



EMPLOYMENT TRIBUNALS

Claimant: Mr S Taylor

Respondent: NASUWT

Heard at: Birmingham (in public)

On: 1 March 2023

Before: Employment Judge Kenward (sitting alone)

Representation

Claimant: Mr S Taylor (in person) assisted by Mr P Nesbitt (lay advocate)

Respondent: Mr S Brittenden (counsel)

PRELIMINARY HEARING RESERVED JUDGMENT

1. The complaints of disability discrimination are not struck out by the Tribunal.
2. The claimant is not ordered to pay a deposit in respect of his complaints of disability discrimination.

REASONS

1. Case Management Orders were made on 24 August 2022 listing a Preliminary Hearing to take place to determine the following issues:
 - (a) whether any of the Claimant's complaints should be struck out because they have no reasonable prospects of success;
 - (b) whether any of the complaints should be made subject to a deposit order because they have little reasonable prospect of success;
 - (c) whether the Claimant's discrimination complaints have been brought in time and / or whether it is just and equitable to extend time (unless the Judge at the

Preliminary Hearing decides that it is in the interests of justice to leave these points for determination to the Final Hearing).

2. At the Preliminary Hearing to consider these issues, the Respondent provided the Tribunal with a Bundle of documents with the bundle being 276 pages in length. Mostly this consisted of the documentation generated by the Employment Tribunal proceedings although key pieces of correspondence predating the proceedings were also included, as well as the Respondent's rule book and protocol documents.
3. The Bundle also included the Claimant's Statement of Evidence for the Preliminary Hearing which was some 41 pages in length and mostly consisted of a narrative setting out events between December 2019 and November 2021.
4. The Claimant also provided the Tribunal with a further Bundle described as the Claimant's Additional Document Bundle which was 2285 pages in length and essentially consisted of documents dating from between December 2019 and October 2021. A large part of this documentation related to documents generated by a subject access request. There was a separate section of some 14 pages dealing with medical records. The Tribunal made it plain that it would consider those documents in the Claimant's Bundle to which it was specifically referred, although, in the event, it was only referred to a risk assessment.
5. Having provided a written Statement of Evidence, the Claimant also gave oral evidence and was cross examined on that evidence. Both parties made representations to the Tribunal at some length, with the Respondent also referring to a Skeleton Argument which had been provided before the hearing.

Relevant history and findings

6. The Claimant worked at Radford Semele School, Leamington Spa. His case, as set out in the Case Management Agenda for the Preliminary Hearing on 24 August 2022, is that the arrangements in respect of his employment were as set out below.

"I was employed as a teacher who was released to perform caseworker union duties on a contract that was paid for through local facilities arrangements. Dismissing me ended this contractual arrangement, as the NASUWT wrote to Warwickshire County Council in November 2021 to ensure I was de-accredited. Therefore, I suffered immediate financial detriment as a direct consequence of losing this paid work".

7. The Claimant had been a union member since 2001. In his capacity as a caseworker, he states that he was dealing with low to medium level casework. Thus, he might deal with disciplinary issues, but not where there was a risk of dismissal, as such cases would be dealt with by train full-time staff.
8. NASUWT membership is limited to those who teach, lecture and instruct, and the Claimant states (in his disability impact Statement) that he *"fulfilled this criterion by additionally working part-time as a supply teacher"*.
9. The Claimant had been a union member since 2001. On 6 January 2021 he was elected as the national Honorary Treasurer of the NASUWT. The Respondent

relies upon the Claimant having put himself forward for election as Honorary Treasurer on the basis that his employment status was that of a supply teacher. The Respondent's position is that having an employment contract to "*teach, lecture or instruct*" is a condition of eligibility for full membership of the Respondent and a condition for election to its national executive and to serve on that body. The Claimant was due to take up office from 5 April 2021.

10. Prior to the Claimant taking up office as Honorary Treasurer, a complaint was made about his conduct and a disciplinary procedure was instigated against him. This followed a Facebook post made by the Claimant on 6 January 2021 which was described by him (in his Statement for the Preliminary Hearing) in the terms set out below.

"ST made a Facebook post celebrating his Honorary Treasurer election success. He also (within a private conversation, within a private group) made reference to how nice it would be if a colleague (referenced only by his initials) was to be appointed to the Deputy General Secretary role. This colleague (WB) contacted ST later that evening as he'd been alerted to the Facebook post and asked ST to politely remove this as he felt uncomfortable about being named. The reason being the impending funeral of the former post-holder, something ST was unaware of".

11. In his oral evidence to the Tribunal, the Claimant accepted that, in hindsight, the post was inappropriate.
12. The Claimant's case (as set out in the Case Summary as part of the Case Management Order sent out after the Preliminary Hearing on 24 August 2022) is that the post was made by him at a time when he describes himself as being he was on a mental "*high*" by reason of his mental impairment. The Case Summary records that the Claimant "*says that his behaviour can be impulsive at times which he relates to his mental impairment*".
13. The Claimant complains that no steps were taken by the Respondent to discuss the matter with him and instead a disciplinary process was instigated.
14. A disciplinary hearing took place on 19 May 2021 notwithstanding the Claimant being absent and having supplied a sick note. A decision was made expelling him from the union, pending appeal, with the decision being communicated to him on 25 May 2021. The claimant subsequently appealed.
15. On 17 August 2021, the Claimant sent a pre-action letter to the Respondent which intimated legal proceedings for disability discrimination and was stated to be for the purposes of complying with protocol requirements applicable to civil proceedings. In setting out the basis upon which the Claim was made and a summary of the facts upon which reliance was being placed, the letter effectively used the same (or very similar) wording to that set out or attached at section 8.2 of the ET1 Forms of Claim later filed by the Claimant in Case Numbers 1305131/2021 and Case Number 1301010/2022 (see below).
16. The Respondent replied to the pre-action letter on 14 September 2021 denying the complaints of disability discrimination. The letter made it plain that the Employment

Tribunal had exclusive jurisdiction for the matters about which the Claimant was complaining under the Equality Act 2010 and referred to the applicable time limit.

17. The Claimant's appeal was heard by the Respondent on 5 October 2021 and a decision to dismiss his appeal was communicated to him by letter dated 6 October 2021. It seems (as suggested by the Claimant's March 2022 Statement) that the appeal decision upholding the Claimant's expulsion was subject to ratification by the Respondent's National Executive, for which purposes the decision was reported to the National Executive at its next scheduled meeting on 5 November 2021. Following the ratification of the decision, on 9 November 2021, the Respondent contacted the Claimant's employer, Warwickshire County Council, to confirm that the Claimant was no longer a representative of NASUWT and, in so far as he was in receipt of NASUWT facility time, such facility time would now need to be reallocated to appropriate NASUWT representatives. The Claimant's case is that his employment was terminated because it was dependent upon membership of the NASUWT.

18. In the meantime, on 8 November 2021, for the purposes of complying with the requirements in respect of early conciliation, the Claimant notified ACAS of a prospective Claim against the Respondent and an Early Conciliation Certificate had been issued by ACAS on 10 November 2021. On the face of it, complaints regarding causes of action which had arisen on or before 8 August 2021 were outside the primary time limit of three months.

19. The Claimant originally commenced proceedings (in Case Number 1305131/2021) by filing an ET1 Form of Claim with the Employment Tribunal on 3 December 2021 (the "2021 Claim").

20. At section 12 the ET1 Form of Claim, the Claimant confirmed that he has a disability and described this in terms set out below.

"I am a long-term sufferer of mental-health issues, primarily stress, anxiety and depression. Whilst not formally diagnosed, I also suffer with Adult Attachment Disorder, a consequence of my early childhood experiences and upbringing. I take anti-anxiety medication daily and have done so for several years to support me. I struggle in situations which I perceive to be hostile and require an advocate for support".

21. In completing the ET1 Form of Claim, the Claimant had completed section 4.1 which applies in cases where the "respondent was not your employer". He provided the information set out below.

"I am not an employee of NASUWT, however I was there elected Honorary Treasurer. My employer released me to provide support to NASUWT members as an elected local caseworker in Warwickshire. NASUWT have expelled me from membership, thereby impacting my employment as I can no longer represent NASUWT members. Additionally, the manner of my exclusion is the key focus of my claim as I intend to demonstrate that NASUWT breached statutory discrimination legislation in several areas".

22. In these circumstances, it was a little misleading or confusing for the Claimant also to complete box 5 providing employment details which refer to the job which he did as that of the NASUWT Negotiating Secretary and Caseworker. He referred to the date that his employment had ended as 5 November 2021 (but this refers to the date that the appeal decision was ratified in relation to his expulsion from the union).
23. Section 8.1 of the ET1 Form of Claim was completed by the Claimant who ticked the boxes to indicate that he was claiming unfair dismissal and disability discrimination. Ticking the box in respect of unfair dismissal was similarly misleading and confusing as the Claimant was not employed by NASUWT and had not been dismissed by NASUWT (and his actual employer was not a party to the proceedings).
24. However, the Claimant also ticked the box at section 8.2 of the ET1 Form of Claim which applies where a Claimant is making another type of Claim within the jurisdiction of the Employment Tribunal. He referred to the Respondent having “*dismissed me according to internal processes only*” and then effectively set out a complaint under section 64(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULR(C)A 1992”) which deals with the right of a member of a trade union not to be unjustifiably disciplined by the trade union. In summary, the complaint set out in this box was that he had been unfairly disciplined by the Respondent through being expelled as a member.
25. The details of the complaints being made by the Claimant were then set out at section 8.2 of the ET1 Form of Claim. The Claimant began by providing a chronology of events between 6 January 2021 when he was elected as the national Honorary Treasurer of the union and 5 October 2021 when the appeal hearing took place arising out of the decision to expel him from the union. The chronology was in the terms set out below.

“The claimant (Sean Taylor) has maintained a comprehensive chronology / log of events, dates including;

** 06/01/2021 - the date of Sean Taylor winning the national Honorary Treasurer election*

** 04/02/2021 - the serving on him by the NASUWT of the internal Rule 27 process papers*

** 09/03/2021 - the determination by the NASUWT appointed Past President to refuse mediation and proceed to a disciplinary hearing*

** 04/05/2021 - procedural challenges submitted to the NASUWT*

** 13/05/2021 - all procedural challenges refused by NASUWT*

** 19/05/2021 - disciplinary hearing takes place - no disability related information shared with hearing panel - Sean Taylor unable to be present and GP note supplied*

** 25/05/2021 - Sean Taylor receives notice he is expelled from the NASUWT pending appeal*

** 21/06/2021 - Apologies for Officer meetings citing disability related absence NOT accepted by NASUWT*

** 09/07/2021 - Sean Taylor's GP note NOT accepted by NASUWT as reason for halting hearing - however the hospital appointment letter was accepted*

* 13/07/2021 - Hearing rearranged with 1 working days notice - Sean Taylor's advocate cannot attend - hearing postponed eventually.

* 09/09/2021 - letter from Patrick Roach of NASUWT stating his concern over Sean Taylor's non-compliance with NASUWT rules in his performance of his HT role. The letter further queries the lack of medical evidence to support STs claims of disability plus it also queries STs assertion that the NASUWT should be providing reasonable adjustments.

* 04/10/2021 - Sean Taylor email to NASUWT querying what will happen as his advocate has not secured fully paid release - despite NASUWT claims to the contrary

* 05/10/2021 - hearing takes place in the absence of Sean Taylor and his advocate - Sean Taylor's GP stated a reasonable adjustment was to have his advocate present - yet Sean Taylor expelled".

26. Thus, it can be seen that the chronology contains a number of criticisms as to the steps taken by the Respondent in dealing with the matter with a large proportion of the criticisms relating to the Respondent's treatment of the Claimant as a disabled person.

27. The Claimant has then included, at section 8.2 of the ET1 Form of Claim, a paragraph which sets out the "basis on which the claim is made" by reference to five sub- paragraphs which are as below.

i The claimant is disabled within the meaning of the Equality Act 2010.

ii The defendant has discriminated against the claimant contrary to the Equality Act 2010.

iii The defendant has failed to make reasonable adjustments so that the claimant can avoid the disadvantage of a finding of misconduct against him because of a Facebook post that he sent. This is a strict application of the NASUWT rules and procedures which might be reasonable for a non-disabled member, but is unreasonable and disadvantageous to the claimant, contrary to the Equality Act 2010.

iv The defendant has harassed the claimant contrary to the Equality Act 2010.

v The defendant has failed to adhere to s64 TULRCA and has unjustifiably disciplined the claimant".

28. It can be seen that, having stated that the Claimant identifies as a disabled person for the purpose of the Equality Act 2010, the next three of the five numbered sub-paragraphs quoted above relate to complaints of disability discrimination, including complaints of a breach of the duty to make reasonable adjustments contrary to Equality Act 2010 sections 20 and 21 and harassment contrary to Equality Act 2010 section 26. The wording of sub-paragraph ii is not specific, but seems to suggest a complaint or complaints of discrimination other than those under Equality Act 2010 sections 20, 21 and 26.

29. The next paragraph of the details of Claim set out at section 8.2 of the ET1 Form of Claim sought to set out a summary of the facts, in the terms set out below.

“Summary of the facts in relation to the 4 claims listed above at ii, iii, iv, v:

1. The defendant knows that the claimant is disabled and has treated the claimant as disabled previously.

2. The defendant has failed to share disability related information with NASUWT employees and NASUWT members involved in the internal disciplinary process against the claimant.

3. The defendant has refused to engage in several offers of mediation as presented by the claimant and his advocate Paul Nesbitt.

4. The defendant has publicly stated via minutes of the National Officers committee, that when apologies for NASUWT Officer meetings were submitted by the claimant (in the claimants role as Honorary Treasurer) they were refused. This is despite the defendant failing to make necessary reasonable adjustments.

5. The defendant has queried the legitimacy of a fit note as provided by the claimants General Practitioner.

6. The defendant insisted the claimant provide an additional GP fit note, with only one working days notice given to source this document, otherwise a final appeal hearing would have taken place in the claimants absence.

7. The defendant has expelled the claimant as a member of the NASUWT at a disciplinary hearing held in the claimants absence, ignoring the claimants disability related health issues.

8. The defendant, in determining the disciplinary sanction against the claimant, has acted inappropriately as the sanction is not proportionate to the action accused of”.

30. Looking at the factual matrix set out above, sub-paragraphs 2, 4, 5, 6 and 7 seem to raise matters which potentially engage the provisions of the Equality Act 2010, whilst sub-paragraphs 3 and 8 do not obviously do so.

31. The complaints in sub-paragraphs 5, 6 and 7 are really complaining about the Respondent having proceeded with the disciplinary or appeal process, or indicated that it would do so, notwithstanding the absence, or intimated absence of the Claimant, with that absence (on the Claimant’s case) having been caused by his disability. These might potentially be complaints under section 15 of the Equality Act 2010, namely discrimination arising from disability, or of a breach of a duty to make reasonable adjustments contrary to section 20 and 21 of the Equality Act 2010. In passing, these complaints do not really seem to be reflected in the List of Issues which was formulated following the previous Preliminary Hearing, yet there is nothing to indicate that these complaints were withdrawn, and they were undoubtedly made in the 2021 Claim (and the 2022 Claim).

32. The complaint at sub-paragraph 4 was later identified as a complaint of harassment related to the Claimant’s disability contrary to Equality Act 2010 section 26.

33. The points being made at sub-paragraphs 1 and 2 do not obviously seem to give rise to freestanding complaints, but are rather putting forward the argument that the Respondent had knowledge of the Claimant’s disability so that, in relation to the various freestanding complaints, the Claimant’s case is that his disability should have been taken into account.

34. Upon receipt of the ET1 Form of Claim by the Employment Tribunal, a vetting form was completed which identified the relevant jurisdictions as being UDL (unfair dismissal), TUM (being subjected to detriment on the grounds of being a trade union member under TULR(C)A 1992 sections 145A to 145C, 146, 147 and 152 to 160) and DDA (disability discrimination).
35. The Claim was referred to be vetted by an Employment Judge who provided the handwritten comments / directions set out below.
- “Reject udl claim under rule 12(1)(a) the tribunal has no jurisdiction to consider unfair dismissal claim against NASUWT if it was not C’s employer. Accept + serve TUM claim. Not sure if it’s correct jurisdiction code but could not find anything else”.*
36. It does seem to be the case that the Employment Tribunal does not have a separate jurisdiction code for complaints in relation to Trade Union and Labour Relations (Consolidation) Act 1992 section 64 and / or 65.
37. The directions / comments provided by the Employment Judge were silent as to the disability discrimination complaints.
38. Further guidance was then sought by a caseworker regarding the instructions which had been given by the Employment Judge. This resulted in the file being referred to a Legal Officer with the question being asked *“should DDA also be accepted?”*. The subsequent instructions which were handwritten by the Legal Officer on the referral stencil were to the effect that the Employment Judge *“has rejected all Claims except the TUM so no”*.
39. Of course, technically, there was no TUM complaint either. However, looking at the handwriting of the Employment Judge, it seems very likely that the Legal Officer has misread *“udl”* (the code for unfair dismissal but which was hand written in lower case) as reading *“all”*.
40. Rather more fundamentally, the Employment Judge had not rejected all Claims, but had only rejected the unfair dismissal complaint, albeit the instructions provided were silent as to the disability discrimination complaints. Thus, the instruction given by the Employment Judge has ended up being interpreted as into the effect that all of the complaints should be dismissed other than the complaint which the Claimant had not made.
41. Accordingly, the caseworker duly acted on the instructions given and sent a letter to the Claimant dated 15 December 2021 stating that the ET1 Form of Claim had been referred to an Employment Judge *“who was decided that only the following complaints can be accepted namely suffering a detriment because of trade union membership”*. The letter further stated that the Judge had *“decided to reject your other complaints because the Tribunal has no jurisdiction to consider them”*. Of course, this reflects the wording of the standard letter used for these purposes, but the resultant letter was inaccurate in that there had been no decision by the Judge to reject the disability discrimination complaints as the Tribunal had no jurisdiction to consider them. That part of the letter was clearly sent in error, and I have set out above the way in which the error seems to have arisen.

42. The letter refers to attaching explanatory notes which are in the form of answers to questions in respect of "*Claim Rejection*". Rule 13 of the Employment Tribunals Rules of Procedure 2013 does provide that a Claimant whose claim has been rejected (in whole or in part) under rule 12 may apply for a reconsideration on the basis that the decision to reject was wrong. There is a 14-day time limit for making such applications for reconsideration. The Claimant did not make such an application. However, in reality there had been no such decision.
43. At the same time, notice of the Claim was served on the Respondent on the basis that only the complaint of "*suffering a detriment because of trade union membership*" had been accepted. As stated, there had been no decision rejecting the discrimination complaints.
44. The Respondent filed its Response to the 2021 Claim on 12 January 2022. It made the point that it was not clear as to the basis upon which any Claim for suffering a detriment because of trade union membership (the Claim was understood to be under section 146 of TULR(C)A 1992) had been accepted. For good measure, the Grounds of Resistance also sought to respond to the complaints of unjustifiable discipline and disability discrimination, even though the effect of the correspondence from the Tribunal was that they had not been accepted.
45. The Claimant's next step seems to have been to commence the process of early conciliation again on 3 February 2022, although on this occasion, in addition to notifying ACAS of a prospective Claim against the Respondent, he also notified ACAS of prospective Claims against various individuals. Further ACAS certificates were issued on 4 February 2022 and the Claimant filed an ET1 Form of Claim on this same date in Case Number 1301010/2022 (the "2022 Claim").
46. In his oral evidence to the Tribunal, the Claimant's explanation for having commenced the 2022 claim on 4 February 2022 was that he was working on the basis that the time limit ran from the date that the appeal decision was ratified by the National Executive, albeit this date and the process of the decision being ratified was not specifically referred to in either the 2021 or 2022 Claims.
47. In addition to citing the NASUWT as a Respondent, he also cited four individuals as named Respondents. At section 8.1 of the ET1 Form of Claim he ticked the boxes in respect of claiming unfair dismissal and disability discrimination as well as ticking the box in respect of making another type of Claim. In stating the nature of this other type of Claim, he stated that a "*trade union member can bring a claim against a trade union under section 57 of the Equality Act 2010*" and then stated that he was pursuing a claim under section 57 which related to disability discrimination and harassment. However, bringing such complaints was already covered by ticking the boxes in section 8.1 in respect of disability discrimination.
48. At section 8.2 of the 2022 ET1 Form of Claim, the Claimant referred to an "*uploaded document*" which essentially set out the same details as he had previously set out at section 8.2 of the 2021 ET1 Form of Claim.
49. There are a few differences. For example, in relation to the actions about which he is complaining, at various points, he has added, in brackets, the name of the

individual Respondent alleged to be responsible for taking the act concerned on behalf of the NASUWT.

50. Another difference is that the 2022 Claim omits any references to bringing a complaint under Trade Union and Labour Relations (Consolidation) Act 1992 section 64.
51. However, on comparing the two documents, it is clear that the Claimant has brought exactly the same complaints of disability discrimination in the second Claim as had been made in the first Claim.
52. New additional information was provided at section 15 of the 2022 ET1 Form of Claim. This was in the form of quoting from a written communication that he had received from a partner at Thompson Solicitors LLP. In oral evidence, the Claimant was to confirm that this Solicitor had not been advising on his case but had been responding to a legal query which he had raised with her informally. Thus, her responses were to the effect that a *“trade union member can bring a claim against the trade union under section 57 of the Equality Act 2010”* and if a trade union *“subjects a member to discrimination on the ground the protected characteristic of disability then that member has a potential claim”* subject *“to the usual rules about time limits”*. She added that, where the actions complained of are those of lay representatives rather than employees, the union can still be liable on an agency basis (see Unite v Naillard [2018] EWCA Civ 1203, CA).
53. It can be seen that the Claimant has effectively gone to these lengths in order to justify resubmitting his complaint of disability discrimination which, as against the Respondent, is exactly the same Claim as that submitted previously in 2021. Other than seeking to claim against individual Respondents on the basis that they were responsible for the acts of the union, the only other difference was that the Claimant had specifically referred to section 57 of the Equality Act 2010 as the basis for bringing a complaint against his union. However, this was not strictly speaking necessary, just as it would not be necessary to refer to section 39 of the Equality Act 2010 if bringing a discrimination complaint against an employer.
54. On this occasion, no part of the Claim was rejected by the Tribunal (including the complaint of unfair dismissal). On 9 February 2022, the Tribunal wrote to the parties indicating that consideration was being given to directing that the 2021 Claim and the 2022 Claim be considered together.
55. For the sake of completeness, it should also be noted that the Claimant had filed a third Claim (Case Number 1301005/2022) against the same individual Respondents which was effectively a duplicate claim (in that it raised the same issues against them as were raised in the 2022 Claim discussed above). This third Claim was subsequently withdrawn by the Claimant resulting in a Judgment dismissing the Claims (in this third Claim) against each individual Respondent on withdrawal by the Claimant. Similarly, the Case Management Orders made at the Preliminary Hearing on 24 August 2022 record that the Claims against the individual Respondents made under Case Number 1301010/2022 had also been dismissed on withdrawal by Claimant.

56. The Grounds of Resistance in relation to the 2022 Claim raised an abuse of process argument on the basis that the Claim “*appears to comprise claims already made against (NASUWT)*”. However, where part of a previous Claim had not been accepted by the Tribunal, this would not prevent a further Claim being commenced in respect of those matters, albeit the further Claim would normally need to remedy the issue which had resulted in the previous rejection, and a potential time issue may then arise, as it potentially did here, in that the Grounds of Resistance contends that the complaints in the 2022 Claim are out of time in that the last matter complained of was the expulsion decision of 5 October 2021 and early conciliation had only commenced on 3 February 2022 so that any act occurring before 4 November 2021 would be out of time.
57. The Grounds of Resistance maintained the stance previously adopted by the Respondent of not conceding disability. On 8 February 2022, Directions were made in relation to the Claimant serving evidence relevant to the issue of disability on the Respondent. The Claimant subsequently provided such evidence. A GP letter dated 22 March 2022 was provided detailing a history of depression, anxiety and stress resulting in variable mood. It was stated that, at times, depending on social and work circumstances, the Claimant “*may have difficulty in being able to socially interact and undertake activities pertaining to work which involved focus and concentration*”.
58. The Claimant also provided a disability impact Statement. The Statement also seems to place reliance on suffering from hypothyroidism which is described as a condition which causes the Claimant’s thyroid not to function properly which has resulted in him being on medication since 2005. The Statement also relies upon being “*registered on the NASUWT membership database as being disabled, listing mental health issues and Adult Attachment Disorder*”.
59. On 6 April 2022, the Respondent gave notification that it now conceded that the Claimant had mental impairments, namely depression and anxiety, at relevant times, but “*does not admit that the claimant had an impairment, hyperthyroidism (sic), at the relevant time because no medical evidence has been provided to evidence that condition*”. This resulted in the Claimant producing a letter dated 11 August 2005 from his GP which confirmed that the Claimant suffers from Hypothyroidism (at least at that date) and had to take regular prescribed medication to control the condition.
60. The position in respect of disability was explored at the previous Preliminary Hearing given that the Respondent did not accept the pleaded disability of hypothyroidism on the basis that there had been inadequate disclosure of medical material. The Claimant was recorded as confirming that there was no further disclosure that he could provide in relation to disability, so the issue of disability remains in dispute save that it is conceded that the Claimant was disabled by reason of depression and anxiety
61. A Preliminary Hearing subsequently took place on 24 August 2022 with the purpose of making Case Management Orders. Prior to the Preliminary Hearing, the Respondent provided a Case Management Agenda which made it clear that the Respondent would seek to amend its Grounds of Resistance if the Claims proceeded and the Claimant provided further and better particulars of his Claims.

A request for further and better particulars was set out by the Respondent in the Case Management Agenda form. In relation to the acts or omissions identified in his grounds of complaint, the Claimant was asked to confirm the acts or omissions relied upon as amounting to discrimination or harassment as well as confirming the particular disadvantage at which he was placed by any acts or omissions.

62. The Claimant's Case Management Agenda had taken issue with any suggestion made by the Respondent that the supposed complaint of suffering a detriment because of trade union membership was the only complaint admitted by the Tribunal under the 2021 Claim and sought to assert that the Claim still included the complaints of discrimination originally made. In relation to the suggestion that any complaints in the 2022 Claim were out of time, the Claimant sought to assert that the Respondent's actions had continued until 16 November 2021 and so were in time.
63. The Claimant's Case Management Agenda did purport to provide further and better particulars. However, instead of confirming which of those acts or omissions identified in the grounds of complaint were relied upon as amounting to discrimination, the Claimant set out, over 32 sub-paragraphs (sub-paragraphs (a) to (ff)), the alleged acts perpetrated by the Respondent against him which he considered to amount to disability discrimination. Most of these were matters which had not been raised in the ET1 Form of Claim for either the 2021 or 2022 Claims. Many of the matters raised amounted to criticisms of the Respondent with no obvious basis for asserting that the criticisms amounted to disability discrimination. For example, a number of the sub-paragraphs related to alleged breaches of the applicable rules of procedure, or alleged breaches of confidentiality or matters relating to data protection or subject access rights. In terms of confirming the acts or omissions relied upon as amounting to harassment, the further and better particulars given were simply that the Claimant relied upon the acts or omissions of the four named individuals as identified in subparagraphs (a) to (ff).
64. The Tribunal noted in the resultant Case Management Orders that there was a lack of clarity as to the precise complaints brought by the Claimant, and he was encouraged to seek independent legal advice so as to assist in fully articulating his complaints. Part of the issue as to a lack of clarity seemed to relate to the difficulty of identifying the relevant provisions of Trade Union and Labour Relations (Consolidation) Act 1992 section 64 (or 65) which would be applicable.
65. The Case Management Order sent out following the Preliminary Hearing on 24 August 2022 included a detailed Case Summary which reflected the discussion which had clearly taken place at the preliminary hearing for the purposes of seeking to clarify the complaints, although much of the focus was on trying to make legal sense of the complaint of having been unjustifiably disciplined.
66. In the Case Summary it was confirmed that the Claimant no longer pursued the complaints made in the 2022 Claim against the individual Respondents and it was recorded that, on this basis, the Tribunal dismissed the Claims against them upon withdrawal.
67. It was also recorded that the Claimant accepted that he was not an employee of the trade union and had no right to claim unfair dismissal against the Respondent.

However, he blames the Respondent for informing the School (at which he was employed to carry out duties as a trade union caseworker) about his expulsion from the union which he says consequently led to his termination of employment at the School. Clearly, this does not give rise to a complaint of unfair dismissal against the union, although there may be a separate issue as to whether any loss of earnings could be said to have been caused by any alleged act of discrimination. The record of the Preliminary Hearing does not specifically refer to any complaints of unfair dismissal having been formally withdrawn, but arguably this is the effect of the concessions recorded as having been made by the Claimant. The List of Issues formulated as a result of the Preliminary Hearing does not list unfair dismissal as a live complaint. Rather, the complaint being made was that of unjustified disciplinary action contrary to TULR(C)A 1992 sections 64 and 65. Subsequent correspondence from the Claimant, having taken legal advice, did not seek to suggest that there was a live complaint of unfair dismissal. In the circumstances, the complaint of unfair dismissal made in the 2022 Claim (that in the 2021 Claim had not been accepted by the Tribunal) will be treated as having been withdrawn by the Claimant and a separate Judgment will be given dismissing the Claim on that basis. Clearly, the concessions made by the Claimant also reflect the fact that any complaint of unfair dismissal was misconceived and would have no reasonable prospect of success.

68. The complaints of disability discrimination which were identified by the Tribunal were set out in the List of Issues formulated as a result of the previous Preliminary Hearing.
69. In relation to the complaint of discrimination arising from a disability (under Equality Act 2010 section 15), the Claimant relied upon the unfavourable treatment as being that of the Respondent expelling him from the trade union. This treatment was stated to arise from the Claimant's disability because the Claimant's disability causes him to act impulsively.
70. In relation to the complaint of breach of the duty to make reasonable adjustments (under Equality Act 2010 sections 20 and 21), the relevant provision, criterion or practice ("PCP") identified as being in place was the Respondent's practice of instigating a disciplinary process following a complaint. The duty to make adjustments was stated to arise because this practice placed the Claimant at a substantial disadvantage compared to someone without his disability in that his disability caused him to act impulsively and inappropriately. The adjustments which it was alleged should have been made were those of applying an informal process and / or consulting with the Claimant as to how and why he behaved as he did and / or engaging with the Claimant as opposed to taking formal action.
71. In relation to the complaint of harassment related to disability (under Equality Act 2010 section 26), the act relied upon was that of publicly recording that the Claimant's apologies for meetings (because of absences which he says were caused by his disability) were not accepted (in Summer 2021).
72. The List of Issues also included complaints of direct discrimination and indirect discrimination although these would be later withdrawn.

73. As stated above, the complaints made in both the 2021 and 2022 Claims about the Respondent having proceeded with the disciplinary or appeal process, or indicated that it would do so, notwithstanding the absence, or intimated absence, of the Claimant, with that absence (on the Claimant's case) having been caused by his disability, do not really seem to be fully reflected in the List of Issues, either as complaints of discrimination arising from disability under section 15 of the Equality Act 2010, or of a breach of a duty to make reasonable adjustments contrary to section 20 and 21 of the Equality Act 2010. Paragraph 7 of the Record of the Preliminary Hearing is not suggesting that the List of Issues formulated is a definitive or final List of Issues. Rather, the Tribunal made it clear that there remained a lack of clarity as to the precise complaints been brought by the Claimant, so that, effectively, it would be necessary to revisit the exercise of articulating his complaints.
74. However, the Tribunal then listed a further Preliminary Hearing to determine the issues set out at the beginning of these Reasons. The Claimant was directed to file and serve a Statement of Evidence "*limited to the issue of time including any assertions as to the period of time it is alleged he was discriminated against and any reason for the delay in issuing disability discrimination claims*".
75. Following the Preliminary Hearing of 24 August 2022, the Respondent then filed Amended and Consolidated Grounds of Resistance dated 23 September 2022. The document does not deal with the detail of the discrimination complaints, but rather states that the Respondent does not understand the basis upon which the Claimant asserts his complaints under the various sections of the Equality Act 2010 upon which he relies, and then further asserts that the complaints should be struck out as being out of time.
76. On the same date, the Respondent confirmed that it was applying for the discrimination complaints to be struck out as being out of time or, in the alternative, for the Claimant to be required to pay a deposit as a condition of continuing each of his five discrimination complaints (identified by reference to the sections of the Equality Act 2010 under which they were brought) on the grounds that complaints had little reasonable prospect of success.
77. The Claimant complied with the Directions that he serve a Statement of Evidence dealing with the issue of time although the resultant statement dated 20 October 2022 does not really provide the evidence that the Claimant had been required to provide, but rather sets out the history of the matter, from his point of view, from the end of December 2019 until November 2020.
78. Paragraph 2 of this Statement does seek to contend that the actions of the Respondent demonstrate quote "*a clear pattern of deliberate behaviour*" which was "*ongoing and continuous since December 2019 and that these actions are conduct extending over a period*".
79. The same paragraph seeks to explain any delay in issuing proceedings on the basis that it was the Claimant's understanding "*that until internal processes are demonstrably exhausted, external bodies are reluctant and/or often refuse to become involved, which is why he never made an application to ACAS and the*

Employment Tribunal until NASUWT processes has (sic) been fully exhausted and there was no further recourse”.

80. At the end of the Statement, the Claimant seeks to argue that there had not been any delay in commencing proceedings as the actions of the Respondent “*meet the threshold of being considered as ongoing, and additionally as continuing over an extended period*”.
81. The Statement also dealt with events after 6 October 2021 which was the date of the e-mail to the Claimant attaching the appeal decision letter (the appeal decision being the last act complained of in both of the 2021 and 2022 ET1 Forms of Claim). In particular, the Statement refers to the Respondent having, on 9 November 2021, e-mailed Warwickshire County Council with confirmation of the Claimant was no longer a union representative so that facility release time would need to be reallocated, and then refers to communications on 16 November 2021 to the same effect.
82. The Statement also sought to make reference to the Respondent’s knowledge of the Claimant’s disability by referring to a previous dispute regarding the Claimant’s reluctance to attend meetings (where he considered that there had been conduct which gave rise to an unsafe environment for him) which had resulted in the Claimant sending an e-mail which referred to his “*issues with anxiety, stress, attachment disorder, and that he takes medication to control these problems and that there are several reasonable adjustments necessary that he requires in order to attend a meeting*”. This then resulted in a risk assessment being undertaken in March 2020 regarding the Claimant’s attendance at the NASUWT annual conference which the Claimant now relies upon as being a document which accepted that he had “*mental health needs and deficiencies*”. In the Preliminary Hearing, the Tribunal was referred to the content of this document which appears in the Claimant’s Additional Document Bundle (pages 50 to 53).
83. On 7 February 2023, the Claimant wrote to the Respondent and the Tribunal indicating that he had taken legal advice (as the Tribunal had suggested that he should do at the previous Preliminary Hearing). He now indicated that he wished to withdraw the complaint of having been unjustifiably disciplined by the Respondent (originally made relying on Trade Union and Labour Relations (Consolidation) Act 1992 section 64(1)) and also the complaints of direct disability discrimination (contrary to Equality Act 2010 section 13) and indirect disability discrimination (contrary to Equality Act 2010 section 19). Accordingly, these complaints fall to be dismissed on withdrawal and a separate Judgment will be given to that effect.
84. Effectively this means that the live complaints which remained as at the Preliminary Hearing on 1 March 2023 were the complaints of discrimination arising from a disability (contrary to Equality Act 2010 section 15), breach of the duty to make reasonable adjustments (contrary to Equality Act 2010 sections 20 and 21) and harassment related to disability (contrary to Equality Act 2010 section 26).

Relevant law

85. Under rule 37(1) (a) of the Employment Tribunals Rules of Procedure 2013, 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*”, with one of the grounds being that it “*has no reasonable prospect of success*”.
86. The Tribunal was referred to North Glamorgan NHS Trust v Ezsias [2007] IRLR 603, CA, the effect of which is that, generally, cases should not be struck out on the ground of no reasonable prospect of success whether central facts are in dispute and it would only be an exceptional case where this would be appropriate such as where the facts ought to be established by the Claimant were “*totally and inexplicably inconsistent with the undisputed contemporaneous documentation*”.
87. A Tribunal needs to be particularly cautious in considering whether to strike out a discrimination complaint, as these are often fact-sensitive and require consideration of disputed evidence: see Anyanwu v South Bank Students Union [2001] UKHL 14; [2001] 1 WLR 638. Generally, the approach to be taken at the preliminary stage is to take a Claimant's pleaded case at its highest. Mr Brittenden, very fairly, but realistically, referred the Tribunal to the oft cited observations of Lord Steyn in Anyanwu regarding discrimination cases being “*generally fact-sensitive, and therefore their proper determination is always vital in our pluralistic society*” so that “*the bias in favour of a claim being examined on the merits or demerits of his particular facts is a matter of high public interest*”.
88. Under rule 37(1) (a) of the Employment Tribunals Rules of Procedure 2013, 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*”.
89. In relation to discrimination complaints, Equality Act 2010 section 123(1)(a) provides that “*a complaint ... may not be brought after the end*” of ... “*the period of 3 months starting with the date of the act to which the complaint relates*” or “*such other period as the employment tribunal thinks just and equitable*”. Equality Act 2010 section 123(3)(a) provides that “*conduct extending over a period is to be treated as done at the end of the period*” and section 123(3)(b) provides that “*failure to do something is to be treated as occurring when the person in question decided on it*”.
90. In terms of the date of any alleged act of discrimination, the Tribunal was referred to and considered the decision in Sougrin v Haringey Health Authority [1992] IRLR 416, CA, which gives guidance as to where a decision as to, say, pay (or in this case expulsion) amounts to a one-off act with continuing consequences, and Cast v Croydon College [1998] IRLR 318, CA, to the effect that a reference back to the consequences of an earlier decision does not amount to a fresh determination.
91. In Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA, the Court of Appeal gave guidance as to considering whether allegations of discrimination amounted to an act extending over a period (so that any time limit would run from the end of that period) set out below.

“The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of “an act extending over a period”. I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the appeal tribunal allowed itself to be side-tracked by focusing on whether a “policy” could be discerned. Instead, the focus should be on the substance of the complaint that the commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the service were treated less favourably. The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed” (Mummery LJ at paragraph 52)

92. The relevant principles to be applied at a Preliminary hearing to consider whether any complaint should be dismissed on the basis of a determination that it is out of time or struck out as having no reasonable prospect of success on the basis of being out of time were summarised in E v X [2020] UKEAT/0079/20/RN, EAT, (which effectively involved a review of the relevant case law authorities).
93. In relation to the issue of considering whether it would be just and equitable to grant an extension of time, the Tribunal was referred to and considered the guidance provided in British Coal Corporation v Keeble [1997] IRLR 336, Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, CA, Southwark London Borough Council v Afolabi [2003] IRLR 220, CA, and Rathakrishnan v Pizza Express (Restaurants) Limited [2016] IRLR 278.
94. Further, in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ indicated concern that Tribunals had tended to use the factors relevant in dealing with any discretion to extend time in personal injury cases, as set out in Limitation Act 1980 section 33 as a checklist and advised that they should not do so. He went on to give the guidance set out below.

“The best approach for a tribunal in considering the exercise of the discretion under section 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 checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:

- the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);*
- the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;*

- the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;
- the conduct of the claimant over the same period;
- the length of time by which the application is out of time;
- the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;
- the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given”.

95. In Abertawe Bro Morgannwg University Local Health Board v Morgan The Tribunal [2018] ICR 1194, CA, the Court of Appeal dealt with the argument that, in the absence of an explanation from the Claimant as to the reasons for not bringing a Claim in time and an evidential basis for that explanation, the Employment Tribunal could not properly conclude that it was just and equitable to extend time. The argument was rejected, as set out below.

“I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it ‘thinks just and equitable’ is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard” (paragraph 25).

96. The Tribunal notes that the above reasoning was relied upon by the Employment Appeal Tribunal in Concentrix CVG Intelligent Contact Ltd v Obi [2023] ICR 1, EAT.

97. The fact that a Claimant has awaited the outcome of his or her employer’s internal procedures before making a Claim is just one matter to be taken into account by an Employment Tribunal in considering whether to extend the time limit for making a Claim (see Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713, CA).

Submissions

98. It can be seen that the Claimant’s position was that he believed that the Statement of Evidence which he provided effectively showed that the conduct about which he was complaining amounted to conduct extending over a period and that the end of that period was within three months of any relevant notification having been provided to ACAS. His position was that the 2021 Claim had made complaints of discrimination which should have been accepted by the Tribunal. In issuing the 2022 Claim he proceeded on the basis that time potentially ran from the ratification of the expulsion decision on 5 November 2021. He had also sought to suggest that he proceeded on the basis that it was necessary to conclude internal procedures

before commencing the Tribunal proceedings. He had effectively been acting as a litigant in person and did not have the benefit of legal representation.

99. The Respondent's position was that, as a result of the Claimant having withdrawn the complaint of unjustifiable discipline contrary to TULR(C)A 1992 section 64 and 65 made in the 2021 Claim, there "*is no extant claim in respect of any of the issues raised in this Claim Form*". As such, any complaints proceeded under the 2022 Claim, for which purposes early conciliation had been commenced on 3 February 2022 so that any act occurring before 4 November 2021 was out of time, which caused all of the complaints to be out of time as the last complaints related to the expulsion appeal on 5 October 2021. The Claimant could not rely upon subsequent correspondence sent by the Respondent to the Claimant's employer in November 2021 because this was not a part of his pleaded case and the correspondence was not an actionable detriment in that it was the inevitable consequence of the decision to expel the Claimant, given that the Claimant would no longer be entitled to paid facility time from his employer to undertake his duties as a member or official of a union if he was no longer such a member or official.
100. In relation to striking out any part of the Claim as having no reasonable prospects of success on the substantive merits, or ordering a deposit on the basis of any part of the Claim having little reasonable prospect of success on its merits, the Respondent's written submissions had indicated that the Respondent's submissions would be developed orally, but the main point ultimately being made, both in the oral and written submissions was that, on the Respondent's case, the reasons for the expulsion were clear and serious.
101. Clearly, the Claimant sought to advance an argument to the contrary. However, the existence of purportedly good reasons for the decision would not, in itself, be a knock-out blow, if the decision was also tainted with discrimination, or the Claimant's disability have been a factor in the decision. In any event, a significant part of the Claimant's case related to the handling of the disciplinary process rather than just its outcome.
102. The Respondent's submissions realistically recognised the high threshold to be met in relation to any striking out application. Indeed, it is to be noted that the main focus of the conclusion to the Respondent's written submissions (at paragraph 34) was that any part of the Claim which related to discrimination through the correspondence sent to the Claimant's employer in November 2021 should be struck out or made subject to the payment of a deposit, on the basis that any such complaint was misconceived, for the reasons already set out above (although this seemed to be without prejudice to the contention being made during the hearing that neither the 2021 Claim nor the 2022 Claim actually included any such complaints).
103. At the Preliminary Hearing, the Tribunal shared with the parties the contents of the documents on the Tribunal file recording the circumstances in which the vetting process and subsequent instructions had resulted in the parties being informed that a decision had been made that the only part of the 2021 Claim that was being accepted was that in respect of being subjected to a detriment on the grounds of trade union membership. The parties were invited to make any further submissions in relation to the possible analysis that, on the face of it, the Claimant

had commenced valid proceedings complaining of discrimination, within three months of the last act being complained about, namely the appeal which had upheld his expulsion from the union.

104. It was already effectively the position of the Claimant (see, for example, the points which he had made in the Case Management Agenda referred to above) that the complaints of discrimination made in the 2021 Claim should be treated as live complaints. The Respondent's position was that it had been open to the Claimant to seek a reconsideration of any decision not accepting the original discrimination complaints and he had not done so. Taking account of the fact that he had raised such complaints in the 2021 Claim, and using this as a basis to conclude that it was just and equitable to extend time to allow any out of time discrimination complaints to proceed, would effectively be allowing a reconsideration by the back door and would offend against the principle as to the finality of litigation. Subject to the position in respect of time limits, which was clearly still to be determined, it was not contended on behalf the Respondent that the discrimination complaints, as made in the 2021 Claim, were outside the jurisdiction of the Tribunal

Discussion and decision

105. The Tribunal is satisfied that the Claimant's complaints of discrimination which are made in the 2022 Claim were made, in exactly the same way, albeit without specific reference being made to section 57 of the Equality Act 2010, as in the Claimant's 2021 Claim, save that the 2021 Claim did not additionally seek to attribute culpability also to various cited individual Respondents.

106. Correspondence was sent to the parties indicating that the only complaint accepted was that of suffering a detriment because of trade union membership with the reason given (in the letter to the Claimant) that the other complaints were rejected because they were outside the jurisdiction of the Tribunal. However, no decision had actually been made to this effect. To that extent, the letter was sent in error. The Tribunal apologises to the parties for the fact that this error only seems to have been appreciated in the Preliminary Hearing which took place in relation to the time issues.

107. Further or alternatively, any decision not accepting the discrimination complaints on the basis that they were outside the jurisdiction of the Tribunal would have plainly been made in error. The last act complained in the 2021 Claim was in time. An issue arises as to whether the earlier acts were part of an act extending over a period, but clearly this was not capable of being determined at a vetting stage. In a situation where a Claimant had notified ACAS within three months of the last act of discrimination about which he was complaining, and then commenced proceedings which should have been accepted, it was difficult to see that, in relation to the 2022 Claim, it would not be just and equitable to extend time, at least in relation to the last act, with the issue of whether that was linked with any earlier acts, so as to be part of an act extending over a period, needing to be determined on hearing all of the evidence. It is true that the Claimant could have challenged any non-acceptance of his Claim by seeking a reconsideration within 14 days. Indeed, the Tribunal could have reconsidered the rejection of the Claim of its own motion. However, the Claimant was a litigant in person who then seems

to have made some informal enquiries to satisfy himself that he could bring such a complaint of discrimination and then issued proceedings a second time. It is effectively open to a Claimant to do so in such circumstances, without this amounting to an abuse of process, although it may give rise to issues in respect of time limits, which may then involve a consideration as to whether it is just and equitable to extend time. In the Claimant's case, if, contrary to the decision set out above, the Claimant could not rely upon the 2021 Claim as having validly instituted the discrimination complaints, the Tribunal concludes that it would be just and equitable to extend time in relation to the last act pleaded (that of 5 October 2021), with the issue of whether that was linked with any earlier acts, so as to be part of an act extending over a period, needing to be determined on hearing all of the evidence.

108. In concluding that it would be just and equitable to exercise any such discretion in the Claimant's favour, the Tribunal takes account of the circumstances set out above in relation to the Claimant having come to commence the 2022 Claim. The Claimant was acting as a litigant in person, albeit he would have had some knowledge of Tribunal proceedings and time limits from his work as a trade union caseworker. He would have received the letter from the Tribunal dated 15 December 2021 indicating that only part of his Claim had been accepted. The letter is a standard letter but provides no real explanation beyond asserting that the Tribunal has no jurisdiction to consider the other complaints. The basis for this is not explained. The letter was clearly wrong (leaving aside the issue of time limits which was for possible later consideration). The Claimant subsequently availed himself of an opportunity to seek clarification of the position from a Solicitor on an informal basis which confirmed that the Tribunal did have jurisdiction to consider complaints of discrimination being made by a trade union member against a trade union. He then re-issued more or less exactly the same Claim on 4 February 2022. It is likely that the Claimant considered that it was arguable that the time limit potentially expired on this date as it is probably no coincidence that this was the last day for taking any such step, if the time limit ran from the date of the meeting of the National Executive, on 5 November 2021, to ratify the appeal decision. The first paragraph of the Statement of Evidence makes specific reference to having been a member of NASUWT from January 2001 until 5 November 2021, which was the date that the decision was ratified by the National Executive. However, on the basis that the last act complained of was that of 5 October 2021, and subject to the issue as to whether any discrimination was an act extending over a period, the Claimant would have been 30 days out of time by the time he issued the 2022 Claim (having given notification to ACAS on the previous day). As to prejudice, the exercise of the discretion relates to all of the Claimant's remaining complaints. Indeed, in responding to the earlier protocol letter the Respondent had made it clear that the Tribunal was the exclusive legal forum for the Claimant's complaints (as well as properly referring to the applicable time limits). However, in terms of prejudice, the Respondent specifically conceded that any delay had not altered the cogency of the evidence. Indeed, it can be seen that the history of this matter is extremely well documented. The main thrust of the Respondent's submissions was that the Claimant did not put forward any or any adequate explanation for any delay (or any exercise of the discretion in his favour). However, the explanation lies in the circumstances set out above. To some extent, the steps taken are understandable having regard to the Claimant's position as a litigant in person who

would not have appreciated whether there was any basis for challenging any non-acceptance of part of the Claim on jurisdictional grounds. At any rate, the Tribunal was not satisfied that any criticism made of those steps would be such as to rule out any exercise of any discretion in the Claimant's favour. Indeed, in the circumstances of this case, the Tribunal was satisfied that it would be far from just and equitable to dismiss the complaints as out of time when the same complaints had been put before the Tribunal in the 2021 Claim. On this basis, and weighing up the relevant factors, the Tribunal was satisfied that it would be just and equitable to grant the extension referred to above.

109. In relation to the earlier acts of alleged discrimination, the issue as to whether these can be said to be in time, on the basis that they form part of conduct extending over a period, and that period ended less than three months before any relevant notification given to ACAS, is really a matter for evidence at a Final Hearing. The Tribunal can see the argument, as set out in the Claimant's Statement of Evidence, that at various points throughout the history of the matter, the Claimant was seeking to place reliance upon being disabled and / or needing adjustments, but was being dealt with by officials or other individuals, on behalf the Respondent, in a way which involved proceeding on the basis that the reliance being placed by the Claimant on any disability was misplaced, or should not be taken into account, or could be discounted (with the Claimant seeking to rely upon the disciplinary hearing and the appeal hearing as two examples of this sort of thing happening, but also other meetings). However, these are fact sensitive issues which may involve a Tribunal considering whether the position being adopted by either party was a viable or justifiable position, and whether any alleged acts of discrimination were isolated acts or could be said to be linked as part of a continuing act, with a further area for possible determination relating to whether any decisions as to the process being adopted could be said to be linked to any decisions over the merits of the disciplinary case against the Claimant so as to form part of the same conduct extending over a period. These are matters which are best considered at any Final Hearing, following proper consideration of all the relevant evidence, and any decision in relation to the issue of any act or conduct extending over a period will obviously be best informed by taking account of the conclusions reached by the Tribunal as to whether the individual acts or decisions or omissions alleged form part of that conduct or amounted, on their own, to acts of discrimination.

110. The Tribunal was also not satisfied that it was in a position, at a Preliminary Hearing, on the basis of the materials to which it had been referred, and on the basis of taking the Claimant's case at its highest, to conclude that any part of the Claimant's case had no reasonable prospect of success or little reasonable prospect of success. Establishing the strength or weakness of the Claimant's case was a fact sensitive exercise which is likely to depend upon considering the relevant evidence rather than the assertions made by the parties with selective reference to limited evidence.

111. One area where the Tribunal had some scepticism was as to whether disciplining the Claimant for the Facebook post could be said to be unfavourable treatment arising from a disability on the basis that the Claimant's disability caused him to act impulsively and that this formed at least part of the explanation for

making the Facebook post in question. However, this will depend upon the Claimant satisfying the Tribunal that any disability had this effect, and establishing the relevant causative link, which will ultimately be a matter of evidence. On the basis of the materials to which the Tribunal was referred, the Tribunal did not feel able to say that there was little or no reasonable prospect of success.

112. The main focus of the Respondent was on arguing that the conduct in question was serious so that the sanction imposed was legitimate. If one was to assume that this was the case, it would not necessarily prevent any decision being tainted by discrimination, or the decision being one in respect of which there was a failure to take into account the Claimant's disability in so far as it was relevant. Similarly, the Respondent's arguments would potentially be relevant in considering any defence of justification pursuant to Equality Act 2010 section 15, but the Tribunal was not satisfied that it was in a position to form a view as to the outcome of the balancing exercise required in assessing a justification defence so as to be able to conclude that any complaints had little or no reasonable prospect of success.
113. Ultimately, the Tribunal concluded that there was at least a sufficient arguable basis to the remaining causes of actions to prevent the Tribunal from being able to conclude, at this stage, on the basis of the matters referred to by the parties at the Preliminary Hearing, that a particular cause of action applicable no reasonable success.
114. And the conclusion of the hearing, the tribunal discussed with the parties the extent of any case management orders which should be made, dependent upon the outcome of the preliminary issues in respect of which judgement was being reserved. Accordingly, separate Case Management Orders in relation to the further conduct of this case will be issued with this Judgment.

Employment Judge Kenward
1 September 2023