and anxiety. When I am placed in stressful situations, I find that I get chest infections and suffer from bronchitis because of my asthma. It takes me longer to recover from these infections and I struggle to breath if I move or over exert myself. If I want my lungs to recover I have to take medication and "take a break" from the situations that cause me the stress. This is also linked to my blood pressure as the infections and my asthma condition put strain and stress on my body and cause my blood pressure to become abnormally high. I then have to remove myself from the stressful situation temporarily, until my blood pressure drops and I can then turn back to the situation when I feel fit and strong enough to do so."

158. I am not in a position to evaluate any evidence, nor do I speculate upon the medical evidence I have been provided with, I only note that the questions such as; whether the alleged "something" arises from the pleaded disability, or the extent to which it may arise from another condition or whether the claimant's asthma is exacerbated by stress, rather than the stress arising from the asthma are all potential issues. As is the respondent's knowledge of the "something" at the material time.

159. The above illustrate that, the issues relating to the claimant's pleaded condition are not simple, nor clear cut and may require considerable time to determine.

160. Further, unlike the victimisation claims, the respondent's witnesses have not been on notice of the claim and this additional claim has the potential to require additional evidence and considerable additional time for the parties' submissions and subsequent deliberation by the employment tribunal panel at the liability hearing.

161. Further, on the amended pleading, taken at its highest, there no assertion of fact which indicates, how an employment tribunal could find that any of the alleged omissions were "because of" the claimant's pleaded propensity to stress and anxiety.

162. I will not rehearse my view in respect of the timing of this application or the absence of a satisfactory explanation for the delay.

163. The final hearing is listed for four days in **April 2024**. That listing was settled without consideration of the outstanding time issue, that must now be considered within that time frame.

164. I take into account that the claimant's case entails claims of direct discrimination and harassment because of his age, and detrimental treatment because he had done several alleged protected acts. Those claims offer the claimant, if he is successful a full opportunity for redress. On the claimant's amended pleadings those claims have a higher prospect of success than the proposed section 15 claim.

165. I take into account that to add a new claim of disability discrimination is likely to lead to the current listing being adjourned "part heard" or the listing vacated to a later date. Given that the current listing is already some four years after the first complaints of age discrimination, further delay might well increase the difficulties of all the witness recollection.

166. I also take into account the additional preparation, and the associated costs of the proposed disability claim.

167. Balancing all of the above, I consider that it is not just, nor equitable to allow the application to amend the claimant's pleadings to include a claim contrary to section 15 of the Equality Act 2010.

The Participation of the second and fourth respondents

168. Mr Davies and Mr Atter are two managers who are alleged to have discriminated against the claimant by rejecting his applications for posts within the respondent because of his age. Their alleged conduct occurred no later than March 2020.

169. The first respondent does not dispute that it is vicariously liable for the conduct of its employees in this case.

170. At the date of the presentation of the claim on 5th December 2021 the last act of either of these respondents had occurred twenty months earlier.

171. The individual respondents are not vicariously liable for any other respondent in this case.

172. In light of the above neither respondent could be liable for a course of conduct extending over the period from April 2020 to August September 2021.

173. In these circumstances the individual claims against them have been presented "out of time". Given that both are to be called as witnesses by the first respondent, that any award of compensation would be made on a joint and several basis and that any finding of discrimination relating to their alleged conduct would be publicly stated in an oral judgment or written reasons, it does not appear to be just and equitable to extend the time for the presentation of the individual claims against them.

174. For these reasons the claims against Mr Atter and Mr Davies are dismissed.

Employment Judge R F Powell
Date: 29th December 2022