EMPLOYMENT TRIBUNALS

Claimant: Mr S Monfared

Respondent: HCRG Care Services Limited

Heard at: Watford **On:** 23 November 2022

Before: Employment Judge George

Representation
Claimant: in person
Respondent: Miss B Venkata, counsel

RESERVED JUDGMENT

1. To the extent that the victimization claim is based on acts said to have occurred prior to 5 January 2021, it has no reasonable prospects of success and is struck out.

2. Otherwise, the respondent's application for orders under rule 37 of the Employment Tribunal Rules of Procedure 2013 is dismissed.

REASONS

Issues at the Preliminary Hearing before me

1. The issues for me to consider were those defined by Employment Judge Tuck QC (as she then was) at the preliminary hearing on 12 July 2021 (see para.1 on page 137).

2. At the hearing on 23 November 2022 I first heard submissions on whether or not the claim 1 (Case No: 3300116/2021) should be rejected on the basis that, at the time it was lodged, there was no valid ACAS EC certificate. I decided that it should be rejected. A letter to that effect was sent to the parties on 24 November 2022. Reasons were requested in time and are set out in paras.25 to 37 below.

3. I also heard submissions on the issues at para.1.b. to e. and reserved judgment on those preliminary issues.

4. The claimant had also made a number of incidental applications which needed to be considered first. I set out details of those below. As a consequence of the judgments I have made on the preliminary issues, I have case managed the claim, clarified the issues in it and listed further hearings. Details of case management orders are set out in a separate record of hearing which contains those matters which did not need to be recorded in a reserved judgment enabling the parties to understand the judgment. I refer to the detailed explanation of the claim found in that record of hearing but do not repeat it here.

5. I had the benefit of a 274 page bundle with separate index. The claimant provided a copy of his disclosure which ran to 1414 pages with a 5 page index. The respondent relied upon a 12 page skeleton argument (which I refer to in this reserved judgment as the RSA) and the claimant on a 24 page "Claimant's application and skeleton argument for open preliminary hearing" (the CSA) which was emailed to the Tribunal on 23 November together with a 5 page supplement to his applications and arguments (numbered page 20 to 24). The statement dated 1 November 2022, which had been submitted in advance and included in the bundle (page 255), was 20 pages long and the additional 5 pages apparently supplemented that. I took all of the claimant's submissions into account; he stated in a covering email words to the effect that he put his arguments forward in writing because he thought that better as English was not his first language.

Relevant law

6. The requirements to go through early conciliation (which I shall refer to as EC), for ACAS to issue an EC certificate, and for a claimant who is not exempt to have a certificate before presenting a claim form, are contained in s 18A of the Employment Tribunals Act 1996 (hereafter the ETA), the relevant parts of which are as follows:

> "(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7). ….
>
> (3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.
>
> (4) If –
>
> (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or
> (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant. …

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.
…….

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4). …

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

(11) The Secretary of State may by employment tribunal procedure regulations make such further provision as appears to the Secretary of State to be necessary or expedient with respect to the conciliation process provided for by subsections (1) to (8).

(12) Employment tribunal procedure regulations may (in particular) make provision –

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4); …"

7. Regulations made under s 18A include the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 ("the 2014 Regulations") which specify the circumstances in which a prospective claimant is exempt from the requirement to go through EC. None of those circumstances apply in the present case.

8. The Employment Tribunals Rules of Procedure 2013 (which I shall refer to as the ET Rules of Procedure), provide so far as relevant:

"1. (1) In these Rules—
"claim" means any proceedings before an Employment Tribunal making a complaint;
"claimant" means the person bringing the claim;
"complaint" means anything that is referred to as a claim, complaint, reference, application or appeal in any enactment which confers jurisdiction on the Tribunal;
"early conciliation certificate" means a certificate issued by ACAS in accordance with the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations [2014];
"early conciliation exemption" means an exemption contained in regulation 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014;
"early conciliation number" means the unique reference number which appears on an early conciliation certificate;

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules.

…

6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39)

does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—

(a) waiving or varying the requirement;
(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
(c) barring or restricting a party's participation in the proceedings;
(d) awarding costs in accordance with rules 74 to 84.

...

10. (1) The Tribunal shall reject a claim if – …

(b) it does not contain all of the following information –
(i) each claimant's name;
(ii) each claimant's address;
(iii) each respondent's name;
(iv) each respondent's address; or
(c) it does not contain one of the following –
(i) an early conciliation number;
(ii) confirmation that the claim does not institute any relevant proceedings; or
(iii) confirmation that one of the early conciliation exemptions applies.

(2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.

……

12. (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be – …

(c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
(d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;

...

(2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs … (c) or (d) of paragraph (1).

…

(3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the judge's reason for rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.

...

37. (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;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing."

…

39.— Deposit orders

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

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

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

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out…..

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

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

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

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

9. Following my preliminary reading prior to starting the hearing, I considered that the cases of Pryce v BaxterStorey Ltd and HMRC v Garau [2017] ICR 1121 were potentially relevant to the first issue that Judge Tuck QC had directed should be considered at this preliminary hearing. I caused copies to be provided to the parties. Both are decisions of the EAT. In BaxterStorey His Honour Judge Shanks considered whether submitting an EC certificate after the presentation of a claim could be re-presentation of the claim. HH Judge Shanks decided that that was not the case, holding that a submission by email of an EC certificate did not comply with the r.8 ET Rules of Procedure requirement that the claim be presented on the prescribed form.

10. He also considered an argument that the Employment Tribunal could and did waive the requirement to represent the claim, using its powers under r.6, by accepting the notification of the EC certificate as agreed presentation. In paragraphs 12 and 13 he rejected that argument, saying that to do so would directly conflict with an express statutory requirement that the EC certificate must be obtained before the claim can be started. The facts of BaxterStorey were that the certificate had not been obtained prior to the claimant submitting the proposed ET1.

11. Garau states that, when a party has obtained one ACAS conciliation in relation to a matter, a second or subsequent certificate does not affect the

time limit for presentation of a claim about the same matter; it does not amount to an EC certificate within s.207B ERA or s.140B EQA. It is a matter of fact and degree whether the proposed proceedings relate to any matter in respect of which the individual has conciliated.

12. Where a claim has been rejected under r.12 ET Rules of Procedure 2013 that is not a determination of proceedings since it does not go to the substance of the claim or involve a resolution of issues: Trustees of the William Jones's Schools Foundation v Parry [2018] ICR 1807 CA.

13. Since the hearing before me, the Court of Appeal has handed down the decision in Sainsbury's Supermarkets Ltd v Clark [2023] EWCA Civ 386. The facts of that case were quite different to those of the present because they concerned a multiple claim. The issue on the appeal was whether the effect of rules 10 and 12 was that where multiple claimants make employment tribunal claims on the same claim form by which proceedings to which a requirement to engage in EC applies it is sufficient for the claim form to contain a single ACAS early conciliation number relating to one of the claimants on the form. The substance of the appeal was that they did and that does not affect the issues in the present case. However, the Court of Appeal did make some general observations about the procedure in cases, such as the present, where a defect has not been noted by the Tribunal at the time of presentation. The Court also approved the EAT decision in Cranwell v Cullen (unreported EAT decision of 20 March 2015) that the claim by a claimant who was not exempt from the requirement for EC and was in breach of s.18A ETA was one that the Employment Tribunal had no jurisdiction to consider.

14. The power to strike out a claim on the ground that it has no reasonable prospect of success is a power to be exercised sparingly, particularly where there are allegations of discrimination and unlawful detriment on grounds such as protected disclosure or health and safety grounds. In the case of Anyanwu v South Bank University [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases. It is generally not appropriate to strike out a claim where the central facts are in dispute because discrimination cases are so fact sensitive. The same point was made by the Court of Appeal in the protected disclosure case of Ezsias v N Glamorgan NHS Trust [2007] I.C.R. 1126 CA where Maurice Kay LJ said this at paragraph 29

> "It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error of law for the employment tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words "no reasonable prospect of success". It would only be in an exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

15. Furthermore, there is a public interest in ensuring that allegations of discrimination are heard and determined after appropriate investigation of the circumstances because of the great scourge that discrimination represents to society. It is relevant to bear in mind that s.136 of the Equality Act 2010 provides for a shifting burden of proof. Furthermore, s.47B of the ERA (detriment for protected disclosure) provides for the respondent to show the reason why the act complained of was done. Therefore at this preliminary stage the question is whether the claimant has no reasonable prospect of establishing the essential elements of his claim, taking into account the burden of proof in respect of each of those elements.

16. Guidance on considering an application to strike out a protected disclosure claim was given by HH Judge James Tayler in the EAT in Cox v Adecco Group UK & Ireland [2021 ICR 1307 EAT. The learned judge stressed the importance of properly identifying the issues in a case before considering whether or not to strike it out under r.37(1). As in the present case, Cox v Adecco concerned litigation brought by a litigant in person and I note the extract from the Equal Treatment Bench Book cited in para.24 of HH Judge James Tayler's judgment which emphasizes that people representing themselves are operating "in an alien environment in what is for them effectively a foreign language". That is even more the case for the present claimant for whom English is not his first language. The Employment Tribunal has throughout its existence been intended to be a place where litigants can present their claims without professional representation which means that the employment judge bears a particular responsibility to take care to seek to understand how the case is put by a self-representing litigant faced with a strike out application.

17. As the learned judge says in para.27 of his judgment, the employment tribunal is limited to determining the claims in the claim form but

> "consideration may need to be given to whether an amendment should be permitted, especially if this would result in the correct legal labels being applied to facts that have been pleaded, or are apparent from other documents in which the claimant seeks to explain the claim."

18. The section of the judgment in paragraphs 27 to 32 are of particular assistance in the task of considering the strike out application presently before me. The principles were summarised by the learning judge in para.28 as follows:

> "From these cases a number of general propositions emerge, some generally well understood, some not so much.
> (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 prospects 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."

19. That said, where it is plain that a discrimination, harassment, victimisation (or protected disclosure) claim has no reasonable prospects of success (interpreting that high hurdle in a way that is generous to the claimant), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail: Anyanwu para.39 per Lord Hope. Such an example is given in the quotation from Ezsias.

20. The authorities relating to applications to strike out at a preliminary hearing claims which are said by the respondent to have been brought out of time but where the claimant seeks to rely upon a continuing act were reviewed by Ellenbogen J in E v X (UKEAT/0079/20 & UKEAT/0080/20). The issue which I have been asked to consider (page 137) is whether any of the claimant's claims should be struck out on the basis that they were lodged out of time (para.1.b.). This is to be approached assuming, for the purposes of the preliminary hearing, the facts to be as pleaded by the claimant and does not require evidence or actual findings of fact. The question is therefore whether there is no reasonable prospect of establishing at trial that a particular incident or incidents formed part of conduct which, together with other incidents, might amount to a course of conduct within s.48 or s.111 ERA or s.123 EQA.

21. Another example of a claim which might be struck out at a preliminary stage is where the claim amounts to res judicata or an abuse of process. Five principles were distilled from the authorities in this area by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2014] AC 160 UKSC paragraph 17 in a passage headed "Res judicata: general principles". First, cause of action estoppel is where a cause of action has been held to exist or not to exist in one set of proceedings then the outcome may not be challenged by either party in subsequent proceedings. Secondly, where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action. Thirdly, a cause of action is extinguished once judgment has been given on it and the claimant's sole right is a right on the judgment. Fourth, there is the principle that where some issue which is necessarily

common to the first action and the subsequent action was decided on the earlier occasion such that, even where the cause of action is not the same, the decision on that issue is binding upon the parties. Fifth there is what is called the rule in Henderson v Henderson (1843) 3 Hare 100 which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Such a claim is liable to be struck out as an abuse of process. The doctrine of res judicata applies to the Employment Tribunal: Munir v Jang Publications Ltd [1989] I.C.R. 1.

22. Ms Venkata relied on the case of Aldi Stores Ltd v WSP Group plc [2008] 1 W.L.R. 748 CA for its guidance on the case of Henderson v Henderson at para.5 (page 757B to G of the report) and emphasised the public interest that a party should not be twice vexed in the same matter. It does not follow that the presentation of a second claim which could and should have been part of an earlier one necessarily gives rise to abuse of process such that the subsequent claim should be struck out. The quotation from Lord Bingham cited in the passage relied on by Ms Venkata refers to a

> "broad merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before."

23. It is for the person who alleges abuse of process to show what makes the subsequent litigation an abuse and the court will rarely find this to be the case unless the later action involves unjust harassment or oppression of the respondent to the second action.

24. The test under rule 37 contrasts with that under rule 39 of "little reasonable prospects of success". This has been described as being less rigorous than that for a strike out under rule 37 but "there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or the defence." (Hemdan v Ismail [2017] I.C.R. 486 EAT para 13). In doing so, the Employment Judge may take into account more than simply the legal issues but may take into account the likelihood of a party establishing the facts essential to their case: Arthur v Hertforshire Partnership University NHS Trust (UKEAT/0121/19). Before making such an order the Employment Judge must take reasonable steps to find out whether the party will be able to satisfy a deposit order and take account of that information when exercising the discretion whether or not to make the order.

Reasons for rejection of Case No: 3300116/2021

25. At the hearing on 23 November 2022 I gave oral reasons for my conclusion that Case No: 3300116/2021 should be rejected under rule 12(1)(d) of the Rules of Procedure 2013 on the basis that it claimed an exemption from the requirement for an early conciliation certificate and that exemption did not apply. Written reasons were requested at the time and are now provided.

26. It is always somewhat unsatisfactory, to put it mildly, when the question of whether a claim should have been rejected on presentation falls to be decided in a case that has been ongoing at the point of decision for nearly two years. In fairness, as Ms Venkata pointed out, I note that the respondent did raise the issue as soon as it came to their attention by means of their Grounds of Response. The decision I have to make in Case No: 3300116/2021 arises because when the claimant presented the claim form on 5 January 2021 (page 2) he answer the question in box 2.3 "Do you have an early conciliation ACAS early conciliation certificate number?" by saying "No". When asked the question, "If no, why don't you have this number?" the claimant ticked the box that indicates "ACAS doesn't have the power to conciliate on some or all of my claim".

27. The requirement on a prospective claimant to contact ACAS is set out in s.18A(1)ETA and it provides that, before any prospective claimant presents an application to institute relevant proceedings relating to any matter the prospective claimant must provide ACAS with the prescribed information in the prescribed manner about that matter. Mr Monfared appears to have complied with that on 19 December 2020 as that was the date on which he contacted ACAS (see the date on the early conciliation certificate at page 25). However, s.18A(1) says that a person who was subject to the requirement to provide ACAS with the prescribed information may not present an application to institute relevant proceedings without a certificate under s.18A(4).

28. The respondent (which in the case of claim 1 is now HCRG Case Service Ltd only) argues that the types of complaint brought by that claim are all relevant proceedings. By claim 1, the claimant brought allegations of age discrimination, race discrimination, disability discrimination, notice pay, holiday pay, arrears of pay, "other payments", victimization, whistleblowing and he also referred to "ongoing bullying and harassment". To the extent that the last of these is not said to be related to one of the protected characteristics previously mentioned which fall within the Equality Act 2010, that would not be a complaint for which the Tribunal has jurisdiction to consider in any event. I'm satisfied that the list of complaints brought by claim 1 are all relevant proceedings under s.18A(1) ETA.

29. The circumstances in which a tribunal shall reject a claim form on presentation are set out in rr. 10 and 12 of the ET Rules of Procedure. I have set the relevant parts out in full above but, so far as is material the present case, they provide in r.10(1) that the Tribunal shall reject claim if it is not made on the prescribed form and also if it does not contain one of the following: an early conciliation number; confirmation that the claimant does not institute any relevant proceedings; or confirmation that one of the early conciliation exemption applies. If the form is rejected then it shall be returned the claimant with the notice of rejection explaining why it has been rejected with information about how to apply for a reconsideration.

30. Rejection under r.12 concerns substantive defects in the contents of the claim form. The staff of the Tribunal office shall referral claim form to a judge in circumstances including where the claim may be one which institutes relevant proceedings and it was made on the claim form that does

not contain either an early conciliation number or confirmation that one of the early conciliation exceptions applies: r.12(1)(c). Rule 12(1)(d) states that this action must also be taken in the case of a claim form which institutes relevant proceedings, contains confirmation that one of the early conciliation exceptions apply but the exemption does not apply. Rule 12(2) states that the claim shall be rejected if the judge considers that the claim or part of it falls with rule 12(1)(c) or 12(1)(d).

31. As Ms Venkata pointed out, there are other particular defects in the contents of the claim form where the Rules which direct that a claim should be rejected are qualified (see rr.12(2ZA) and 12(2A)). Those circumstances are not relevant to the present claim but where they do apply the judge has a discretion to accept the claim notwithstanding the defect in question, (broadly) if they consider that it is in the interests of justice to do so. An inaccurate assertion of an exemption from EC is not one of the circumstances in which the employment judge has that discretion; if rule 12(1)(d) applies, the judge does not have any alternative but to reject the claim.

32. I am of the view that this claim form did institute relevant proceedings and the asserted exemption did not apply; ACAS did have the power to conciliate the proceedings. The respondent's submissions are, in essence, that this is a jurisdictional point which they raised in the Grounds of Response and at an early stage when they applied for a substantive open preliminary hearing by a letter of 7 April 2021. The claimant did commence EC and he argues that his failure to include a conciliation certificate number was not an intentional act. He said he did not set out to challenge the requirements of the law but had been told by the respondent, through the Head of the HR Department, that they did not intend to engage in negotiations to settle through EC. He argues that that was what led to his conclusion that ACAS did not have the power to conciliate; he appears to have equated the likelihood the conciliation would not be successful from his perspective with ACAS not having the power to conciliate.

33. It is clear from his submissions that this is not the first occasion on which he has brought Employment Tribunal proceedings. I do not make a judgement on whether his actions were justifiable, not least because if the claimant chooses to apply for reconsideration in the appropriate manner, then questions about whether there are explanations or excuses that justify the steps which he took might be live issues on another occasion. However, the exemption which applies where ACAS does not have the power to conciliate the proceedings does not apply to a situation where the claimant believes that EC will be unsuccessful – whether or not that belief is based upon substantial grounds. If ACAS comes to the conclusion that EC is unlikely to be successful, then they will bring it to an end and issue the EC certificate; their power to conciliate continues whether or not the parties consent to use their expertise.

34. Prior to the start of the hearing before me I caused the parties to be given a copy of the decision of His Honour Judge Shanks in Pryce v BaxterStorey Ltd [2022] EAT 61 (a decision dated 9 December 2021). Paragraphs 11 and 12 of the judgement set out the two matters which were permitted to go to

appeal included whether submitting an EC certificate after the presentation of a claim could be re-presentation of the claim. Paragraph 11 explains why HH Judge Shanks decided that that was not the case, namely that a submission by email of an EC certificate did not comply with the r.8 requirement that the claim be presented on the prescribed form.

35. He also considered an argument that the Employment Tribunal could and did waive the requirement to represent the claim by accepting the notification of the EC certificate as agreed presentation. In paragraphs 12 and 13 he rejects that argument, saying that to do so would directly conflict with an express statutory requirement that the EC certificate must be obtained before the claim can be started.

36. Mr Monfared argues that when an allegation of protected disclosure detriment are raised by a claim these are of public importance. He argues that a rule that is strict in relation to ordinary unfair dismissal should be flexible to ensure that the Employment Tribunal remains seized of claims where matters of public importance concerning the safety of employees and others are raised. In my view, the wording of paragraph 13 of HH Judge Shanks' judgement does not suggest that there would be any such exemption. I also note that Ms Pryce's case involved claims of race and sex discrimination. These are also the types of claims of which it is often said that there is a wider public interest in them being heard on their merits.

37. I have come to the conclusion that Case No: 3300116/2021 must be rejected under rule 12(1)(d) of the ET Rule of Procedure. The claimant later sent in an EC certificate which had been issued, after presentation of the claim, on 30 January 2021. This cannot be regarded as a re-presentation of the claim for reasons explained by HH Judge Shanks. The claimant did not have an EC certificate at the time he commenced the claim and was in breach of s.18A ETA. The claim should have been rejected at that point. Since it is a mandatory, jurisdictional matter it is something that the Employment Tribunal has to deal with at the time that it comes to light. The Tribunal does not have the power under rule 6 ET Rules of Procedure to waive these mandatory statutory requirements. The claimant will be given notification that he can apply for reconsideration but that any future claim would only be accepted on the prescribed form. As Ms Venkata pointed out, any such claim would be received on the date on which it was presented which would likely then mean that questions of whether it was presented in time would arise.

Procedural Chronology

38. The following relevant procedural chronology emerges from the documents before me (including those on the Tribunal files):

Date:		**Page No:**
18.04.17	C's employment starts	
19.12.20	EC certificate Day A (C contacts ACAS about matters in claim 1)	25
05.01.21	ET1 in claim 1 presented against the company (now HCRG Care Services Ltd) naming two others as	1

Date:		Page No:
	additional individual respondents.	
22.01.21	C is dismissed	
30.01.21	EC certificate issued against the company only.	25
05.02.21	Claim 1 accepted against the company only and treated as presented on date of original presentation. There was no EC certificate at all for the proposed individual respondents so claim 1 was not accepted against them.	
05.02.21	Claim sent to R stipulating ET3 to be sent by 05.03.21.	
05.03.21	ET3 presented in time.[1]	34
10.03.21	C contacts ACAS to conciliate in respect of the company and one named individual.	51 & 54
29.03.21	C contacts ACAS to conciliate in respect of two other named individuals.	52 & 53
13.04.21	EC certificates issued in respect of all 4 prospective Rs	51 – 54
21.04.21	ET1 in claim 2 (3306029/2021) presented naming the company twice (pages 56 & 57) but citing EC certificates for the company and CE. It was confirmed by Judge Tuck QC that this had not been accepted to be a claim against Charmaine Eckerlsey (CE) so the only existing R is the company.	55
20.06.21	ET orders further information about the claim. The notification is confusing about when this was to be provided by.	79
13.07.21	R writes asking for information abut the progress of the second claim and state that they have not yet received it.	83
15.07.21	C does likewise	
20.07.21	C asked for information about the progress of the claim and asked to amend the current claim to include the appeal outcomes which he described as biased.	82
13.08.21	ET writes to the parties saying that the paperwork had been referred to a judge but apparently not returned and could not be located. It had been re-printed and was being referred to a Legal Officer because of the question of the identity of the respondent and the existence of claim1.	81
24.09.21	Claim 2 was served on the company with a direction to reply by 5.11.21	108, 112
24.09.21	On the same date, the Tribunal wrote on the direction of Employment Judge Tobin stating that he was unable to discern a claim against CE and asking whether the claimant had intended her to be a respondent. Judge Tobin also ordered that specific questions about the complaints be answered. The intention was expressly that the further information should be limited to "1 or 2 sentences for each point". Time for the response was calculated to give R 24 days after the further information to provide a full response. Judge Tobin combined claim	115

[1] The claimant had queried whether this ET3 was submitted late in his 5 page supplementary arguments and applications but accepted that the ET3 was in time once it was explained that the deadline set by the ET for it to be provided was 5 March 2021.

Date:		Page No:
	1 and claim 2 and directed that the case be listed for a preliminary hearing in public with a time estimate of 1 day.	
12.10.21	R asks for an extension of time for the response because there had been no further information provided by C	117
02.11.21	Stay on the order of Employment Judge Bedeau apparently on the application of C to promote settlement	122
26.11.21	C requested a stay to promote settlement which was objected to by R.	119 & 118
01.12.21	C requests further time to consult a lawyer	123
12.04.22	Notice of case management hearing to take place on 12.07.22 by CVP	129
28.06.22	Schedule of Loss provided	130
05.07.22	R requests further information	135
12.07.22	Case management preliminary hearing when Judge Tuck QC attempted to clarify the issues, listed the preliminary hearing in public, directed that R need not provide the ET3 until after the preliminary hearing in public and ordered further information previously ordered by Judge Tobin and that requested by R to be sent by 16.08.22.	137
14.08.22	C's further information	
22.09.22	R asks further questions about the information.	144 & 153
13.10.22	C to the Tribunal asking questions including for an explanation for the absence from the paperwork of the individuals named on the face of claim 1 but not accepted as Rs to that claim. He asks for an amendment to put them on the claim form and refers to a particular incident from 2018 involving a locum.	
24.10.22	C provides that and the updated information with R's questions (in red) and C's further answers (in blue) is at page 199	196 @ 199
02.11.22	C sends draft statement to the Tribunal	253

The hearing on 23 November 2022

39. The applications by the claimant set out in his CSA from page 13 onwards were discussed at the hearing on 23 November 2022. Some were dealt with informally as is set out in the Case Summary sent to the parties alongside this reserved judgment. I refer to but do not repeat the details from that record of hearing.

The claimant's complaints within Case No: 3306029/2021

40. I have read the following documents in order to seek to understand the complaints which the claimant wishes to present:

    a. The ET1 form and grounds of claim in 3306029/2021;

b. The ET1 form and grounds of claim in 3300116/2021 (pages 1 and 14 respectively) where they might help to explain the allegations in the remaining claim form;

c. The schedule of loss dated 28 June 2022 at page 130;

d. The claimant's application and skeleton argument for open preliminary hearing 23 November 2022 (hereafter referred to as the CSA – 24 pages long);

e. The claimant's statement dated 1 November 2022 (page 255) and the 5 page skeleton argument and new applications provided on the morning of the hearing which criticizes Judge Tuck QC's formulation of the claims;

f. The order of Judge Tuck QC (as she then was) especially para.28 and 29 at page 141;

g. The claimant's further and better particulars first provided in the version at page 153 and then provided in an amended version at page 199.

41. In doing so, I remind myself that the claim form (by which I mean the claim form in claim 2 at page 55 and the accompanying grounds of claim at page 70) are important documents which set and limit the scope of the claim. They are not to be regarded as a starting point just to get the claim off the ground. However, as HH Judge James Taylor said in Cox v Adecco, when considering an application to strike out a claim the employment judge should remember that details of the claim may be found in a number of different documents which should be considered and, potentially, consideration should be given to whether an amendment of the claim should be allowed if the claim would have reasonable prospects of success had it been properly pleaded; any such application would involve the application of the usual principles set out in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT and applied in a number of other cases.

42. The full procedural chronology is set out above which shows that there have been the following previous attempts to get clarification from the claimant of the specific complaints which he wants the Tribunal to consider in order for the dispute between the parties to be determined:

a. Employment Judge Bartlett ordered that an impact statement be provided of the asserted disability discrimination on 20 June 2021 (although no facts to support the alleged claim were in the first claim form): page 79. This order was not complied with and the claimant informed Judge Tuck QC at the hearing before her that the disability relied on was a hearing impairment. She determined that the claimant would need to make an application to amend his claim to include any such complaint. The claimant disputed Judge Tuck's record at para.28.a. that he had stated expressly that he was not pursuing any disability discrimination claim within the first complaint. Be that as it may, he does not include disability discrimination within para.3 in the grounds of

claim in 3306029/2021 and there does not therefore appear to be a claim of disability discrimination presently before the Tribunal.

b. Employment Judge Tobin directed that particulars of the allegations be provided by the claimant by 8 October 2021 (page 115). This was not answered by the claimant and Judge Tuck QC directed that the information be provided by the claimant (see her paras.26 & 27). The answers were provided within the documents at pages 153 and 199 on 15 August 2022 to the respondent and then, in October to the Tribunal, as I understand it.

c. Judge Tuck QC records (para.7 page 138/139) that "despite seeking to discuss the claims for some three hours today, it remains unclear as to how the Claimant puts his case." She expressed herself as reluctant to make orders for further particulars (para.30) and stated that it "proved impossible to construct a list of issues". I infer that it was not for want of trying to understand the written documentation or of giving the claimant the opportunity to explain his case orally that the learned judge was unable to construct a list of issues.

d. Those further particulars were ordered (para.30 page 142) and resulted in two iterations of responses at page 153 and page 196, both of which asserted the right to make further amendments. I am reminded of the comment by HH Judge James Taylor in Cox v Adecco that "the litigant in person, who struggled to plead the claim initially, unsurprisingly, struggles to provide the additional information and, in trying to produce what has been requested, under increasing pressure, produces a document that makes up for in quantity what it lacks in clarity."

43. I then am the employment judge faced, as HHJ James Taylor says (para.29 of Cox v Adecco) with determining strike out in a claim that is even less clear than it was before. I also have made real efforts to understand the core of the complaint brought by Mr Monfared through analysis of the documents and his submissions.

44. This has been hampered by the fact that the claimant did not provide the targeted particulars which had been ordered. Initially he provided no response at all and then responded again in narrative form without isolating specific acts by individuals for whose action or inaction the respondent is liable in law. The purpose of particulars is to pin down exactly what the complaint is so that the Tribunal (and the respondent) can judge whether the complaint is within the scope of the existing claim, whether amendment is needed and whether it should be allowed. The respondent can then reply to the claim and this respondent has so far not been required to reply.

45. The Employment Tribunal is very used to guiding self-representing parties to outline their factual and legal allegations despite some complexity in the applicable law. It is relatively unusual that so many attempts have been made by experienced judges to clarify the claims with such little success. The respondent argues, in essence, that reasonable attempts having been

made it can be adjudged that those claims which are not based upon the decision to dismiss can clearly be found to be out of time or so difficult to understand that they have no reasonable prospects of success.

46. Once the claimant provided particulars, he attempted to enlarge the scope of the claim and sought to reserve the right to add yet further information in the future (see for example para.3 on page 154 where he states they are not his final particulars and the wording of his CSA). He does not directly answer the specific questions asked but appears to think he has been given the opportunity to add completely new allegations ranging over the whole of his employment. That was not the purpose of the case management orders. In the Employment Tribunal the intention is that the parties should be able to set out their dispute in straightforward language without undue formality so that the case can progress through the system without delay. Neither party has the right to continually amend their claim or response at will. The scope of the claim is limited by the contents of the claim form or, in the case the respondent, the grounds of response. Where particulars are ordered, it is particulars of those contents so that those contents may be understood.

47. Furthermore, the claimant does not merely provide further information but also seeks within his particulars to challenge previous decisions (see para.4 on page 153). This adds confusion. There has to be finality in case management. If there has been no significant change in circumstances, an existing case management order (such as an order ruling on the issues in the case or on an application for amendment) is unlikely to be varied.

48. The claimant sets out a lot of narrative within his documents about conditions at work of which he is critical and alleged difficulties with workplace relationships ranging over at least 4 years back to 2017. It is frequently difficult, and occasionally impossible, to tell which legal complaint within the employment tribunal's jurisdiction he seeks to bring based on which act, the date of the matters complained of, which matters are alleged to be less favourable treatment of him and which are allegations that the service was being poorly run or run in a way with which the claimant disagrees. Some of the allegations read more as matters potentially suitable for a workplace grievance and not as matters which can be aired in the employment tribunal. Such incidents as are identifiable are often repeated and such details as are available suggest that some grievances are historic. For example, he refers to bringing a grievance in March 2019 – more than two years before the surviving claim – which suggests that any complaints within the scope of that grievance are about events long pre-dating proceedings (page 72 para.4 k). Where individuals are named it is not always possible to see whether they are complained about, have similar complaints to the claimant and are relied on as tending to support his factual allegations or are alleged comparators.

49. All of these comments are in no way intended to be a personal criticism of the claimant who was courteous in making his submissions and appeared to be genuinely seeking to help me to understand his claim. I merely seek to explain the very real difficulties that I have had when doing so – difficulties which I can see were also experienced by Judge Tobin and Judge Tuck QC.

50. Having said all that, I disagree with the respondent that it is not possible to discern a sufficiently clear minimum factual basis from which to rule on the legal and factual scope of Case No: 3306029/2021 outside the dismissal based claims. It is not possible, from the many pages so far generated, to say that there are no issues to be identified. It was challenging to do so, but perfectly possible. It is clear that the claimant intended to bring the following claims (see para.3 page 70)

    a. Direct race discrimination;

    b. Indirect race discrimination;

    c. Race related harassment;

    d. Victimisation;

    e. Protected disclosure;

    f. Unfair dismissal;

    g. Age Discrimination.

51. As Judge Tuck QC said (para.29 page 141) the remaining claim clearly includes complaints based upon dismissal and the respondent does not seek to argue that the claim based upon dismissal should be struck out on the basis that it is out of time or has no reasonable prospects of success. They accept that the claim was brought within the applicable time limit starting with dismissal.

52. The claimant described his dismissal based claims (page 77) as follows:

    "I had been constructively unfairly and wrongfully dismissed by the respondent because of my protected characteristic in base of Race, Religions, Age and as well as I brought a Public Interest Disclosures regarded ASDA fire 2017 and breach of COVID 19 pandemic rules in 2020 as well as raising my first the Employment Tribunal claim to the Watford office."

53. In the same paragraph, he goes on to complain about "being disciplined on wrongful grounds following a poor investigations" and refers to back to paras.4.a to z. in the grounds of complaint stating he has been "treated badly" and "given verbal warning unfairly as result of not being represented well in the hearing and there is serious failure to not raise an appeal and contest of the outcomes of hearing". He alleges a "repeated patterns of behaviour of harassment". Although some of those points appear to be directed towards his representatives and therefore cannot be part of the claim against the respondent he is clearly referring to disciplinary action more generally, poor investigations and an earlier verbal warning (see para.46.r of the Case Summary sent to the parties at the same time as this judgment). It is clear that he complains of a pattern of behaviour in this regard.

54. On a fair reading of all of the documents set out in para.40 above it seems to me that,

a. The victimization claim under s.27 EQA relies upon an alleged protected act of Case No: 3300116/2021 and the belief that the claimant was about to bring a further employment tribunal claim.

b. The alleged protected disclosures are:

i. a communication in March 2017 to the claimant's then manager, Trefor Evans, that a fire in the ASDA Store opposite the premises in which the claimant and other employees of the respondent worked meant that it was unsafe for them to remain in the office and a request that the staff should evacuate. This appears to have taken place before the start of the claimant's formal employment contract when he was working as a locum physiotherapist. It appears (to judge from para.29 page 226 within the amended further information) that this communication was allegedly repeated within the March 2019 grievance and (to judge from para.4.x) page 77) to Vivienne McVey, the CEO, at about the time of disciplinary action being taken against the claimant in late 2020.

ii. A verbal communication in about January 2020 to Suzanne Gregory and Rupali Soni about the coronavirus pandemic in Italy (page 248 para.54). In the most recent particulars (page 249) the claimant says that the disclosure happened in a meeting but does not say what information he communicated – the implication is that it concerned advice about managing the risk to health of the disease which had been provided by the World Health Organization but the claimant does not plainly state what it was that he told SG and RS which is alleged to give him protection. See also para.4.p) page 73.

iii. Although in para.4.e) of the ET1 statement the claimant refers to reports about a patient who had attended his clinic and makes clear that he considers there to have been a lack of training and proper process in relation to the care of this patient, he does not appear to rely upon any associated communication as a protected disclosure and the narrative in this paragraph does not make an allegation of unlawful treatment of the claimant but rather appears to relate what he regards to be the poor handling of a complaint made by him. This does not appear to allege a protected disclosure or a detrimental act.

55. Therefore, no act predating claim 1 (which was presented on 5 January 2021) can be intended to be pursued as unlawful victimization under s.27 EQA. References to 'victimisation' in respect of earlier acts must be intended to mean detriment on grounds of protected disclosure or (more colloquially) whistleblowing victimization. To the extent that the claim seeks to allege that acts predating 5 January 2021 were unlawful because they were contrary to s.27 EQA, those complaints have no reasonable prospects

of success because the alleged detriments predate the protected act which is alleged to have been part of the reason for them.

56. I have case managed this claim by formulating a summary of the case. My analysis of which particular acts the claimant appears to complain about within claim 2 and under which lead head of claim is set out in the Case Summary and proposed list of the issues to be decided which is sent to the parties along with this judgment. I do not repeat the contents here so that this judgment should not be unnecessarily long but the parties should read them along with this judgment in order to understand the conclusions I have reached, in particular about whether the claimant has no reasonable prospect of succeeding in showing that the claims were presented in time. Having reached a conclusion on the broad scope of claim 2, I go onto consider the respondent's arguments that all non-dismissal based allegations should be struck out.

Given that Case No: 3300116/2021 has been rejected, are any complaints in Case No: 3306029/2021 an abuse of process as contrary to the rule in *Henderson v Henderson?*

57. I consider that the only specific factual allegations found in 3306029/2021 which is not found in 3300116/2021 is that the dismissal is unlawful for the various reasons set out above and (potentially) that the respondent's solicitors have sent a costs warning letter.. This is my reading, in particular, of paras.4.y) and z) of the statement attached to the ET1 in claim 2.

58. I am making a judgment on this issue when claim 1 has been rejected. It was accepted by the parties that it was convenient that I make a decision on that issue before going onto consider the other matters to be determined at the preliminary hearing in public. I do not consider that rejection under rule 12 is a judicial determination of claim 1 or the issues in it. Indeed, had the fact that claim 1 was presented when the claimant did not have an EC certificate been picked up when the ET1 was vetted, the right thing for the claimant to have done would have been to re-present the claim. As it happens in the present case he had been dismissed in the meantime and there was therefore an additional act about which he wished to complain.

59. The respondent argues that the question of whether claim 2 was an abuse (in whole or in part) should be judged as at 21 April 2021 when it was presented. At that date, it is argued, claim 1 was alive.

60. Were I to accede to that argument that would produce considerable unfairness to the claimant, in my view. The respondent (rightly) raised the issue of whether the Tribunal had jurisdiction to consider claim 1 because the claimant was in breach of the EC obligations in their response. Were I, having ruled in their favour that argument, conclude that the fact of claim 1 nonetheless means that claim 2 was an abuse strikes me as being unfair to the claimant. The respondent does not argue that there has been a judgment on the issues within claim 1 which mean that questions of issue estoppel arise. In the absence of a judicial determination of claim 1, I do not consider that the present circumstances could fall within any of the first four categories explained by Lord Sumption in Virgin Atlantic Airways.

61. I am of the view that claim 2 entirely lacks the quality of abuse referred to in the authorities. Given my conclusion at para.57 above, there are no acts complained of in claim 2 which could and should have been complained of in claim 1 so the Henderson v Henderson argument would not, in my view, have been the applicable *res judicata* argument in any event. Although there is public interest that a party should not be twice vexed in the same matter, there is now only one claim before the Tribunal and this respondent is not being twice vexed. I reject the argument that claim 2 or any part of it should be struck out as an abuse of process.

Should the claims in 3306029/2021 be struck out on the basis that they were lodged out of time and/or that they have no reasonable prospects of success?

62. As I say in para.55 above, to the extent that the further information suggests that the complaint of victimization contrary to s.27 EQA is based on acts which predate the protected act, that complaint has no reasonable prospects of success. However, he argued orally that two of the respondent's senior officers were aware that he intended to bring a claim/about the claim. It seems, therefore, that he argues that the dismissal was victimization.

63. The respondent's arguments were as follows:

a. All of claim 2 except the alleged acts of Ms Wilkinson including the dismissal on 22 January 2021 were out of time. The preceeding acts were unrelated to the dismissal because they were carried out by different people and relate to different subject matters.

b. The overview of claims set out in para.4 page 70 (which I have analyse in para.46 of the Case Summary sent to the parties with this reserved judgment) include reference to acts in 2018 which are not connected with Ms Wilkinson's decision to dismiss. There was no connection between the failure to upgrade the clamant to ESP, the scores in his appraisal by Kathryn Gunter and transfer to Stockwood Park in 2018 and the later issues. The first time that Ms Wilkinson was mentioned was November 2020 (para.4.x) page 76).

c. In essence, it was argued that there is no reasonable prospect of the series of disparate acts being found to be linked in such a way as to amount to a continuing act within s.48 ERA or s.123 EQA which would give the Tribunal jurisdiction to consider the complaints.

d. In particular, my attention was drawn to the face that the last allegation of age discrimination was significantly out of time and it was argued that there was no connection between that (alleged conduct of the line manager from July 2020) and the dismissal.

64. In response, the claimant addressed the period of 2017 to 2020 in his employment which he accepted "looks like a gap". The claimant had provided an electronic file of his disclosure and I advised him that I would

not read the whole of the file but would read those pages which he directed me to read. I had, relatively early in the hearing, informed the parties that limited time to consider all issues meant that I would have to reserve my decision. The scope of the hearing appeared wider that originally anticipated by Judge Tuck QC. The file of the claimants disclosure runs to 1414 pages and he stated that it was available for me to look through. Even giving every allowance for the claimant as a litigant in person, he could not reasonably expect the Tribunal to look for evidence in the file or that additional Tribunal hearing time should be allocated. He comes across as an intelligent and professional man and it was not uneasonable to expect him to be able to direct me to the specific pieces of evidence he relied on to show that he has reasonable prospects of showing that the different incidents are linked.

65. I had timetabled the hearing so that the claimant should have an hour to respond to the respondent's applications and he made those submissions between 15.07 and the end of the hearing at 16.36. He did argue that the hour he had available to him for submissions was insufficient, but my view is that, by allocating time to discuss the preliminary applications described in the Case Summary section of the case management orders, and by reserving judgment, I had agreed to cover more than originally scheduled and had already increased the Tribunal time being made available to the parties so further allocation of hearing time was not proportionate, taking into account the needs of other Employment Tribunal Service users.

66. He directed me to the following documents:

    a. CB Pages 649 and 654: He wrote to Ms Wilksinson on 25 November 2020 complaining of public disclosure detriments over a long period of time, and (effectively) restating the alleged disclosure of information about the ASDA fire.

    b. CB page 654. On 14 December 2020 he wrote to Ms McVey and argued that he had been subjected to poor investigations in respect of many allegations which he believed to be related to his complaints about the ASDA fire. Among other things he asked that Ms Wilkinson should not contact him directly.

    c. CB page 483. This is an email by which the claimant forwarded to the Tribunal and the respondent's representative an email from 17 June 2019 attaching an occupational health assessment which he described as fabricated.

    d. CB page 487. This is the second page of the occupational health assessment itself which gives the opinion that the claimant was temporarily unfit for work.

    e. CB pare 315. An exchange of emails from April 2019 during the investigation of his grievance.

    f. CB page 318. This appears to be part of an email starting at CB page 315 which raises various complaints which the respondent, in

the email at CB page 315, states cannot be considered within the existing grievance but would need to be the subject of a further grievance. None of the complaints in this email appear on the face of it to be within claim 2 so it is not obvious what the relevance is to the issues in the litigation.

67. One of the page numbers I was referred to was CB page 657. That appears to be part of an exchange with Mr Reyatt which suggests that there was a challenge by the claimant to the independence of Ms Wilkinson as decision maker which was rejected for reasons Mr Reyatt gives on CB page 656.

68. The claimant argues that many matters within the scope of this claim had been raised within his grievance which was a complaint to the organisation about many things which went wrong during his employment. The outcome was, he argued, implemented in 2020 and then dismissed before, between 2 and 4 months later he was syspended again.

69. He complained that the person to whom a complaint was made in 2019 which led to his suspension was appointed to implement the grievance outcome. He had objected and a hearing became heated which led to his suspension.

70. Much of the remainder of his submissions became an explanation of the allegations themselves and he appeared to have difficulty in focusing upon the arguments about the allegations which were the subject of the hearing before me. If and when this claim comes to a final hearing, consideration needs to be given to how the claimant can be helped to focus on particular issues to enable the necessary ground to be covered within the allotted time. It may be that a direction should be given for the claimant to prepare questions in advance – not that the respondent's should have advance notice of that but to give structure to the oral self-representation which is necessary in an adversarial hearing.

71. I asked him specifically about the respondent's allegation that all matters from para.4.a) to x) on page 70 and following were in no way connected to the dismissal. He repeated the procedural history of this case before, in essence, arguing that his initial disclosure about the ASDA fire had been repeated and been a cause of his detrimental treatment throughout his employment.

72. In the schedule of loss at page 170 the claimant states that the claims were late due to his computer being broken. This was not repeated orally where the principle argument was that the acts were so linked as to amount to a continuing state of affairs.

73. The claimant stated his clear belief that his employers were racist but was not able orally to articulate what he relied upon in support of that. However, in respect of some allegaitons he does set out alleged white English comparators.

74. By contrast, he does not set out specific comparators for the religious discrimination claim.

75. At one point in the hearing he stated that he would withdraw the complaint based on race and religion but then stated that he found himself under pressure and I did not regard the exchange, as a whole, as amounting to an unequivocal withdrawal of those claims. I therefore made case management orders directing him to write to the Tribunal by 30 November 2022 to say whether or not he was withdrawing the race discrimination and harassment and religious discrimination and harassment claims. If that was done, the correspondence has not been forwarded to me.

76. The respondent's argument needs to be approached by considering whether there is no reasonable prospect of the claimant establishing at trial that the incidents prior to that referred to in para.4.y) on page 70 form part of conduct which, together with other incidents, might amount to a course of conduct linked to the act of dismissal. Another way of saying the same thing is to say that the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be a continuing act or an ongoing state of affairs that included his dismissal which is in time.

77. The authorities in this area are conveniently analysed and summarized in E v X in paragraphs 40 to 50. The summary is at paragraph 50 but, in the context of the arguments raised in this case I note in particular:

    a. Whether there are same or different individuals involved is relevant but not conclusive;

    b. A prima facie case can be made out in circumstances in which the relevant facts fall under different headings of discrimination or harassment;

    c. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason.

78. It is quite clear that the claimant complains about being subjected to investigations both formal and informal in each of 2017, 2018, 2019 and 2020. The respondent argues that different individuals were involved on each occasion. That is relevant but not determinative. The overall thrust of the claimant's protected disclosure argument is that because he complained more than once about the March 2017 incident involving a fire in a nearby ASDA Store he was targeted for detrimental treatment culminating in his dismissal. In particular, the allegation at para.46.i of the separate Case Summary is that a disciplinary investigation arose out of the meeting to discuss implementing the outcomes of his grievance. It is not possible at this preliminary stage to say that there are no reasonable prospects of a series of disciplinary proceedings being linked because the grounds were complaints made by the claimant whether because the original complaint or disclosure was historic or because different managers were making decisions.

79. Indeed, on the face of it there is a certain similarity between the allegations about the genesis of the 2019 disciplinary investigation (Case Summary paras.46 i., l.) and the genesis of disciplinary action in 2020 (Case Summary para.46.v.). Other complaints are said by the claimant to have been described to him as instigated because of patient complaints. The relevance of the alleged link with earlier disciplinary action is that when I ask myself whether there is no reasonable prospect of those allegations being linked to the disciplinary proceedings following which the claimant was dismissed I'm bound to say that the answer is "no".

80. Although the respondent made a broad application in relation to all acts prior to the dismissal I have considered whether any of the matters complained of could be viewed individually as having no reasonable prospects of being part of the continuing state of affairs. This is an exceptionally fact sensitive area.

81. One might argue that the allegations at Case Summary para.46.n. o. and q. are of a different quality to those which form a pattern of formal and informal disciplinary action or treatment of appraisals. They concern complaints of less favourable treatment in relation to facilities provided during the early months of the coronavirus pandemic. However, the claimant had apparently just returned to work when his suspension had been lifted and was on restricted duties so it does not seem to me to be possible to say there is no reasonable prospect of him demonstrating that his treatment on those restricted duties was linked to the ongoing investigation.

82. I do note, however, that the age discrimination claim is partly a historic allegation (Case Summary para.46.d) which would, taken on its own, be well out of time and partly based upon a number of separate allegations against Mrs Gregory and Mr Connolly, the last of which dates from June or July 2020. I would have to be very confident that the claimant would neither succeed in showing those to be linked to the other allegations nor in an application for an extension of time on the basis that it was just and equitable to do so before I concluded that there were no reasonable prospects of the age discrimination claim being found to be in time. I do not find there are no reasonable prospects of the Tribunal having jurisdiction to hear the age discrimination claim.

83. However, all of the particulars put forward by the claimant argue less favourable treatment. The headline allegation of indirect race discrimination in the attachment to claim 2 does not appear to be pursued. In case management orders sent with this judgment I shall order the claimant to show cause why that claim should not be struck out on the basis that it has no reasonable prospects of success or that it has not been pursued.

84. Similarly, in the absence of comparators for the religious discrimination claim and given the comments made by the claimant in the hearing, I shall make a similar letter order in respect of the religious discrimination claim.

85. A separate order is made in respect of the application for deposit orders.

86. The outstanding application to amend is dealt with in the separate case management orders.

Future conduct of the claim

87. As I have already indicated, alongside this reserved judgment, the parties are sent a Record of Hearing which includes a Case Summary and a proposed list of the issues to be decided at a final liability hearing in this case. The parties will have 14 days from the date on which the order is sent to them to write and say whether they disagree that the list in any significant way. If they do not do so then the list will be final.

88. Further orders for case management are made in that order.

_____

Employment Judge George

Date: 20 August 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 August 2023

FOR EMPLOYMENT TRIBUNALS