EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110426/2021

Sitting at Aberdeen (via Cloud Video Platform)
On 16 August 2023

Employment Judge Smith

Mr D Fong	**Claimant** **Represented by** **Mr T Merck,** **Counsel**
Montgomery, Cordiner and Low **t/a The Raemoir Trout Fishery**	**Respondent** **Represented by** **Ms L Taylor,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's claims of discrimination arising from disability, religious belief-related harassment, and unfair dismissal (under sections 94 and 98 Employment Rights Act 1996) are all dismissed upon their withdrawal by him.

2. The respondent's application to strike out disability-related harassment claims 1 to 9 is refused.

E.T. Z4 (WR)

3. The claimant's application to amend the claim form to include disability-related harassment claim 10 is allowed.

4. The respondent has permission to file an amended response in relation to disability-related harassment claims 1 to 10 and must do so, with a copy to the Claimant, by **15 September 2023**.

5. The matter shall be set down for a further preliminary hearing for case management purposes, on **11 December 2023**. The preliminary hearing shall take place via Cloud Video Platform, with a time estimate of 2 hours.

REASONS

Introduction

1. By a claim form dated 19 July 2021 the claimant presented a number of claims to the Employment Tribunal. Regrettably this case is now quite old and has a chequered procedural history. The basis for the claimant's claims was quite unclear from the claim form and attempts have been made in the intervening two years to identify exactly what was being claimed. It is not, however, necessary for me to delve deeper into the history of the proceedings as today the case has reached the stage by which all of the claimant's claims – save for a disability-related harassment claim under **section 26** of the **Equality Act 2010** – have been withdrawn. I have therefore dismissed them under **rule 52**.

2. The claimant's application to amend the claim form to include claims of automatic unfair dismissal under **sections 103A** and **104** of the **Employment Rights Act 1996** was originally refused by Employment Judge Hendry on 9 December 2022. Therefore, as the case stands today, no such claims feature in the proceedings but the claimant has appealed Employment Judge Hendry's decision to the Employment Appeal Tribunal (EAT). Permission to appeal was apparently refused at the initial sift stage but the claimant has exercised his right to an oral permission hearing under **rule 3(10)** of the **EAT Rules**. That hearing, I am informed, will take place on 29 November 2023. If on that occasion the EAT decides that the appeal should proceed, it may be that the eventual result of the

appeal is that either of both of the putative unfair dismissal claims should be included in these proceedings. That, however, is not something which is imminent nor would it have any impact on my decision on the Respondent's strikeout application at today's preliminary hearing.

Today's Preliminary Hearing

3. The matter originally set down for determination today was the respondent's application to strike out the remaining disability-related harassment claims on the basis that they have no reasonable prospect of success, under **rule 37(1)(a)** of the **Employment Tribunal Rules 2013**. It emerged during the course of the preliminary hearing that the claimant wished to make an application to amend the claim form to include certain matters. I shall return to that application in due course.

The respondent's application for strikeout under rule 37(1)(a)

4. In this case both sides agree that at the material time, the claimant did not have a disability. However, the respondent accepts that the claimant did meet that definition in the past, on account of the mental impairments of schizophrenia and a major psychotic illness. This case is therefore one brought on the basis of **section 6(4)** of the **Equality Act 2010**, a "past disability" case.

5. The basis for the respondent's application was set out in a document sent to the Tribunal on 16 September 2022, in particular paragraphs 7.1, 7.1.1 and 7.5 to 7.10. Whilst the substance of the application advanced by Ms Taylor today went somewhat beyond the original written application, the overarching submission as advanced in that written application was that the disability-related harassment claims should be struck out owing to deficiencies in how they had been pled (see paragraphs 7.7 and 7.8). As a general submission, that appeared to me to be the wrong approach to striking out claims. As HHJ Tayler observed in the EAT case of ***Cox v Adecco Group UK & Ireland Ltd*** [2021] ICR 1307, *"Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't*

know what it is" (paragraph 28(5)), thus negating the power to strike out under **rule 37(1)(a)**. As ***Cox*** is binding on me, I had no hesitation in rejecting this overarching submission and refused to strike out any part of the disability-related harassment claim on that basis.

6. That, however, is not the end of the matter. On 14 August 2023 (two days before the preliminary hearing) Mr Merck on behalf of the claimant sent to the Tribunal a document entitled "Consolidated Particulars", in which the basis of the claimant's disability-related harassment claims were said to be pursued and in which all other claims were withdrawn. On the face of that document, ten claims of disability-related harassment were said to be advanced. Although Ms Taylor had received this document she had not had a proper opportunity to take instructions as to its contents. However, there was no objection to the preliminary hearing proceeding and no application to adjourn was made. Ms Taylor went on to make full and specific submissions on behalf of the respondent as to why each of the ten individual claims should still be struck out under **rule 37(1)(a)**. Mr Merck responded on behalf of the claimant in oral submissions.

7. Before deciding the respondent's application it was necessary for me to determine which (if any) of the ten claims set out in the Consolidated Particulars document were actually part of the claim or not. If any were not, I would have no power to strike them out.

8. Of assistance to me in doing this was the decision in ***Cox***. Drawing on the applicable principles in "no reasonable prospects" strikeout cases, paragraph 28(2) of ***Cox*** reminds Tribunals that whilst there is no general rule prohibiting the striking out of discrimination cases – of which the present disability-related harassment claims are a type – it is a power that is not only draconian but should be exercised with special care and, ultimately, very rarely. Where a case turns on a disputed factual matter, it is normally highly inappropriate to make such an order (paragraph 28(3)). The Tribunal must take the claimant's case at its highest (***Cox***, paragraph 28(4)), and it must do so by considering in reasonable detail what the claims and issues are (paragraph 28(5)) by reference to the claim form

and *"any and any other documents in which the Claimant seeks to set out the claim"* (paragraph 28(6)). Furthermore, *"… 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"* (paragraph 28(7)).

9. The claimant has been a party litigant in the proceedings thus far, although it is right to note that he has been assisted by a solicitor from time to time and today has had the benefit of counsel in the form of Mr Merck. He set out certain matters in his claim form at boxes 8.2 and 15 himself, and he has endeavoured to clarify his claim in two sets of further and better particulars, the first dated 27 October 2021 and a second dated 8 September 2022. It is those documents which I have taken reasonable care to read and understand as the basis for the claims that are now sought to be advanced, but in doing so I have also been mindful that where a particular claim goes beyond clarifying or further particularising a matter that was pled in the claim form, permission to amend would necessarily be required. That is so even where such a matter was included in a further and better particulars document ordered by the Tribunal.

10. It was accepted by Mr Merck that claim 10 was not pled in the claim form and thus permission to amend to include would be necessary. I shall return to that matter following my determination of the strikeout application and instead confine my determination on the latter to claims 1 to 9.

11. As to each of claims 1 to 9, my determination in relation to whether the matter was pled or not, and on strikeout, is set out as follows. Where necessary, I have made reference to the parties' submissions but it is not necessary for me to rehearse them in full.

Claim 1: "Late January 2021: Notwithstanding a recent report from the claimant to Mr Cordiner that his psychiatrist (1) considered him to be free of any psychotic illness, and (2) advised that insistence that he was ill was "gaslighting", Mr Cordiner's attempted or continued to "gaslight" the claimant by insisting the claimant was mentally ill or psychotic."

12. Ms Taylor accepted that this allegation was set out in the claim form and thus indisputably forms part of the proceedings. The application to strike out was instead advanced on the basis that it was unclear what Mr Cordiner actually said. In my judgment, this was no basis for striking out the claim as the particulars were clear enough without it being necessary to specify what was actually said by Mr Cordiner. In addition, this claim turns on a factual dispute and therefore not one which could be considered to have no reasonable prospects of success. The respondent's application is refused and claim 1 proceeds.

Claim 2: "Approx 1 March 2021: claimant re-raised with Mr Cordiner concerns regarding September 2020s pay and being paid in vouchers Mr Cordiner and Mr Clark both insist that the doctors were wrong. In particular, Mr Clark told the claimant the doctors "deh ken fit the fuck they're speaking about" *after the claimant had been fairly recently clinically assessed by a specialist psychiatrist as not having any major mental illness."*

13. The parties agreed that the first specific mention of this allegation was made in the claimant's first further and better particulars document. Mr Merck, however, submitted that it had its roots in the claim form and should be properly categorised as a claim that exists within the proceedings. In box 8.2 the claimant made reference to both Mr Cordiner and Mr Clark being *"people involved"* in his treatment (Mr Cordiner being referenced as the employer). Furthermore, at box 15 the claimant stated that, *"In November 2020 along with others made an assault on my mental stability by trying to convince me I was ill"*, and, *"his assault continued into March 2021"*. I agree with Mr Merck that claim 2 can be properly characterised as further and better particulars of a claim that existed in the claim form already, and thus forms part of the proceedings.

14. Ms Taylor's submission in inviting me to strike out this claim was that the particularisation lacked the necessary context for Mr Cordiner to be able to understand and defend himself against the allegation. I disagree: the claim as clarified identifies a relatively specific date, a relatively specific context (a discussion about pay for September 2020), who was present, and exactly what was said by Mr Clark. It revolves around a factual dispute and therefore cannot

be considered to have no reasonable prospect of success. Ms Taylor's secondary submission was that Mr Clark is merely a customer of the respondent and therefore it cannot legally be held liable for his actions. Whilst I would generally accept that a person who was neither an employee or an agent of the employer could render the employer liable for discriminatory acts (**section 109 Equality Act 2010**), Mr Clark's status is also in dispute as the claimant contends that he was not a mere customer and may well fall into one or other of those definitions. That too is a factual dispute which I cannot resolve today. For these reasons the respondent's application is refused and claim 2 proceeds.

Claim 3: "5 March 2021: Mr Cordiner told the claimant "You can't go around telling these guys 'you're not a doctor' thus not allowing the claimant to defend his dignity."

15. The parties appeared to agree that the first specific mention of this allegation was made in the claimant's first further and better particulars document. That is actually incorrect, as specific mention of the same allegation was made by the claimant in box 15 of the claim form when he said, *"The results of my assessment were not well received by Mr Cordiner who stated that I cannot tell them that they're not doctors"*. Whilst the wording and syntax of both these sentences is not identical they are, upon a fair reading, driving at the same matter.

16. Ms Taylor's submission was that this claim has no reasonable prospects of success because it is talking about the claimant being denied the opportunity to defend his dignity, not alleging that his dignity was in fact violated (as **section 26(1)(b)(i)** may require). In my judgment, that interpretation was not a fair one given the heavy implication that the claimant considered his dignity to have been violated in the first place. In any event, it would remain open to the Tribunal that hears the case to find, in the alternative, that the necessary environment was created for him (as *per* **section 26(1)(b)(ii)**), noting that the subsection expressly provides for the two as alternatives to each other. It could not sensibly be said that this claim had no reasonable prospects of success. Accordingly, the respondent's application to strike it out is refused; claim 3 proceeds.

Claim 4: "5 March 2021: Mr Cordiner misled, or failed to correct, Mr Clark that the claimant had said to "build a spaceship to visit the higher man above" when in fact the claimant had said no such thing."

Claim 5: "5 March 2021: Mr Clark misled the claimant that the claimant had said to "build a spaceship to visit the higher man above" when in fact the claimant had said no such thing."

17. In deciding whether to strike out these claims I have taken them together as they refer to the same subject-matter (words the claimant had allegedly used, about building a spaceship *etc.*) but apparently not to the same conversation.

18. The parties appeared to agree that the first specific mention of this allegation was in the claimant's first further and better particulars document, at paragraph 34. That too was incorrect, as box 15 of the claim form states, *"there was a claim made that I was building a spaceship to visit the man above"*. The appearance of that express sentence, together with the claimant's invocation of both Mr Cordiner and Mr Clark being people involved in his treatment (box 8.2) led me to conclude that both claims 4 and 5 could properly be described as amounting to further and better particulars of claims that were present in the claim form, and thus within the proceedings.

19. Taking them then in reverse order, in relation to claim 5 Ms Taylor submitted that it nevertheless had no reasonable prospects of success and should be struck out because it concerns the actions of Mr Clark whom she contends was neither an employee nor an agent of the respondent. For the reasons expressed in relation to claim 2, I consider that the status of Mr Clark to be a disputed question determinable on the facts and thus it is not appropriate to strike out claim 5 on that basis. The respondent's application is refused and claim 5 proceeds.

20. Claim 4, however, is more problematic. Mr Merck accepted that the alleged conversation between Mr Cordiner and Mr Clark on 5 March 2021 was a different one to that referred to in claim 5 and took place when the claimant was not present. It was only later that he became aware of it, although how much later is not specified. I raised with the parties the recent decision of Lady Haldane in the

EAT case of ***Greasley-Adams v. Royal Mail Group Ltd*** [2023] EAT 86 by putting the case name and citation in the CVP chat facility and inviting the parties to comment. Paragraph 20 of Lady Haldane's judgment reminds Tribunals that the perception of the individual is an essential component of the legal test for harassment (**section 26(4)(a)**) and that, *"If there is no awareness, there can be no perception."* That said, upon my reading of ***Greasley-Adams*** the possibility that there may still be grounds for a harassment claim even where there is a period of time between the conduct occurring and the victim becoming aware of it is not wholly excluded, and I note that the case concerns "effect"-type cases only and not "purpose"-type cases under **section 26(1)(b)**. The claimant has expressly stated in both of his further and better particulars documents, and Mr Merck in his Consolidated Particulars document, that his case is put on the "purpose" footing as well as the "effect". Given that these points remain arguable, I decided that it would be wrong at this stage to conclude that claim 4 has no reasonable prospects of success and therefore declined to strike it out on the ***Greasley-Adams*** basis.

21. In relation to claim 4, Ms Taylor's submission in favour of striking out was that Mr Cordiner could not legally be liable for inaction, and that the formulation of the claim was unclear. I disagreed with both submissions. As to the first, it is wrong in law that an employer cannot be liable for its discriminatory omissions: it can be, and **section 123(3)** and **(4)** of the **Equality Act 2010** expressly set out time limits for the presentation of claims where the alleged discriminatory act is a failure to do something. In addition, the formulation of claim 4 as drafted by Mr Merck included an allegation that Mr Cordiner had *"misled"* Mr Clark; misleading someone is by definition a positive act and not an omission. As to the second submission, I rejected it because the formulation as put by Mr Merck was clear enough, with an identified date, an identified alleged perpetrator, an identified other participant to the conversation. On neither submission was I persuaded that claim 4 has no reasonable prospect of success, although I have expressed misgivings about it in relation to the ***Greasley-Adams*** decision. The respondent's application is therefore refused and claim 4 also proceeds.

Claim 6: "Approx 5 March 2021: Mr Cordiner repeated to the claimant that the claimant was not well and was behaving psychotically and abnormally when in fact the claimant had been fairly recently clinically assessed by a specialist psychiatrist as not having any major mental illness and had told Mr Cordiner the same."

22. The parties took opposite positions as to whether claim 6 appeared in the claim form or not. Mr Merck submitted that it did, by reference to the matters set out in box 15. Whilst it is right to observe that the specific wording used by Mr Merck is not what appears in box 15, I took the view that it does have its genesis in the claim form because within that section the claimant did say, *"In November 2020 Mr Cordiner along with others made an assault on my mental stability by trying to convince me I was ill"*, and, *"His assault continued into March 2021"*. Reading those parts of box 15 properly, in my judgment Mr Merck's reference to Mr Cordiner repeating an assertion about the claimant being ill is apt to cover a claim already set out in the claim form. It appeared to me to be, in essence, a repetition of claim 1 which is said to have taken place some weeks earlier.

23. Ms Taylor submitted that claim 6 should be struck out owing to a lack of particularisation. I disagreed that the allegation lacked proper particularisation, given Mr Merck's revised wording. However, even if I had accepted Ms Taylor's submission it would not be right, as *per* ***Cox***, to strike it out on that basis. In my judgment it could not properly be said that claim 6 had no reasonable prospect of success, and accordingly the respondent's application is refused. Claim 6 proceeds.

Claim 7: "Approx 5 March 2021: Mr Cordiner threatened the claimant to be careful because with mental health, things could be done behind the claimant's back."

24. Mr Merck suggested, but did not formally concede, that claim 7 might be new and if so, it would require amendment. Ms Taylor submitted that it was new, and that permission to amend would certainly be required. It is right to say that the specific wording of the claim as now put by Mr Merck does not appear in the claim form, nor does it appear in the first further and better particulars document. Of assistance to me, however, has been the second further and better particulars

document, which does mention this specifically. It is said within that document that there is a recording of this threat being made. The claimant did, in his claim form at box 15, mention his allegation that Mr Cordiner's *"assault continued into March 2021"* and also in the same box that, *"I recorded all this on tape"*.

25. Whilst it has been with some reluctance, I have concluded that claim 7, as now formulated by Mr Merck, should properly be categorised as a matter just this side of the boundary between the further and better particularisation of a claim already intimated in the claim form and something new requiring amendment. I have reached this decision on the basis of the claimant's express reference to adverse events taking place in March 2021 in box 15, as well as to events from that time being recorded by him. Properly understood in light of what is said in the second further and better particulars document, claim 7 is not a new matter but something which does exist as a claim in the proceedings, albeit one now clarified. It is not, in my judgment, a matter which requires permission to amend.

26. Ms Taylor's submission focused on Mr Cordiner needing more information by way of context before he could fully understand the claim against him. I disagreed, particularly in circumstances where there is said to be a recording of this threat being made. Again, we now have proper particularisation in the form of an approximate date, an identified alleged perpetrator, and precisely what was said. That information, in my judgment, is sufficient for the respondent to be able to understand the case against it and respond. There is in my judgment no basis for striking out this claim, either because of a lack of particularisation (***Cox***) or in circumstances where there is a critical dispute of fact. The respondent's application is refused and claim 7 proceeds.

Claim 8: "Approx 5 March 2021: Mr Cordiner threatening to dismiss the claimant when the claimant raised concerns of non-payment/underpayment and of "gaslighting" the claimant into believing he continued to suffer from psychotic episodes."

27. Ms Taylor submitted that this claim was not in the claim form because although the claimant had expressly referred to Mr Cordiner threatening to dismiss him, he had not previously ascribed the treatment as being related to past disability

and was doing so for the first time now. She further contended that it was not consistent with his primary case on dismissal, which is that he wishes to claim that the principal reason for his dismissal was the fact he made a protected disclosure (**section 103A Employment Rights Act 1996**) or because he asserted at statutory right (**section 104 Employment Rights Act 1996**): those putative claims are those for which permission to amend was refused by Employment Judge Hendry, which is presently being appealed to the EAT.

28. I disagree. This claim is not about the dismissal itself but about an earlier *threat* to dismiss. That is a discrete issue and one which is expressly mentioned in the claim form in both boxes 8.2 and 15. In neither box does the claimant specifically ascribe – or indeed rule out – any particular reason as being a reason for his being threatened with dismissal by Mr Cordiner. He ticked the box for disability discrimination in the claim form itself. In this context it cannot be said that the claimant has never before put the case that his being threatened with dismissal related to disability. To me, the wording of the claim form suggested that the claimant was indeed putting disability at the forefront of this allegation, when he referred (in both boxes) to the discussion in which the threat was allegedly made being on the subject of the *"abuse"* he says he had received at the hands of the respondent. That *"abuse"* encompasses within those same sections the mental health-related events the claimant describes.

29. In my judgment, Ms Taylor's submission cannot be sustained. In reality, whether or not the claimant was threatened with dismissal is a fact that remains to be proven. Similarly, if such a threat is found to have been made then the question of whether that threat amounted to unwanted conduct related to the claimant's past disability is also a matter which remains to be proven. The respondent is entitled to defend that case on both fronts. I am not, however, entitled to strike out such a case where the core facts remain in dispute. The respondent's application is therefore refused and claim 8 proceeds.

Claim 9: "Approx 5 March 2021: Mr Cordiner dismissed the claimant."

30. A claim regarding the claimant's dismissal was indisputably contained within the claim form and thus exists within the proceedings. Ms Taylor's submission in support of it being struck out essentially replicated the submission made in relation to claim 8, and for substantially the same reasons as expressed in relation to claim 8, I rejected it in relation to claim 9 as well. Furthermore, returning to the claim form itself I noted that as well as the unfair dismissal box being ticked the claimant also ticked the disability discrimination box. In neither box 8.2 nor box 15 does the claimant specifically ascribe – or indeed rule out – any particular reason as being a reason for his dismissal (never mind a principal reason). In this context it cannot be said that the claimant has never before put the case that his being dismissed was unwanted conduct relating to his past disability. The respondent's application to strike out claim 9 is refused and that claim proceeds.

The claimant's application to amend to include claim 10: "Approx. Jan to Aug 2021 but only known to the claimant on 8 August 2021: Mr Cordiner or Mr Clark disseminated defamatory remarks about the claimant (see para 76) that they knew to be plainly false."

31. In determining any application for permission to amend the claim form I have reminded myself of the essential principles governing the Tribunal's exercise of that power, which are set out in what remains the leading case in this area: ***Selkent Bus Company Ltd v Moore*** [1996] IRLR 661 (EAT). Whilst the overarching consideration is the balance of prejudice to the parties, specific matters that should be considered within that consideration are, firstly, the nature of the amendment. Secondly, I should take into account the applicability of statutory time limits. Thirdly, I should take into account the timing and manner of the application. These factors are not a mere checklist (and indeed they are not necessarily exhaustive) but they are relevant to the question of prejudice, which remains the touchstone for amendment applications.

32. Turning first to the nature of the amendment, it appeared to me to be one which is relatively spurious, although not unparticularised. I have also considered

paragraph 76 of the Consolidated Particulars document, which sets out in more detail what the *"defamatory remarks"* are said to have been. In short, those remarks are said to have been an allegation that the claimant had stolen fishing equipment from a deceased friend and sold them for personal gain, and that the claimant had been dismissed from a subsequent employer for the same reason as he had been dismissed by the respondent. The claimant cannot say with certainty that Mr Cordiner or Mr Clark were the persons who made these remarks; he attributes those comments to them through the word of a third party: a customer of the respondent, who told him of the remarks in August 2021.

33. Whilst the amendment sought is also put legally as a disability-related harassment claim in common with claims 1 to 9, it would bring into the proceedings a new set of facts and, on the claimant's own admission, rumour. Also, given that the claimant did not know about the apparent remarks until potentially seven months after they had been made, I am concerned that such a claim may (I stress, *may*) be relatively unmeritorious given the decision in ***Greasley-Adams***, as discussed above. These factors pointed away from granting permission to amend.

34. Turning next to the applicability of statutory time limits, it was apparent from the first further and better particulars document (dated 27 October 2021) that the basis of this claim was first intimated at that time. However, even at that stage it was a new claim and not one which had its roots in the claim form. The application to amend *to include this particular claim* was only made at this preliminary hearing (on 16 August 2023) and therefore a consideration of the applicability of time limits must necessarily take account of the fact that the primary time limit would have expired around 1¾ years ago. Whilst the claimant might be able to persuade the Tribunal at the hearing stage that it is just and equitable to extend time *etc.* in respect of this claim, I am conscious of the fact that Parliament has set relatively stringent time limits in respect of harassment claims and this too is a factor which points away from granting permission to amend.

35. Turning to the timing and manner of the application, I have already noted that the application has been made at a stage in the proceedings which is more than two years on from the date the claim form was presented (19 July 2021). Much has occurred in these proceedings without them reaching the point where the case can be finally determined, which is most regrettable. That said, much may still occur in the proceedings given the existence of the appeal to the EAT (although I pass no comment on the merits of that appeal) and the fact that at this preliminary hearing the Tribunal now has a definitive list of the other claims. Whilst putative claim 10 involves at its core certain remarks made to other people about the claimant, both Mr Cordiner and potentially Mr Clark would be in a position to defend those claims if they deny having made such comments (and in the case of Mr Clark, potentially also on the basis that he was neither an employee or agent of the respondent).

36. Despite Ms Taylor's submission, putative claim 10 would not, it seems to me, involve too much in the way of additional work or cost to the respondent were permission to be granted. It is an allegation which concerns the spreading of rumours, which is not likely to be documented in any way. It will likely only need to be dealt with in oral evidence, and Mr Cordiner will likely be a witness for the respondent in any event, given his status as the main alleged antagonist. Mr Clark may also be in attendance to give evidence as to his status and the claims in which he is said to have been involved. If the claimant wishes to prove to the Tribunal that the conduct occurred, it is he who will likely have to bear the greater work and potential cost in procuring the individual who informed him of the rumours (and indeed any other such persons to whom he says the rumours may have been spread by Messrs Cordiner and Clark) to attend the Tribunal to give evidence on the claim. It is, of course, his application. But if permission were not granted, the claimant would lose the ability to seek redress in relation to the rumours he alleges Messrs Cordiner and Clark have spread about him.

37. In determining the balance of prejudice in this application, I consider that the first and second ***Selkent*** factors are outweighed by the third, and that the balance of prejudice favours allowing the application. The decisive factor in my decision has

been the comparative effects on the parties of either granting or not granting the application, namely the loss of the claimant's ability to pursue claim 10 set against the limited additional trouble to which the respondent would be put.

Next steps

38. The Respondent therefore has permission to rely upon an amended response to disability-related harassment claims 1 to 10, as *per* my case management order set out above.

39. A further preliminary hearing has also been set down a short while after the **rule 3(10)** hearing in the EAT, because at that stage it may be that the proceedings continue on the disability-related harassment basis only and the case can be prepared for a full hearing. If, however, the EAT grants the Claimant permission to appeal on that occasion then the Tribunal may, at that preliminary hearing, decide upon the best way to progress the case in the meantime, if indeed any progress can be made at all where there is an outstanding appeal.

Employment Judge: P Smith
Date of Judgement: 18 August 2023
Date sent to Parties: 18 August 2023