EMPLOYMENT TRIBUNALS

Claimant: Mr Samuel Shenton

Respondent: Stonegate Pub Company Limited

Heard at: Watford Employment Tribunal **On:** 30-31 May 2023

Before: Employment Judge Young (sitting alone)

Representation
Claimant: Ms S Chan (Counsel)
Respondent: Mr M Bignell (Counsel)

RESERVED JUDGMENT

It is the Judgment of the Employment Judge that:

1. The Claimant is disabled within the meaning of section 6 of the Equality Act 2010

2. The Claimant's claim of direct discrimination on the grounds of sexual orientation was presented out of time;

3. The Claimant's claim for direct discrimination on the grounds of disability for acts that took place before 6 May 2021 that are not continuing acts was presented out of time.

4. It is not just and equitable to extend time;

5. The Claimant's application to amend the claim to add harassment on the grounds of sexual orientation is refused.

6. The Claimant's claim for harassment on the grounds of sexual orientation is out of time.

7. The Respondent's application to strike out the Claimant's reasonable adjustments claim is refused.

8. A public preliminary hearing is listed on 29 August 2023 to deal with the Respondent's application for a deposit order and to case manage the Claimant's claim.

REASONS

Introduction

1. The Claimant was employed by the Respondent as a Front of House team leader from 1 October 2018 until 11 July 2022. Whilst in employment with the Respondent on 15 January 2020 the Claimant lodged a grievance complaining of bullying, harassment and intimidation by other members of the Respondent's staff. The Respondent had a grievance meeting with the Claimant on 10 December 2020. The Respondent produced a written outcome of the grievance dated 1 April 2021. The Claimant appealed that decision by email dated 11 April 2021 and that appeal was heard on 22 July 2021. The Claimant was sent an outcome to that appeal following the appeal hearing. Early conciliation commenced on 5 August 2021 and the certificate was issued on 20 August 2021. The Claimant issued proceedings by ET1 dated 19 September 2021. The Respondent responded by ET3 and grounds of resistance dated 29 November 2021. The Claimant was dismissed on 11 July 2022.

Hearing

2. The preliminary hearing was listed for 2 days. Both parties were represented ably by Counsel, the Claimant by Ms Chan and the Respondent by Mr Bignell. On the first day of the hearing I asked the Respondent's counsel, Mr Bignell whether there was an application for a strike out. The Respondent confirmed that there was no outstanding application, but he was now making one. Initially the basis for the application was on the grounds that the Claimant's claim for reasonable adjustments had no reasonable prospects of success on the grounds of knowledge and secondly that the reasonable adjustments were vague and unclear and so had no reasonable prospects of success.

3. The Claimant's counsel, Ms Chan objected to this application on 2 grounds, firstly that the application was made for the first time in Mr Bignell's written skeleton which was provided to her for the first time at approximately 09:00am that morning. Ms Chan referred to Employment Judge Liz Ord's case management order dated 15 January 2023 paragraph 1.5 of the orders ordering the parties to provide their skeleton arguments 2 days before the hearing and argued that because the Respondent was in breach of this order that the application should not be considered. She also argued that the presentation of the application caused great prejudice to the Claimant because the Respondent had not presented any evidence in respect of the issue of knowledge and the Claimant did not come prepared to deal with the issue of knowledge. After taking time to deliberate I decided that as an application for strike out under rule 37 can be made at anytime during a hearing and that the Claimant had notice that there could be an application for a strike out as it was set out as one of the issues for me to decide in

Employment Judge's order, the Claimant was not prejudiced and that I would hear the application.

4. I received a 303 page bundle which contained the Claimant's witness statement and disability impact statement. The Claimant asked for both his disability impact statement and the witness statement in the bundle to stand as his evidence. Both statements were accepted as the Claimant's evidence. I heard evidence from the Claimant. The Respondent did not present any witnesses.

5. I was informed that the Claimant wished for reasonable adjustments to be made of regular breaks. I made those adjustments by taking 10 minute breaks every hour.

6. I heard oral submissions from Ms Chan and Mr Bignell. Ms Chan's started with the Claimant's amendment application. Ms Chan asserted that the application was not a brand-new claim but already explicitly referred to in the Claimant's ET1. Ms Chan referred to the case of Selkent when addressing the issue of the balance of hardship. Ms Chan claimed the balance of hardship was in the Claimant's favour. She said the people named as harassers were already named in the Claimant's direct discrimination claim and there were more people named in the direct discrimination claim than named in the Claimant's harassment claim and they were a subset of those individuals. The Respondent had already investigated the Claimant's harassment claim as part of the grievance and so there was no prejudice to the Respondent as they would be able to rely on relatively contemporaneous documents. Ms Chan referred me to the EAT case of Bauhaus v Pizza Express Restaurant Ltd UKEAT/0029/11/DA wherein Judge Peter Clarke remarks at paragraphs 20 & 21 *"it is significant because on the one hand the Claimant has lost not simply a speculative claim, but a good claim on its merits. Conversely the Respondent has suffered no prejudice in conducting its defence to the claim. In the circumstances balance prejudice is all one way. It impacts solely against the Claimant's interest. [21] The tribunal's failure to take this significant matter into account represents, in our judgement, an error of law…"*

7. On the issue of disability Ms Chan relied on paragraphs 2 to 17 of her written skeleton argument and paragraphs 1 to 11 of her written further submissions as to why the Claimant was disabled within the meaning of section 6 of the Equality Act 2010. Ms Chan said that the evidence demonstrated that the Claimant's condition was substantial and that was not a high bar but it need not be more than trivial. Ms Chan referred to the Claimant's GP notes as showing that from January 2018 the Claimant was recorded as having problems with mixed anxiety disorder, and that the Claimant was asked to take the clinical GAD test on three occasions and the Claimant's scores on those three occasions fell in the severe category. Ms Chan said the fit note was a limited document and that only reflected what the Claimant had asked the GP to record. The Claimant's GP would not have prescribed the Claimant medication on multiple occasions if the doctor did not believe that the Claimant was experiencing symptoms of anxiety and depression. Ms Chan submitted that there was not a significant difference between work-related stress and generalised anxiety and depression. On the issue of time limits Ms Chan referred me again to her written skeleton at paragraph 18-22 but also made a distinction between the

Claimant's direct discrimination claims and the reasonable adjustments claim. Ms Chan said that the Claimant's direct discrimination claim referring me to paragraph 19 & 20 of the Claimant's FBP dated 9 August 2022 was not a continuing act, but the Claimant's reasonable adjustment claim were. Ms Chan also referenced the fact that the same person, Mr Chad Dicks who it is alleged was involved in perpetrating direct discrimination was also involved in the reasonable adjustments claims which the Claimant considered were continuing acts. In dealing with the Respondent's strike out application Ms Chan questioned the basis of the application in respect of knowledge and stated that there was evidence that the Claimant told Mr Dicks about his mental health. The Claimant's evidence was not challenged and therefore the Respondent had at least constructive knowledge of the Claimant's disability. Ms Chan also questioned the basis of the Respondent's strike out application on the basis of lack of clarity regarding the Claimant's PCPs. Ms Chan stated she didn't fully understand the Respondent's arguments and that when the Claimant presented his PCPs on 27 February 2023 as ordered by Employment Judge Welch he was not represented. The Respondent did not mention that those details of the PCP lacked clarity at the time and has waited three months to raise this argument.

8. Mr Bignell for his part on behalf of the Respondent submitted that the amendment was a whole different claim entirely and that time should run from the date of the alleged harassment, not from the date of the claim form as asserted by Ms Chan. Mr Bignell stated that it was clear from the Claimant's ET1 that the Claimant always intended to bring a section 13 EQA 2010 claim and included the alleged harassment as a section 13 EQA 2010 claim. Mr Bignell dealt with the Claimant's argument that the Respondent was responsible for the delay. He said the Respondent tried to set up a grievance meeting during early 2020 but it was the Claimant's illness that prevented the hearing taking place in March 2020. The Respondent didn't want to have a hearing online because it regarded the matters raised very seriously and wanted to allow the interviewees as part of the investigation of the grievance to see the WhatsApp messages that the Claimant was complaining of.

9. In respect of the time issue the Respondent stated that the Claimant's reason for not bringing this claim in time was not credible as the Claimant already had indicated he wish to take the Respondent to court as set out in the Claimant's GP notes.

10. Mr Bignell said there was a significant difference between generalised anxiety and depression and work-related stress, that the fact that the Claimant was able to return to work meant that the Claimant had in fact recovered from work-related stress. The activities that the Claimant claims were affected and impacted by his alleged disability was different to the activities carried out at work, as those activities at work were carried out in a different context and carried different obligations. Mr Bignell stated that the Respondent accepted that the Claimant was unwell which is why he was prescribed medication but that the GAD questionnaire was not a diagnosis as it was filled out by the Claimant and there was no diagnosis following the completion of the GAD questionnaire. There was only one sick note dated 28 April 2020 that did refer to anxiety, but actually that anxiety was related to Covid. The only mention of anxiety in relation to the Claimant's sick notes

in 2022 related to the Claimant going on holiday. In the circumstances Mr Bignell said that the Claimant could not be disabled in July 2022 when he was dismissed.

11. Mr Bignell stated that Dr Mir's report was of low quality and stated that the Claimant's anxiety was situation specific and that the report did not say that the Claimant's anxiety situation specific condition was a disability in any event. Mr Bignell stated that even if I was to conclude that the Claimant was disabled from 2020 to 2022, the Claimant was not disabled when he took on a new job in March 2022. The Claimant did not take his medication consistently and did not provide any evidence to the Tribunal that not taking his medication affected him detrimentally. In addressing the time limits, Mr Bignell stated that the Respondent accepts that the reasonable adjustments proposed are continuing acts but that the reason put forward by the Claimant as to why he delayed bringing his claim after having the assistance of his partner from October 2020 did not justify the Claimant's delay, having taken advice from his mother in and around July 2021. The Claimant did not explain why he waited a month before issuing his claim having already received the certificate from ACAS.

12. In respect of the Respondent's application for a strike out of the Claimant's reasonable adjustments claim, Mr Bignell stated that the application was made on the basis of the lack of knowledge of the Claimant's disability as there was nowhere in the documentation that the Respondent knew about the Claimant's actual disability. I put to Mr Bignell that to consider the strike out application on that basis would require me to make a determination as to the knowledge of the Respondent and that is not within my remit to decide at the preliminary hearing, but was a matter for the full merits hearing. Mr Bignell stated that the allegations of reasonable adjustments were unclear and had no reasonable prospects of success and the actual PCPs were identifying the potential effect of the PCP and not the PCP itself. The claim had not been particularised properly and that accordingly the disadvantages set out by the Claimant was also not a disadvantage but an effect of the effects of the PCP.

13. Mr Bignell also asked me to consider whether the reasonable adjustments claim had little prospects of success and therefore consider a deposit order. There was insufficient time to hear evidence from the Claimant regarding his means in respect of an application for a deposit order. In the circumstances parties agreed that the Claimant would give evidence at an public preliminary hearing which I listed taking into account the parties dates of availability.

Issues and Claims

14. The Claimant brings a claim of unfair dismissal, discriminatory dismissal on the grounds of disability, direct discrimination on the grounds of sexual orientation and disability and a claim for reasonable adjustments. The Claimant also wishes to add a claim of harassment on the grounds of sexual orientation. I was required to consider the following issues:-

    1. Disability

1.1 Did the Claimant have a mental impairment of anxiety and depression?

1.2 If so, did it have a substantial adverse effect on his ability to carry out day-to-day activities? (An effect is substantial if it is more than minor or trivial: s 212(1) EqA)

1.3 If not, did the Claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

1.4 If so, would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities without the treatment or other measures?

1.5 Were the effects of the impairment long-term? (Consider at the time of the discriminatory acts). The tribunal will decide:

1.5.1 Did they last at least 12 months, or were they likely to last at least 12 months?

1.5.2 If not, were they likely to recur?

2. Time limits – issues (Discrimination)

2.1 Whether the claim was made within three months (allowing for any early conciliation extension) of the acts complained of.

2.2 If not, whether there was conduct extending over a period.

2.3 If so, whether the claim was made within three months (allowing for any early conciliation extension) of the end of that period.

2.4 If there has been a failure to do something, when did the person who decided on it make that decision?

2.5 If the claims were out of time, whether they were made within such further period as the tribunal thinks is just and equitable. The tribunal will decide:

2.5.1 Why the complaints were not made in time.
2.5.2 In any event, whether it is just and equitable in all the circumstances to extend time.

3. Amendment with respect to harassment on the basis of sexual orientation.

3.1 The nature of the proposed amendment, and in particular whether it is a relabelling matter or a new cause of action, having regard to all the circumstances of the case.

3.2 Where does the balance of injustice and hardship lie by taking account of the following factors?

3.3 If it is only a claim, whether it is out of time, should time be extended? (Whether it is just and equitable to extend time- discrimination)

3.4 Whether the application was made within a reasonable time period?

4. If the Respondent makes an application for strike out and or a deposit order with respect to the reasonable adjustments claim, it will be determined at the preliminary hearing, if time permits.

5. Case Management Orders, as appropriate.

Evidence & Findings of fact

15. I make the following findings of fact on the balance of probabilities.

16. I have had careful regard to all the evidence that I have heard and read about concerning the Claimant's personal circumstances. It is not necessary for me to rehearse everything that I was told in the course of this case in this judgment, but I have considered all the evidence in the round in coming to make my decision. All numbers in square bracket are page references to the bundle.

17. Unless stated otherwise on particular points or issues, I found the Claimant to be a truthful witness. The Claimant appeared to me to be trying his best to remember matters that took place some 2-3 years ago. However, the Claimant's evidence was inconsistent in part and not credible in others. Where I found this to be the case, I have set it out in my findings below.

18. The Claimant worked at the Midsummer Tap pub in Milton Keynes for the Respondent. The Claimant's tasks involved working with the public, cleaning, washing glasses, stocktaking. Before the start of the Claimant's employment in October 2018, the Claimant experienced some of the symptoms (in particular sleeplessness and anxiety **[158-159]**) which he relies upon as part of his claim that he is disabled and his disability is anxiety and depression.

19. In January 2018, the Claimant's GP identified the Claimant's medical problem as mixed anxiety and depressive disorder. The Claimant described his mood as low due to circumstances **[158].** At that time, the Claimant was prescribed propranolol as an anti anxiety medication and later in February 2018, Zopiclone, sleeping tablets. However, in August 2018 the Claimant reported that all his symptoms had settled down. There was no further prescriptions of anti anxiety or anti depressant medication until 18 December 2019, when the Claimant was diagnosed with work stress. At that time the Claimant's GAD score was 17 which is in the severe category. The Claimant was prescribed Zopiclone. The Claimant was signed off work for approximately 2 weeks. However, the Claimant continued to be signed off work on the basis of work related stress and did not return to work for any significant period before his dismissal on 11 July 2022.

20. It is on 6 January 2020 that the Claimant reported bullying by his boss to his GP by saying this had made him feel anxious again.**[165]** On 15 January 2020 Claimant raised a formal grievance, writing to the Respondent about

the bullying and harassment he says he was subjected to by Mr Chad Dicks, the Midsummer Tap's General Manager and Mr David Barker, the Deputy General Manager. Furthermore, the Claimant refers to WhatsApp messages as part of a "Buddies" group (which included fellow Respondent employees) in the previous 12 months which he considered to amount to bullying harassment and intimidation. The Claimant's grievance referred to the Claimant experiencing stress and anxiety. On 29 January 2020, the Claimant reports to his GP he *"is trying to find another job but struggling with the anxiety"* **[166]**

21. On 27 February 2020, the Claimant told his GP that he was taking his employer to court. **[168]** When asked about this in evidence, the Claimant said that when he said court to his GP, he meant the grievance process. On this issue I find the Claimant's evidence to be lacking credibility. I find that the Claimant did intend to take his employer to court at that stage. The Claimant accepted in evidence that there was a difference between the internal process and the external process which involved ACAS and the Employment Tribunals. However, I did not accept the Claimant's evidence that he believed that it was the Respondent who triggered the external process. The Claimant knew when he started the grievance process that there was a possibility that the grievance outcome would not go his way. The Respondent did attempt to meet with the Claimant in February 2020 **[89]**. However, due to the side effects of the Claimant's medication, the Claimant could not attend the proposed dates.**[88-89]**

22. The Claimant indicated that he was prepared to attend a grievance meeting whilst covered by a sick note and so the Claimant was again invited to attend the grievance hearing on 18 March 2020, however, unfortunately that grievance hearing was postponed. I say unfortunately because due to the various COVID lockdowns in 2020, the grievance hearing was not rescheduled until 10 December 2020. The Claimant spent most of 2020 away from home, with a friend in Sheffield. The Claimant did not socialise whilst away from home.

23. In April 2020 the Claimant's GP says that the Claimant's anxiety and low mood is situational and due to the COVID 19 pandemic and that it is likely to settle with supportive measures once the social situation with Covid is better.

24. However, in July 2020 the Claimant reported to his GP that regarding his mood, that he was *"much better now"* **[174]**. On 17 July 2020, the Claimant attended by telephone his GP regarding Covid. During that call, the GP reported that the Claimant "*denies any other concerns*" **[195]** It is at the end of July 2020, that the Claimant says that he cannot "*cope at present*" **[176]**. It is only in September 2020 that the Claimant reports feeling slightly anxious but this is in relation to the Claimant feeling rushed **[176]**

25. However, by September 2020, the Claimant is prescribed 84 tabs of Propranolol again **[177]**. In or around October 2020, the Claimant starts a relationship with his current partner who is an Australian qualified lawyer who does not specialise in employment law. However he does work as a support lawyer for the legal firm Linklaters.

26. The Claimant attended the grievance hearing on 10 December 2020. The Claimant was retrospectively covered by a sick note from 19 November 2020-

10 January 2021 **[179]**, but the Claimant reported on 15 December 2020 to his GP that he wouldn't be able to move forward until he got an outcome. **[179]**

27. The Claimant references the Equality Act 2010 in his grievance notes of the meeting on 10 December 2020 **[103]** and says he believes there has been "a *breach of the law."* **[103].**

28. In 2021 the Claimant is prescribed Propranolol consistently and diagnosed in January 2021 with an anxiety disorder **[180]**. The Claimant was unable to start a new job in January 2021 as he suffered from panic attacks **[180]**. The Claimant receives the outcome of his grievance dated 1 April 2021, which upholds his grievance to the extent that the Respondent accepts some of the WhatsApp posts were inappropriate **[115]**. However, the Respondent doesn't accept there was bullying or discrimination of the Claimant and suggests the Claimant either returns to the Midsummer Tap following mediation or attends work at an alternative site as a resolution to the Claimant's grievance. The Claimant is unhappy with the proposed resolution and appeals the grievance outcome by email dated 11 April 2021. On 5 May 2021 the Claimant visits his GP to be signed off work from 1 April to 31 May 2021. **[250]**

29. In June 2021 the Claimant instructs a consultant psychiatrist, Dr Mir to issue a report on the Claimant's mental health. Dr Mir issued his expert report dated 18 June 2021. The Claimant told Dr Mir he had " been suffering from anxiety since 2019". **[282]** Dr Mir reported the Claimant as diagnosed with "*mixed anxiety and depression*". Dr Mir concluded that the Claimant has a "*specific situational anxiety"* **[289]** and *"[h]is anxiety is mainly situation specific"* **[283].** Dr Mir states that the Claimant's anxiety was "*more prominent and severe than the depression*" and comments that the Claimant's anxiety was *"really impacting his day to day life"* **[288]**. Dr Mir lists the impacts to the Claimant's day to day activities as "fear of having to go to the shops" **[282]**, going for a meal means the Claimant "*sits with his back towards the wall so you can scan the entire area and if he comes across a known face he would leave. As a result he's not going out much*" **[283]**, *"mood is up and down",* "*it is still bad 1 to 2 days a week", during those days he doesn't want to do anything"* **[284],** *"sleep is a huge problem", " he keeps waking up frequently" "he usually has 2 to 3 hours of sleep*" **[284]** "his concentration is not good**.** He can concentrate for 10 to 15 minutes before starting to look for something else" **[285]** " *there is evidence of him being hypervigilant for every noise*" **[286]**. Dr Mir characterised the Claimant's depression as mild **[288]**. *"As a result of his anxiety, his level of functioning has reduced, he doesn't even go out to the local shops in case you may come across people from work. This is really impacting his day-to-day life, his occupational life and social life."* **[288]** The Claimant's *"sleep problems are maintained by his anxiety."* **[290]**

30. Following Dr Mir's report which recommended as a treatment plan CBT and for the Claimant to consider antidepressants, the Claimant visited his GP on 5 July 2021 and explains that he is now keen to try CBT rather than medication. However, the Claimant does not undergo any therapy and continues to experience anxiety. The Claimant's appeal hearing takes place on 22 July 2021. The Claimant raises a concern about coming off Furlough pay at the end of September **[156]**. The proposed resolution of the grievance outcome is upheld and the Claimant is offered work at an alternative site in Leighton Buzzard. **[155]**

31. Following the outcome of the grievance appeal the Claimant has a conversation with his mother in or around 23 July 2021, where the Claimant's mother advises the Claimant that he can pursue his complaint through ACAS. The Claimant contacts ACAS on 5 August 2021 who advise him of the time limits in respect of any claims he wishes to bring against his employer. The Claimant did not enquire about the time limits regarding his discrimination claims before having contact with ACAS. The Claimant said he understood that he needed to exhaust the internal process, by that he meant the Respondent's grievance process which was contained in the Respondent's employee handbook. The ACAS certificate was issued dated 20 August 2021. The Claimant with the assistance of his partner presents an ET1 claim complaining of discrimination to the Employment Tribunal on 19 September 2021. The Claimant's furlough pay came to an end in September 2021. At a visit to the GP on 21 October 2021 the Claimant told the GP his mental health was good. **[255]** . The Claimant was asked about this in cross examination as this was inconsistent with his witness statement. The Claimant explained that he was being hopeful when he told his GP that his mental health was good. But actually he continued to experience poor mental health. I accept the Claimant's explanation for why he said in October 2021 that his mental health was good.

32. In March 2022, the Claimant starts a new job, 30 hours per week as a member of a front of house team for a local pub in Milton Keynes. The Claimant tells his new employer about his employment tribunal case against the Respondent, mental health problems and in particular his difficulty in dealing with the public. The Claimant's new employer make multiple adjustments for him, allowing him flexibility in his role and avoiding public facing tasks. However, even with such adjustments the Claimant regularly has to leave work due to anxiety and was sometimes unable to attend work as he could not get out of bed. By letter dated 24 June 2022, the Claimant is invited to attend a welfare meeting on 11 July 2022 to discuss his long term sickness and not attending occupational health appointments.

33. At the welfare meeting on 11 July 2022 the Claimant was questioned about his failure to provide sick notes. The Claimant stated at the meeting that he did not believe it was necessary to obtain a sick note as he was not getting any pay from the Respondent. However, when the Claimant gave evidence the Claimant said the reason he did not provide sick notes was because of the confusion he experienced in his interactions with HR and he wasn't sure that he needed to provide sick notes. I did not find these two explanations incompatible with each other and consider the Claimant was doing his best to remember why he didn't have any sick notes since February 2022 having regard to the significant passage of time.

34. Following the Claimant's welfare meeting, by letter dated 12 July 2022 the Claimant was informed he was dismissed from 11 July 2022. Whilst the Claimant continued in his new role for the other pub for some time following his dismissal from the Respondent, the Claimant told me that he resigned from this role in December 2022 due to his poor mental health. The Claimant listed his symptoms in his disability impact statement as hypervigilance, panic attacks, skin flushing, profuse sweating, heart palpitations, increased heart rate, itchy skin feeling, shakiness, sleeplessness, restlessness, social withdrawal, mood swings, picking of hands and fingers, low mood, inability to

get out of bed to perform activities of daily living, increase nicotine consumption, increased alcohol consumption, sub- normal abnormal liver function, and self-harm (cutting myself).

35. The Claimant explained that the impact on his day-to-day activities of his symptoms were: experience of low mood and he didn't want to talk to his friends throughout 2021- 2022. He said that some days he didn't want to get out of bed and he experienced that through from 2020-2022 and to date. He would pick at his hands causing bleeding and that led to him being unable to do cleaning tasks as his hands would get infected. This occurred throughout 2020. The Claimant had difficulty with self-care throughout 2020 and to be motivated to cook for himself. The Claimant stated he was constantly exhausted through 2020 to 2022 though he acknowledged that there were examples of him being exhausted before he started working for the Respondent, the Claimant had a problem with acid reflux and this symptom was aggravated by his anxiety throughout 2020 to 2022. I accepted the Claimant's evidence when explaining hyper vigilance that when he went out in Milton Keynes since the November 2019 he was like a "meerkcat" but that he was not anxious when he was at home.

Law

Amendment application

36. In relation to amendment applications, I must apply the principles set out in Selkent Bus Company Limited v Moore [1996] ICR 836. I must consider all relevant factors, including time limits. I must consider the balance of hardship and injustice of allowing the amendment as against the injustice and hardship of refusing it.

37. The EAT, more recently, in Vaughan v Modality Partnership (UKEAT/0147/20) gave detailed guidance on applications to amend tribunal pleadings. That confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application, but noted that the focus should be on the real practical consequences of allowing or refusing the amendment, considering whether the Claimant has a need for the amendment to be granted as opposed to a desire that it be granted.

38. The Presidential Guidance, paragraph 5.2 makes the point that *"If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended"*.

39. However, the EAT, in Galilee v The Commissioner of Police of the Metropolis [2018] ICR 634, noted that it is not always necessary to determine time points as part of an amendment application, and that a Tribunal can decide to allow an amendment subject to limitation points. The EAT pointed out that the use of the word "essential" in Selkent should not be taken in an absolutely literal sense, and should not be applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered.

Time Limits

40. Section 123 set out the time limits under the Equality Act 2010 ("EQA 2010"). It states as follows: *"(1) [Subject to sections 140A and 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… (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."*

41. Section 123(1)(b) EQA 2010 provides the Tribunal with the discretion to hear a discrimination claim if it is just and equitable to do so. The EAT decision of British Coal Corporation v Keeble and ORS 1997 IRLR 368 has been approved repeatedly as confirming that a Tribunal should consider the checklist under section 33 of The Limitation Act 1980, as adjusted for tribunal cases. Although the Court of Appeal in Southwark London Borough Council v Afolabi [2003] ICR 800, warns Tribunal's not to adhere slavishly to the checklist. Underhill LJ in the Court of Appeal case of Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, warns against against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980. At paragraphs G-H Mummery LJ advises "[t]he *best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay. If it checked those factors against the list in Keeble, well and good; but his Lordship would not recommend taking it as the framework for its thinking."*

42. It is also worth noting Leggatt LJ comments at paragraphs 18–19 in Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050. In paragraph 18 Leggatt LJ states "*…it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list."* And in paragraph 19, Leggatt LJ says *"[t]hat said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."*

43. The factors that a Tribunal may take into account under Keeble are these: the length of, and reasons for, the employee's delay; the extent to which the strength of the evidence of either party might be affected by the delay; the

employer's conduct after the cause of action arose, including his/her response to requests by the employee for information or documents to ascertain the relevant facts; the extent to which the employee acted promptly and reasonably once s/he knew whether or not s/he had a legal case; the steps taken by the employee to get expert advice and the nature of the advice s/he received. Unlike in the unfair dismissal jurisdiction, a mistake by the employee's legal adviser should not be held against the employee and is therefore a valid excuse.

44. The Tribunal should consider whether the employer is prejudiced by the lateness, i.e. whether the employer was already aware of the allegation and so is not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing because of the lateness.

45. Where the delay is because the employee first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into consideration (Apelogun-Gabriels v Lambeth LBC and another [2002] IRLR 116, CA). The Court of Appeal approved the approach taken in the EAT decision of Robinson v Post Office [2000] IRLR 804, in which Mr Justice Lindsay clarified at paragraph 29 that there is no "*proposition of a broad applicability such that whenever and so long as there is an un-exhausted internal procedure, then delay to await its outcome necessarily furnishes an acceptable reason for delaying the presentation of an [E]T1, such as would of itself and without more lead to relief*" under the just and equitable discretion.

46. Mr Justice Lindsay summarised the position as this: *"We can only conclude that Parliament has quite deliberately not provided that invariably in running time against the employer should be delayed until the end of domestic processes. According, when delay on account of an incomplete internal appeal is relied upon as a reason for delaying and [E]T1 or failing to lodge it in time and where that is not merely alleged but upheld as a matter of fact, if that allegation and that that is fairly considered by the employment tribunal and put into the balance of justice and equity of the matters considered that ordinarily will suffice the employment tribunal to escape the error of law as to that issue."*

Is there a continuing act of discrimination

47. In Barclays Bank Plc v Kapur and others [1991] ICR 208 HL, the House of Lords make a distinction between a continuing act and an act that has continuing consequences. A practice will amount to an act extending over a period, but if there is no practice then there is no continuing act even if that act has ramifications which extend over a period.

48. The Court of Appeal in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530 CA, clarifies that the focus should be on the substance of the allegations of discrimination that the employer is responsible for an ongoing situation where the employee is being treated less favourably.

49. The Court of Appeal in Kingston-Upon- Hull CC v Mausczowizc [2009] IRLR 288 held that failure to make a reasonable adjustment is an omission not a continuing act.(See Lord Lloyd judgment at paragraph 22). Abertawe Bro

Morgannwg University Local Health Board v Morgan [2018] IRLR 1050 provides further guidance on the question of when time would begin to run in respect of a failure to make reasonable adjustments. Leggatt LJ held that time runs from the point in time when it had, or ought to have, become apparent to the employee that the employer was not complying with its duty to make reasonable adjustments. This may be a date later than the date on which the employer's duty had first arisen, but if time had begun to run on the earlier date, a Claimant might be unfairly prejudiced, in particular if they reasonably believe that the employer was taking steps to seek to re address the disadvantage, when in fact the employer was doing nothing at all. Leggatt LJ says *at paragraph 15, "This analysis of the mischief which s 123(4) is addressing indicates that the period in which the employer might reasonably have been expected to comply with its duty ought in principle be assessed from the claimant's point of view, having regard to the facts known or which ought reasonably to have been known by the claimant at the relevant time."*

Disability

50. Disability is defined under Section 6 of the EQA 2010 as:

"(1) A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

51. When deciding at which point in time the Claimant is disabled, the Tribunal is to look at the time of the alleged discriminatory act: Cruickshank v Vaw Motorcast Ltd [2002] I.C.R. 729. 52.

52. Schedule 1 of EQA 2010, sets out how to assess whether the Claimant has fulfilled the components of the definition of disability. However, there is no specific definition of "impairment" in the EQA 2010, Tribunals need to refer to the case law in order to ascertain what impairment means in the context of the statute. In Rugamer v Sony Music Entertainment UK Ltd [2001] IRLR 664, the EAT defined "impairment" as: "*Impairment" for this purpose and in this context, has in our judgment to mean some damage, defect, disorder or disease compared with a person having a full set of physical and mental equipment in normal. The phrase 'physical or mental impairment' refers to a person having (in everyday language) something wrong with them physically, or something wrong with them mentally."* (paragraph 34)

53. In the pre Equality Act 2010 authority of Goodwin v Patent Office [1999] I.C.R. 302, Morison J (President, as he then was), provided guidance on the proper approach for the Tribunal to adopt when applying the provisions of the Disability Discrimination Act 1995. At paragraph 3 of that decision, Morison J held that the following four questions should be answered, in order: a) Does the Claimant have an impairment which is either mental or physical? (the 'impairment condition'); b) Does the impairment affect the Claimant's ability to carry out normal day-to-day activities …, and does it have an adverse effect? (the 'adverse effect condition'); c) Is the adverse effect substantial? (the 'substantial condition'); and d) Is the adverse effect long term? (the 'long-term condition').

54. It is for the Claimant to prove that he is disabled, that is to show, on the balance of probabilities, that he satisfies all four elements, that is that: a) he

has a mental or physical impairment, b) the impairment affects his ability to carry out normal day-to-day activities, c) the adverse condition is substantial, and d) that the adverse condition is long term.

55. In J v DLA Piper UK LLP [2010] ICR 2010 Underhill J (President, as he then was) suggested that although it was still good practice for the Tribunal to state a conclusion separately on the question of impairment, as recommended in Goodwin, there will generally be no need to actually consider the 'impairment condition' in detail: *"In many or most cases it will be easier (and is entirely legitimate) for the tribunal to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected on a long- term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from an impairment which has produced that adverse effect. If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve the difficult medical issues*." (paragraph 40)

56. At paragraph 42 in J v DLA Piper UK LLP the EAT said: *"The first point concerns the legitimacy in principle of the kind of distinction made by the Tribunal, as summarised at paragraph 33(3) above, between two states of affairs which can produce broadly similar symptoms: those symptoms can be described in various ways, but we will be sufficiently understood if we refer to them as symptoms of low mood and anxiety. The first state of affairs is a mental illness – or, if you prefer, a mental condition – which is conveniently referred to as "clinical depression" and is unquestionably an impairment within the meaning of the Act. The second is not characterised as a mental condition at all but simply as a reaction to adverse circumstances (such as problems at work) or – if the jargon may be forgiven – "adverse life events". … We dare say that the value or validity of that distinction could be questioned at the level of deep theory; and even if it is accepted in principle the borderline between the two states of affairs is bound often to be very blurred in practice. But we are equally clear that it reflects a distinction which is routinely made by clinicians – it is implicit or explicit in the evidence of each of Dr Brener, Dr MacLeod, and Dr Gill in this case – and which should in principle be recognised for the purposes of the Act. We accept that it may be a difficult distinction to apply in a particular case; and the difficulty can be exacerbated by the looseness with which some medical professionals, and most laypeople, use such terms as "depression" ("clinical" or otherwise), "anxiety" and "stress". Fortunately, however, we would not expect those difficulties often to cause a real problem in the context of a claim under the Act. This is because of the long-term effect requirement. If, as we recommend at paragraph 40(2) above, a tribunal starts by considering the adverse effect issue and finds that the Claimant's ability to carry out normal day-to-day activities has been substantially impaired by symptoms characteristic of depression for 12 months or more, it would in most cases be likely to conclude that he or she was indeed suffering "clinical depression" rather than simply a reaction to adverse circumstances: it is a common-sense observation that such reactions are not normally long lived"*.

57. The Guidance on matters to be taken into account in determining questions relating to the definition of disability ("The Guidance") states, at A3 and A5: *"A3 The definition requires that the effects which a person may experience must arise from a physical or mental impairment. The term mental or physical*

impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects. [..]"

58. *"A5 A disability can arise from a wide range of impairments which can be: […]* • *impairments with fluctuating or recurring effects such as rheumatoid arthritis, myalgic encephalitis (ME), chronic fatigue syndrome (CFS), fibromyalgia, depression and epilepsy [..]* • *mental health conditions with symptoms such as anxiety, low mood, panic attacks, phobias, or unshared perceptions; eating disorders; bipolar affective disorders; obsessive compulsive disorders; personality disorders; post-traumatic stress disorder, and some self-harming behaviour;* • *mental illnesses, such as depression and schizophrenia; produced by injury to the body, including to the brain*".

59. The EHRC Code of Practice on Employment, at paragraph 7 of Appendix 1, puts it succinctly "*What it is important to consider is the effect of the impairment, not the cause."*

60. Paragraph 16 of appendix 1 of the EHRC Code of Practice on Employment states *"Someone with an impairment may be receiving medical or other treatment which alleviates or removes the effects (though not the impairment). In such cases, the treatment is ignored and the impairment is taken to have the effect it would have had without such treatment"*

61. In Herry v Dudley Metropolitan Council, [2017] ICR 610, referring to paragraph 42 of J v DLA Piper UK LLP, the EAT said this:

"55.This passage has, we believe, stood the test of time and proved of great assistance to Employment Tribunals. We would add one comment to it, directed in particular to diagnoses of "stress". In adding this comment we do not underestimate the extent to which work related issues can result in real mental impairment for many individuals, especially those who are susceptible to anxiety and depression. 56. Although reactions to adverse circumstances are indeed not normally long-lived, experience shows that there is a class of case where a reaction to circumstances perceived as adverse can become entrenched; where the person concerned will not give way or compromise over an issue at work, and refuses to return to work, yet in other respects suffers no or little apparent adverse effect on normal day-to-day activities. A doctor may be more likely to refer to the presentation of such an entrenched position as stress than as anxiety or depression. An Employment Tribunal is not bound to find that there is a mental impairment in such a case. Unhappiness with a decision or a colleague, a tendency to nurse grievances, or a refusal to compromise (if these or similar findings are made by an Employment Tribunal) are not of themselves mental impairments: they may simply reflect a person's character or personality. Any medical evidence in support of a diagnosis of mental impairment must of course be considered by an Employment Tribunal with great care; so must any evidence of adverse effect over and above an unwillingness to return to work until an issue is

resolved to the employee's satisfaction; but in the end the question whether there is a mental impairment is one for the Employment Tribunal to assess. […]"

"71. It is true that in paragraph 42 Underhill P said that in a case where mental impairment was disputed the ET might begin with findings as to whether there was a long-term effect on normal day-to-day activities, because reactions to adverse circumstances were not usually long lived. He was, however, not setting out any rule of law; he was considering a case where the principal diagnosis in issue was depression; and he did not rule out the possibility of a reaction to adverse circumstances which was long-lived. As we have explained above, when commenting on J v DLA Piper, there can be cases where a reaction to circumstances becomes entrenched without amounting to a mental impairment; a long period off work is not conclusive of the existence of a mental impairment."

62. S. 212(1) EQA 2010 defines "substantial" as meaning "*more than minor or trivial."* Providing guidance as to how to determine the question of substantial adverse effect, HHJ McMullen QC held in Rayner v Turning Point [2010] 11 WLUK 156, *"that although the question of whether there is a "substantial" adverse effect is a matter of fact for the Tribunal to determine. The cumulative effects of an impairment should be taken into account when working out whether it is substantial. An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, taken together, could result in an overall substantial adverse effect."(paragraph 22)*

63. Appendix 1 to the EHRC Employment Code of Practice also provides guidance on the meaning of "substantial", at paragraph 9 "Account should… be taken of where a person avoids doing things which, for example, causes pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation."

64. The Guidance sets out a number of factors for the Tribunal to consider when deciding whether an impairment has a substantial effect. The Guidance includes by way of relevant factors: the time taken by the person to carry out an activity [paragraph B2]; the way a person carries out an activity [B3]; the cumulative effects of an impairment [B4]; the cumulative effects of a number of impairments [B5/6]; the effect of behaviour [B7]; the effect of environment [B11] and the effect of treatment [B12]

65. In Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT, the EAT furnish guidance as to the Tribunal's role in applying the words of the statue. The EAT state: *"14. It is clear first from the definition in section 6(1)(b) of the Equality Act 2010 , that what a Tribunal has to consider is on adverse effect, and that it is an adverse effect not upon his carrying out normal day-to-day activities but upon his ability to do so. Because the effect is adverse, the focus of a Tribunal must necessarily be upon that which a Claimant maintains he cannot do as a result of his physical or mental impairment. Once he has established that there is an effect, that it is adverse, that it is an effect upon his ability, that is to carry out normal day-to-day activities, a Tribunal has then to assess whether that is or is not substantial. Here, however, it has*

to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other."

66. In assessing an impairment's effect on a Claimant's ability to carry out normal day-to-day activities, Mr Justice Elias (the President, as he then was) emphasised in the decision of Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT, that a Tribunal should not compare what the Claimant can do with what the average person in the population can do, but what the Claimant can do and whether the Claimant could do the same without the impairment. That is to say *"In order to be substantial the effect must fall outwith the normal range of effects that one might expect from a cross section of the population', but 'when assessing the effect, the comparison is not with the population at large… what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired"*. (paragraph 27)

67. "Day to day activities" encompass activities which pertain to participation in professional life as well as participation in personal life, and Tribunals are cautioned to focus on what the Claimant cannot do, not what they can do.

68. In Elliot v Dorset County Council UKEAT/0197/20/LA, HHJ Tayler reminds Tribunals, that in looking at what are day to day activities, it is difficult to look at this question in isolation, after all *" it is not possible to properly analyse whether an impairment results a substantial adverse effect on day to day activities, without knowing what the day to day activities are."* (paragraph 18)

69. Notwithstanding, The Guidance sets out examples of what is meant by "normal day to day activities". "D3 *In general, day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities"*.

70. The Appendix to The Guidance, provides an illustrative non-exhaustive list of factors set out which, if experienced by a person, would be reasonable to regard as having a substantial adverse effect on normal day to day activities. In contrast, there is a separate list of what would not be reasonable to regard as having a substantial adverse effect on normal day to day activities.

71. The list of factors which, if they are experienced by a person, it would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes: Persistent general low motivation or loss of interest in everyday activities; Frequent confused behaviour, intrusive thoughts, feelings of being controlled, or delusions; Persistently wanting to avoid people or significant difficulty taking part in normal social interaction or

forming social relationships, for example because of a mental health condition or disorder; Persistent distractibility or difficulty concentrating.

72. An illustrative and non-exhaustive list of factors which, if they are experienced by a person, it would not be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, includes: • Inability to concentrate on a task requiring application over several hours;

73. To conclude, Schedule 1, part 1, paragraph 2 EQA 2010 defines "long-term" as: *"The effect of an impairment is long-term if –(a) it has lasted for at least 12 months, (b)it is likely to last for at least 12 months, or (c) it is likely to last for the rest of the life of the person affected"*.

74. Tribunal must analyse all three scenarios envisaged in paragraph 2 of schedule 1 (see McKechnie Plastic Components v Grant UKEAT/0284/08). 'Likely' has been held to mean it is a "real possibility" and 'could well happen' rather than something that is probable or more likely than not (SCA Packaging Ltd v Boyle [2009] ICR 1056). In that case, the Supreme Court upheld Girvan LJ in the Court of Appeal (at [19]): *"The prediction of medical outcomes is something which is frequently difficult. There are many quiescent conditions which are subject to medical treatment or drug regimes and which can give rise to serious consequences if the treatment or the drugs are stopped. These serious consequences may not inevitably happen and in any given case it may be impossible to say whether it is more probable than not that this will occur. This being so, it seems highly likely that in the context of paragraph 6(1) in the disability legislation the word "likely" is used in the sense of "could well happen"*.

75. The Guidance states that conditions with effects which recur only sporadically or for short periods can still qualify as long term impairments for the purposes of the Act. If the effects on normal day to day activities are substantial and are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. The guidance sets out examples of impairments with effects which can recur beyond 12 months, or where the effects can be sporadic [C5 and C6]

76. The Guidance says that it is not necessary for the effect to be the same throughout the period which is being considered in relation to determining whether the 'long-term' element of the definition is met [C7]. The Guidance sets out what should be considered in relation to the likelihood of recurrence. Essentially this means that all circumstances should be taken into account including the way in which a person can control or cope with the effects of an impairment, which may not always be successful.

77. At [C9] The Guidance states: "Likelihood of recurrence should be considered taking all the circumstances of the case into account. This should include what the person could reasonably be expected to do to prevent the recurrence. For example, the person might reasonably be expected to take action which prevents the impairment from having such effects (for example, avoiding substances to which he or she is allergic). This may be unreasonably difficult with some substances".

Strike Out

78. Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 ("Tribunal Rules") is in the following terms:

79. "*37 Striking out* (*1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds— (a) that it is scandalous or vexatious or has no reasonable prospect of success;"*

80. The House of Lords authority of Anyanwu and anor v South Bank Student Union and anor [2001] ICR 391, HL, highlights the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination of the facts to make a proper determination.

81. HHJ Tayler condenses the authorities in Cox v Adecco & others [2021] UKEAT/0339/19/AT (V) to provide general principles when dealing with applications for strike out, where the claim is unclear. HHJ Tayler says *"(1) No-one gains by truly hopeless cases being pursued to a hearing; (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate; (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate; (4) The Claimant's case must ordinarily be taken at its highest; (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is; (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the Claimant seeks to set out the claim; (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the Claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the Claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing; (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer; (9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."*

82. The Equality Act 2010 Statutory Code of Practice on Employment, paragraph 6.10 says *"[t]he phrase [PCP] is not defined by the Act but should be construed widely so as to include, for example, any formal or informal policies, rules, practices, arrangements, orqualifications including one-off decisions and actions .."*

83. Section 15(4)(b) Equality Act 2006 provides that the Equality Act 2010 Statutory Code of Practice must be taken into account by courts or tribunals in any case in which it appears to the court or tribunal to be relevant.

84. Guidance on identifying a PCP is provided at paragraph 28 of the Court of Appeal case of United First Partners Research v Carreras, where the Court of Appeal referred to the EAT decision of the same case where HHJ Eady stated at paragraph 31 of her judgment "*The identification of the PCP was an important aspect of the ET's task; the starting point for its determination of a claim of disability discrimination by way of a failure to make reasonable adjustments (see Environment Agency v Rowan [2008] IRLR 20 EAT, paragraph 27). In approaching the statutory definition in this regard, the protective nature of the legislation means a liberal rather than an overly technical or narrow approach is to be adopted (Langstaff J, paragraph 18 of Harvey); that is consistent with the Code, which states (paragraph 6.10) that the phrase 'provision, criterion or practice' is to be widely construed."*

Analysis & Conclusions

The Amendment Application

85. The Claimant seeks to add by way of amendment a complaint of harassment on the grounds of sexual orientation. I have had regard to the principles set out in Selkent and I do not think that the claim is a new claim, but a relabeling exercise, as the claim form explicitly refers to harassment under the heading of sexual orientation. I consider that the Claimant did intend to bring a claim of harassment in respect of his grievance which included references to texts that could potentially amount to harassment on the grounds of sexual orientation. However, the claim would have been out of time if it had been presented at the same time as the other complaints of sexual orientation, and they are out of time now. For reasons which I go on to give in below I consider it would not be just and equitable for me to exercise my discretion to extend time. Consistent with my conclusion which I go on to give that the Tribunal has no jurisdiction to consider the complaints of direct discrimination on the grounds of sexual orientation, I refuse the amendment application in this case.

Disability

(i) Did the Claimant have a mental impairment of anxiety and depression?

86. The Claimant clearly had a history of anxiety and depression as evidenced by episodes of anxiety in 2017 and 2018 before the Claimant was employed by the Respondent. The Guidance in [A5] mentions anxiety, low mood, sleeplessness, panic attacks as symptoms of a mental health condition. Whilst these symptoms were experienced by the Claimant in November 2017; in August 2018, the Claimant's symptoms appear to clear up. The Claimant also continues to attend work during 2018 & 2019 until December 2019 when the Claimant is diagnosed with work stress. It is following from the Claimant's report of bullying by his boss in January 2020 that the Claimant is consistently off work and prescribed anti-anxiety medication. Whilst I was being asked to find that the Claimant had a mental impairment from 2018, I

found it significant that the Claimant stated himself to Dr Mir that he had been *" suffering anxiety from 2019"* **[282]**. I therefore conclude that the Claimant did not have a mental impairment in 2018.

87. The Claimant's experience at work throughout 2019 and 2020 led to the Claimant's increased experience of anxiety and low mood. It was significant to me that the Claimant admitted in evidence that he did not have difficulty seeing his friends through 2020. Although it is worth pointing out that for most of 2020 the country was in lockdown, and so seeing friends in person was a low probability for everyone living in England including the Claimant. I did not think that the Claimant's sicknotes throughout 2020 which said work-related stress prevented the Claimant having a mental impairment, whilst the EAT in J v DLA Piper UK LLP, explains that such a diagnosis resulting from life events could indicate that there was not a disability, the EAT confirms that it is whether such a diagnosis either has or is likely to have a long term effect that means such symptoms arising from life events do not meet the definition of a mental impairment. I was not convinced by Mr Bignell's submissions that there was some magic in the term work-related stress as used by the Claimant's GP that meant that the Claimant could not have a mental impairment. I was more convinced by the Claimant's Counsel's submission that the GP was reporting what the Claimant said.

88. The Claimant reported to Dr Mir **[287-288]** in June 2021 that he had significant problems with sleep, and problems with concentration and enjoying things. He was diagnosed with situational anxiety which initially was attributable to Covid. Although it was put to me by Mr Bignell that there were problems with Dr Mir's report as it referred to having access to Claimant's GP medical reports **[278]** but reported that the Claimant "*did not have any problems with his mental health before the episode".* **[287]**, I do think that this statement was taken out of the context of the report. Dr Mir goes on to report that the Claimant had psychological problems as a child so clearly was aware of the Claimant's medical history. I understood Dr Mir to be saying that the Claimant had not had a medical diagnosis of a mental disorder, I did not think that this invalidated Dr Mir's diagnosis of the Claimant as having anxiety and mild depression **[288]**. I was persuaded that a Psychiatrist such as Dr Mir who described himself as having extensive experience in report writing would take the contents of the report and his expert declaration **[291-292]** very seriously. Dr Mir states that he has a "special expertise in the diagnosis and treatment of mental disorders" **[277]** and so I consider that Dr Mir was qualified to give an accurate diagnosis of the Claimant. In June 2021 the Claimant is given another situational diagnosis in respect of his anxiety but this time it is because of work. This diagnosis does mean that the Claimant did have a mental impairment of anxiety and depression.

(ii) If so, did it have a substantial adverse effect on his ability to carry out day-to-day activities? (An effect is substantial if it is more than minor or trivial: s 21 2(1) EQA 2010

89. It is clear that taken together, the symptoms of the Claimant's anxiety and depression did have a substantial adverse effect on the Claimant's ability to carry out day to day activities. The Claimant experienced low mood such that he didn't want to talk to his friends throughout 2021- 2022. The Claimant gave evidence that that some days he didn't want to get out of bed and that affected

his day to day activities because he did not want to care for himself or cook for himself and he experienced that from 2020-2022 and to date. The Claimant spoke of hypervigilance since 2019 that meant when he was out in Milton Keynes would be like a "meercat". The Claimant complained of picking at his hands causing bleeding and that led to him being unable to do cleaning tasks and his hands being infected, this occurred throughout 2020. The effects of these symptoms fall within the meaning of substantial set out in paragraph 9 of appendix 1 of EHRC Code of Practice on Employment.

90. Clearly the Claimant's anti-anxiety medication helped with the Claimant's mental impairment as the Claimant took it if and when needed. However, even with the medication, the Claimant still was adversely affected in his ability to carry out day-to-day activities. And in any event, the EHRC Code of Practice on Employment provides guidance that I need to ignore the effect of the medication on helping the Claimant cope with the substantial effects of his anxiety in assessing whether the effect was substantial.

(iii) Were the effects of the impairment long-term? (Consider at the time of the discriminatory acts).

91. It is my view that the effect of the Claimant's mental impairment was long term for the following reasons. The Claimant had various incidents of anxiety and depression requiring medication from 2018. However this was a short incident where the Claimant stated his symptoms had calmed down by August 2018. However, by December 2019 the Claimant experiences anxiety and depression again, such that he is off work consistently from January 2020 to March 2022 when he started a new job. This is a period of approximately 27 months. The Claimant required significant adjustments in April 2022 in order to do his new job which meant the effects of his symptoms were ongoing beyond the date of his dismissal on 11 July 2022 resulting in the Claimant giving up work due to his mental impairment in December 2022.

(iv) Did they last at least 12 months, or were they likely to last at least 12 months? If not, were they likely to recur?

92. However, I do not find that it can be said that in December 2019 it was the case that the mental impairment was likely to last for 12 months. This is because the impact of COVID meant that the impact on the Claimant's day to day activities were minimal. The Claimant was not required to go out and interact with members of the public since most of 2020 was spent in lockdown and the Claimant spent time away from home in 2020 with a friend in Sheffield.

93. The Claimant said he did not socialize in 2020, but no one else did either for the most part. In January 2020, there are references to the Claimant's anxiety but most reference situations that are likely to cause anyone anxiety i.e. reporting your boss for bullying, looking for a new job etc. In April 2020 the Claimant's GP said that the Claimant's anxiety and low mood was situational and due to the COVID 19 pandemic and that it was likely to settle with supportive measures, once the social situation with Covid was better. It was also the case that at that point the Claimant's grievance had not yet been

heard and once the Claimant was able to have his grievance heard with an outcome it was likely that his condition would improve as the Claimant reported on 15 December 2020. However, after the grievance is heard the Claimant wasn't able to move forward without an outcome of the grievance. It is this expectation that the Claimant would recover after the resolution of his grievance, that leads me to conclude that in 2020 it was not likely that the Claimant's anxiety and depression were likely to last 12 months.

94. The Claimant's sick note expired on 18 November 2020 and the Claimant did not get a sick note again until May 2021. Notwithstanding, in January 2021, the GP diagnosed the Claimant with an anxiety disorder, furthermore the Claimant was unable to start a job because he suffers from a panic attack.

95. But following the outcome of the grievance on 1 April 2021 when the Claimant's grievance is partially upheld, the Claimant's condition does not improve. The Claimant's May sick note covers the Claimant from 1 April 2021. The impacts that Dr Mir reports by 18 June 2021 that the Claimant experiences are more than trivial, i.e. being fearful of going to the shops, having an unstable mood *which is bad 1 to 2 days a week and on those days not wanting to do anything, intermittent sleep , bad concentration,* hypervigilance for every noise" *impacting his day-to-day life, his occupational life and social life."*

96. It is from April 2021 that it can be said that the Claimant's mental impairment was likely to last 12 months. The effect of the Claimant's impairment was long term. Even when the Claimant got a job in March 2022 with adjustments implemented, and the Claimant started working in April 2022. The Claimant was unable to remain in the job due to his panic attack at being around members of the public and his fear that members of staff of the Respondent would attend his new place of work. The effects of the mental impairment have therefore lasted 12 months.

97. It is for those reasons I detail above that I find that the Claimant was disabled in respect of any acts of disability discrimination dating from 1 April 2021.

Are the Claimant's discrimination claims in time?

1.1. Whether the claim was made within three months (allowing for any early conciliation extension) of the acts complained of.

98. The Claimant's claims for direct discrimination under paragraphs 1 & 4.1,4,2,4,3 of the Annex to EJ Ord's order dated 15 January 2023, and harassment are all out of time as separate acts. The Claimant's claim for unfair dismissal is in time. The Claimant started early conciliation on 5 August but the certificate was not issued until 20 August 2021. I extend no criticism to the Claimant for this delay of 15 days. I accept the Claimant's explanation that after ACAS told him about the limitation period in respect of discrimination, they would try and deal with it as soon as possible. However, the Claimant was unable to explain the delay between the issue of the certificate on 20 August 2021 and the presentation his claim on 19 September 2021. There was no evidence presented to me in respect of this delay. The early conciliation provisions do not help extend time for the Claimant's discrimination claims as the early conciliation certificate was issued after the primary time limit expired.

1.2. If not, whether there was conduct extending over a period.

99. It is the Claimant's case that the direct discrimination of sexual orientation and disability are continuing acts. Even if this was the case in respect of the allegations of direct discrimination on the grounds of sexual orientation, the Claimant accepts that the last act that the Claimant relies upon is on 6 January 2020 **[62]**. In respect of the claim for harassment on the grounds of sexual orientation, the Claimant relies upon whatsapp messages and verbal acts of harassment, the last of which was on 28 December 2019. There is no more allegations of harassment after this. The Claimant does not rely upon the dismissal as an act of discrimination on the grounds of sexual orientation. The Respondent's failure to have the grievance heard is not alleged as an act of discrimination on the grounds of sexual orientation nor how the grievance process was dealt with; it therefore, does not fall within the bounds of Lyfar v Brighton and Sussex University Hospital Trust [2006] EWCA Civ 1548, which the Claimant's counsel refers to in her skeleton. Therefore the claims of direct discrimination and harassment on the grounds of sexual orientation are out of time. Even if the acts were a continuing act, the claims are out of time by approximately 1 year and 9 months. This is a significant period of time. However, I see no acts extending over a period of time in accordance with the test in Hendricks concerning the sexual orientation claims that would require me to make a finding that there was a continuing act.

1.3. If there has been a failure to do something, when did the person who decided on it make that decision?

100. However, in respect of claims discrimination on the grounds of disability, the Claimant does rely upon the act of dismissal as an act of direct discrimination in paragraph 4.4 of Employment Judge Liz Ord's order dated 15 January 2023 **[63]**. In paragraph 17 of the Claimant's particulars of claim **[17**] and expanded upon in paragraph 20 of the Claimant's further and better particulars dated 9 August 2022 **[41]**, the Claimant claims a continuing state of affairs from 28 December 2019 when the Claimant went off sick to the failure of the Respondent to implement the recommendations of Dr Mir's report as part of the Respondent's decision to terminate the Claimant's employment **[17 & 41]**. However, there is no date for this omission so I have to decide when the failure to implement the recommendations was made.

101. In the grievance appeal outcome, Mr Di Menza clearly says *" you then made us aware that you had requested a pysch report, so we wanted to wait to review this"* **[155]** the Claimant is then offered redeployment in the outcome of the grievance **[155]**. It is my finding that the decision not to implement Dr Mir's recommendations were made as part of the decision whether to uphold the Claimant's grievance at the grievance appeal on 22 July 2021. The decision on the appeal was made on approximately 23 July 2021. **[155-156]**. I find that time began to run from 23 July 2021. This date is within 3 months of the presentation of the Claimant's claim on 19 September 2021, so the Claimant does not need the ACAS EC provisions to extend time. In those circumstances the Claimant's direct discrimination in respect of the failure to implement Dr Mir's recommendations is in time. The Claimant relies on the pressure to return to work as well as accept redeployment as a PCP and the continuing risk of termination. It is right to say that these could potentially

amount to a practice of the Respondent and therefore I find the PCPs amount to a continuing act.

102. However, I see no continuing act including the allegations set out in the annex list of issues at 4.1- 4.3 of Employment Judge Liz Ord's order dated 15 January 2023. **[63]** There is no act extending over the period, these are different acts by different people and bear no connection to the Claimant's complaint of the Respondent's failure to implement support. These allegations are therefore out of time.

103. As the dismissal is in time, both the identified claims for direct discrimination on the grounds of disability and reasonable adjustments are in time and I do not need to exercise my discretion to extend time.

104. This is not the case in respect of the Claimant's claim for harassment on the grounds of disability. The Claimant relies upon a comment made by Mr Dicks on 28 December. The Claimant's further better particulars dated 9 August 2022 puts the date of 28 December in 2020, however the Claimant did not return to work after 6 January 2020, so it is clearly a typo. In any event even if the allegation took place in 2020 the Claimant would still be out of time.

105. In the circumstances, I need to consider whether to exercise my discretion to extend time on the grounds it is just and equitable in relation to the claims for harassment on the grounds of both sexual orientation and disability and the identified claims for direct discrimination on the grounds of sexual orientation.

1.4. If the claims were out of time, whether they were made within such further period as the tribunal thinks is just and equitable.

106. The Claimant has delayed by approximately 2 ½ years in respect of the first allegation on 20 February 2019 and approximately 1 year 8 months in respect of the last allegation on 6 January 2020.

107. The Claimant's reason for delay is because he believed that he needed to complete the internal grievance process first. However, the Claimant knew that there was an internal grievance process and an external process as Claimant explained this distinction to me. The Claimant was fully aware that he could trigger the legal process as he mentioned it to his GP as early as February 2020. He said he was *" taking them to court"*. Them was a reference to his employer. The Claimant also knew the harassment could be a breach of the Equality Act 2010. It did not seem reasonable to me that if the Claimant knew as early as January 2020 when he first raised a grievance that he had been harassed that he wanted to take them to court, that it was not reasonable that he did not look up anything regarding the time limits on harassment. There was nothing preventing the Claimant from pursuing his claim in the tribunal at that time. Had he done so, the Claimant would have been in time.

108. The Claimant did not seek any legal assistance or research any law. I do accept that the Claimant did not want to talk to his partner about the legal situation at the beginning of their relationship in October 2020, but it is clear that by July 2021 the Claimant has discussed the situation with his partner who accompanied him to see Dr Mir. This was 3 months before he actually brought

his claim. It would have made little difference even if his partner had assisted him to bring his claim by then. The Respondent already investigated the harassment claims and had spoken to the main antagonists **[115]** so would not be prejudiced in obtaining evidence in relation to the allegations of harassment. Furthermore, the Respondent did not offer any evidence as to the prejudice that the delay would cause them, however, I do not think the justice lies with allowing the out of time claims. A significant amount of time has lapsed since the events that form the basis of the Claimant's claims for direct discrimination for disability & sexual orientation and harassment on the grounds of sexual orientation and this will cause difficulties in the Respondent's witnesses ability to recall events.

109. There was nothing his employer said to the Claimant that would lead the Claimant to think that he had to wait until the end of the grievance process to bring a claim. However, it does seem to me that the Respondent could have had the grievance meeting much earlier. The grievance was heard by telephone and there was nothing preventing the Respondent from holding the grievance hearing during the Covid pandemic and even during lockdown.

110. But I do not accept that it was reasonable for the Claimant to have delayed bringing his claim on the basis of waiting for the grievance process. The Claimant did not bring a tribunal claim as it appears that he did not want to at that stage. It appears to me that the Claimant was trying to get another job and was using his energies to do that. The Claimant was engaged in the grievance process, was able to write emails to HR and attend meetings throughout the grievance process. Equally, I do not think that the Claimant was prevented due to his mental health from researching the time limits on his claim and bringing a claim in the Employment Tribunal in time. The grievance process ended in July 2021 and the Claimant got his ACAS certificate on 20 August 2021. The Claimant waited until September 2021 to bring his claim because that is when his furlough pay expired not because the grievance process had finished. That is why I do not consider it is just and equitable to exercise my discretion to extend time.

Strike out

111. The Respondent argues that firstly the reasonable adjustments claim lacks clarity. I wholly agree with HHJ Tayler's sentiments in Cox v Adecco [2021] that lack of clarity by a litigant in person (as the Claimant was when he drafted the reasonable adjustments) is not normally a barrier to a Tribunal that cannot be overcome by the Tribunal rolling up its metaphorical sleeves at the beginning of a hearing in order to get that clarity from the Claimant (see paragraph 30). The Respondent then argues that the reasonable adjustments claim has no reasonable prospects of success because the Respondent had no knowledge of the Claimant's disability. The Claimant set out in his witness statement that he told the Respondent a few weeks after the start of his employment about his mental health problems. In order to determine whether what the Claimant says he told his employer is sufficient to amount to actual or constructive knowledge requires evidence to resolve this dispute. This is the very thing that means that the claim is not suitable for a strike out. Finally, then the Respondent says that the PCPs identified by the Claimant are not identified with sufficient clarity. Having regard to HHJ Eady's words at paragraph 28 of the Court of Appeal case of United First Partners Research v Carreras, PCPs should be construed widely. It is not for me to decide whether the Claimant's

PCP are PCPs. On the current construction of the PCP as drafted, at their highest I do not think that it can be said that the PCPs are not arrangements or informal policies.

112. The Respondent argues that the Claimant does not identify the substantial disadvantage with sufficient clarity or how the PCP produced those disadvantages. The disadvantages identified do not lack clarity so that it is unclear what the disadvantage is. I think is it is clear enough for the Respondent to know the case against him. It is a matter of evidence as to whether a particular disadvantage flows from a particular PCP. With the Claimant's case put at its highest, it would not be impossible for the Claimant to be able to demonstrate this at a hearing. In the circumstances, I cannot say that the Claimant's reasonable adjustment claim has no reasonable prospect of success. The strike out application fails.

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Employment Judge Young

_____

Date 20th July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 20 July 2023

FOR EMPLOYMENT TRIBUNALS