EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000042/2023

Preliminary Hearing held in public at Glasgow on 14 August 2023 and conducted remotely using the Cloud Video Platform (CVP) ; and parties' further written representations dated 16 and 17 August 2023, considered in chambers, without the attendance of parties, by private deliberation on 21 August and 22 November 2023

Employment Judge Ian McPherson

Mr Christopher Milloy	**Claimant** **In Person**
Telecom Service Centres Limited (t/a WebHelp UK)	**Respondents** **Represented by:** **Mr Rory Byrom** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The reserved judgment of the Employment Tribunal, having heard both parties' submissions at the CVP Preliminary Hearing, and having then reserved judgment to be given later, and having resumed consideration of the case, in private deliberation in chambers, and there considered parties' closing submissions on time bar and the claimant's opposed application to amend the claim, is as follows:

(1) All discrimination allegations against the respondents, relating to alleged acts of the respondents in the period of the claimant's secondment as an IT technician, which ended on 25 August 2022, are time-barred, in terms of **Section 123 of the Equality Act 2010**, and the Tribunal does not

consider it is just and equitable to allow an extension of time to the claimant to permit him to proceed with those heads of complaint against the respondents, alleging discrimination arising from disability, failure to make reasonable adjustments, and harassment, and so they are all dismissed as being outwith the Tribunal's jurisdiction.

(2) In relation to the claimant's opposed application of 3 July 2023 to amend the ET1 claim form presented on 30 January 2023, by adding additional text to include an additional head of complaint of constructive dismissal in terms of **Sections 94 to 98 of the Employment Rights Act 1996**, relating to his resignation from the respondents' employment with effect from 14 September 2022, said to be by reason of a final straw of an unfair and unjust suspension on 13 September 2022, the Tribunal refuses to allow the amendment sought by the claimant in his amendment application, it not being in the interests of justice to allow that amendment.

(3) The Tribunal finds and declares that it was reasonably practicable for the claimant to have included such a head of complaint, alleging unfair constructive dismissal, in his ET1 claim form in the present case, presented on 30 January 2023, as he had included such a head of complaint, albeit unparticularised, in his earlier Tribunal claim (case number **8000035/2023**) presented on 26, and rejected by the Tribunal on 30 January 2023.

(4) Further, and, in any event, even if the Tribunal had decided that it was not reasonably practicable for him to do so, the further period until 3 July 2023 to make the present application to amend to include such a head of complaint was not reasonable in all the circumstances.

(5) In these circumstances, the claimant's whole claim against the respondents is dismissed in its entirety, under exception of the outstanding complaint, in terms of **Regulation 30 of the Working Time Regulations 1998**, of the respondents' alleged failure to pay him holiday

pay accrued but untaken as at the effective date of termination of his employment on 14 September 2022.

(6) Accordingly, the Tribunal orders that the claimant's claim for holiday pay, as the only remaining head of complaint left before the Tribunal, shall proceed to a one-hour Final Hearing before any Employment Judge sitting alone at Glasgow Tribunal Centre, and to be conducted remotely using the Cloud Video Platform (CVP), on a date to be hereinafter assigned by the Tribunal, in the proposed listing period of **January, February, and March 2024.**

(7) Further, the Tribunal directs the clerk to the Tribunal to delay issue of Notices of Final Hearing by CVP from the Tribunal to allow both parties to discuss further procedure **within no more than 14 days from date of issue of this reserved Judgment**, and for the respondents' solicitor to update the Tribunal within that 14-day period.

REASONS

Introduction

1. This case called before me as an Employment Judge sitting alone on Monday, 14 August 2023, for a 1-day public Preliminary Hearing to be conducted remotely using the Cloud Video Platform (CVP), previously intimated to both parties' representatives by the Tribunal, by a Notice of Preliminary Hearing dated 12 July 2023.

2. An earlier CVP Preliminary Hearing, listed on 5 July 2023, for 28 July 2023, to determine time-bar as a preliminary issue, was postponed by the Tribunal, on the claimant's application, as he was not available that date, on account of being abroad on holiday, and the case had been listed by the Tribunal for that date in error. There was no objection to that postponement from the respondents' solicitor.

3. A further, amended Notice of Preliminary Hearing was issued on 11 August 2023, on my instructions, for this sitting of the Tribunal. This case was listed to determine the following issues: "***time bar and claimant's opposed application to amend the claim"***. The circumstances surrounding that amendment application from the claimant, and the respondents' opposition to it, are detailed below, later in these Reasons.

4. As I indicated at the start of this Hearing, the additional text in that amended Notice of Preliminary Hearing saying "***employment status and case management issues"*** was inserted by the Tribunal listing clerk in error, as both parties agreed that there is no disputed preliminary issue of employment status in this case.

Background

5. The ET1 claim form in this case was presented by the claimant, acting on his own behalf, to the Tribunal on 30 January 2023, following ACAS early conciliation between 9 December 2022 and 20 January 2023. The claimant, who was formerly employed by the respondents, stated that he was making a claim for discrimination by the respondents against him on the grounds of disability and sexual orientation, and that he was owed holiday pay. He identified WebHelp as the respondent employer.

6. The claimant did not tick section 8.1 of the ET1 claim form to indicate that he had been unfairly dismissed, albeit, at section 5.1, he had indicated that his employment with the respondents had ended on 14 September 2022. In section 8.2 of his ET1 claim form, the claimant set out the background and details of his claim, very, very briefly, and without any detail such as the dates when the events he was complaining about happened, as follows:

"I was mocked for my disabilities (epilepsy)

I was mocked for my shoulder dislocations related to seizures

Sexual discrimination

Bullying/ harassment

Physical harm

Suspended without just cause

Holiday pay

Disability discrimination

Failure to make reasonable adjustments"

7. In the event of success with his claim, the claimant sought an award of compensation only from the respondents, which he then quantified, at section 9.2, as being **£25,000**. He did not then provide any explanation as to how he had calculated that sum. As detailed later in these Reasons, a schedule of loss for the claimant was produced to the Tribunal at a later date.

8. His claim was served on the respondents by the Tribunal, on 2 February 2023, requiring an ET3 response by 2 March 2023. The claim was defended, by ET3 response, lodged on behalf of the respondents, by Mr Rory Byrom, solicitor with Harper Macleod, Glasgow, on 1 March 2023.

9. He noted that the claimant had named Webhelp as the respondent and explained that the correct identity of the respondent, being the company that employed the claimant, is Telecom Service Centres Limited, which trades as WebHelp UK and the identity of the respondent should be substituted accordingly.

10. The defence stated that the claimant's employment had terminated by reason of resignation on 14 September 2022. It was denied that the claimant had been the subject of disability discrimination, or discrimination on the grounds of his sexual orientation, and denied that he had been the subject of unlawful deductions of wages, specifically in respect of holiday pay. Disability status was disputed, although it was accepted that the claimant had epilepsy. Time-bar was pled as a further preliminary issue.

Earlier Procedural History of this Claim

11. Thereafter, there was sundry procedure before the Tribunal, including two separate telephone conference call Case Management Preliminary Hearings, firstly before Employment Judge Cowen, on 30 March 2023, and secondly before Employment Judge Wiseman on 22 May 2023. Written Notes and Orders were issued by each Judge after each such Hearing, the claimant having attended both, acting on his own behalf, while Mr Byrom attended both as solicitor for the respondents.

12. At the first such PH, before Judge Cowen, the claimant was ordered to provide a schedule of loss, and further details of his claim, and the second PH was assigned. The claimant confirmed that his claims included constructive dismissal, as he said that he was suspended for no just cause, which caused him to resign. The respondents, who, at that stage, denied that the claimant was disabled, also denied the discrimination allegations, claimed that the ET1 was out of time, and that it did not contain reference to a constructive dismissal claim.

13. The first mention of "***constructive dismissal***" in the present case was when the claimant completed, and returned to the Tribunal, on 28 February 2023, his PH Agenda for the first Case Management Preliminary Hearing listed for 30 March 2023. At section 2.2 of his PH Agenda , he inserted "***constructive dismissal (Employment Rights Act 1996)"***, along with holiday pay under the **Working Time Regulations 1998,** as part of his claim in addition to his discrimination heads of complaint which he had listed at section 2.1 under the **Equality Act 2010.**

14. Pursuant to his compliance with Judge Cowen's orders, on 12 April 2023, the claimant provided a schedule of loss seeking a grand total of **£47,601.31** compensation from the respondents. Thereafter, on 26 April 2023, the claimant lodged further and better particulars of his claim, as also ordered, in a document entitled "***Order of Events that took place***", along with a disability impact statement, and further medical evidence in a further email of 19 May 2023.

15. In that "***Order of events***" document produced by the claimant, he stated, amongst many other things, as follows:

"Constructive unfair dismissal- being unfairly and unjustly suspended was the last straw. Absolutely no justification for this. This was upheld in grievance outcome, they acknowledged that alternative measures to minimise risk should have been explored first. The ET3 response is contradictory. It was also not a gross misconduct allegation; I was advised it was due to performance issues and not being on agreed schedule. I did not know schedule due to not having access to emails which the company were fully aware of. Any performance issues were due to lack of training."

… That was the last straw at WebHelp and I felt like I was left with no option but to resign. I believe the suspension and the threat of gross misconduct was completely and totally unjust I also believe that WebHelp done this to force me into handing in my resignation. "

16. At the second PH before Judge Wiseman, on 22 May 2023, the respondents were given 7 days to confirm whether they accepted the claimant was a disabled person in respect of his epilepsy, and to confirm their position regarding time-bar, and the claimant's various claims against the respondents were noted under **Sections 15, 20 and 26 of the Equality Act 2010**, being discrimination arising from disability, failure to make reasonable adjustments, and harassment, and further noting that the claimant had provided details of his constructive dismissal complaint, and specification of the last straw which led to his resignation.

17. Thereafter, on 30 May 2023, Mr Scott Milligan of Harper MacLeod confirmed to Glasgow ET, with copy to the claimant and Mr Byrom, that on review of the claimant's further information, the respondents accepted that the claimant was a disabled person throughout the entirety of the relevant period in question, in respect of his epilepsy, and he made application for a Preliminary Hearing to determine whether or not parts of the claim, specifically those under the **Equality Act 2010**, were out of time.

18. His email addressed, from the respondents' perspective, their salient points in relation to the time-bar issue, that any claim relating to any alleged act of discrimination that took place more than 3 months before the claimant notified his claim to ACAS on 9 December 2022 (i.e.,10 September 2022) should be dismissed as being brought outwith the relevant time period.

19. In particular, the respondents' salient points were there set out by Mr Milligan as follows:

"Timebar

Further to consideration of the Claimant's further specification as to his claims provided at the preliminary hearing, the Respondent makes an application for a preliminary hearing to determine whether or not parts of the complaint, specifically those under the Equality Act 2010, are out of time.

As noted at Paragraph 13 of the Respondent's ET3 paper apart, under Section 123 of the Equality Act any claim relating to an alleged act of discrimination that took place more than three months before the Claimant notified this claim to ACAS on 9 December 2022 (ie 10 September 2022) should be dismissed as they are being brought out-with the relevant time period.

The Claimant's complaints were set out at Paragraphs 3 – 6 of the Note Following the Preliminary Hearing, and reference is made to the detail contained within these paragraphs. The salient points in relation to time bar are noted below.

<u>Discrimination arising from disability</u>

The Claimant is to confirm the relevant dates relating to the alleged unfavourable treatment, being the alleged accusation by Mr David Hill, in front of others, that he had deliberately dislocated his shoulder/s in order to leave

shift early. However, it is understood that this allegation relates to the period of the Claimant's secondment, which ended on 25 August 2022.

Therefore, subject to the Claimant's confirmation of dates, the Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.

Failure to make reasonable adjustments

There are two separate complaints:

1. The first complaint is in respect of an alleged practice of working a shift pattern which involves varying start and finish times. The Claimant accepts that the Respondent put the adjustment in "around 10 August 2021".

Therefore, the Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010. The last possible date of the alleged failure was "around 10 August 2021".

2. The second complaint is respect of an adjustment to be made to enable the Claimant to return to college, which was refused. The decision on this matters was issued by the Respondent's Natasha Sanders on 24 August 2022. Therefore, again the Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.

Harassment

There are 6 complaints of harassment:

1. *An incident in January 2022. The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

2. *An email of 26 October 2021. The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

3. *Alleged threats of violence on or about September 2021 "for a period of 4 months". The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

4. *On or about September 2021, Mr Hill overshared information. The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

5. *From September 2021 to the end of the Claimant's secondment, Mr Hill allegedly engaged in name-calling. The Claimant's secondment ended on 25 August 2022. The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

6. *Mr Hill allegedly using vulgar language in relation to the Claimant's mother and displayed her Facebook page to others. No dates are stated in the Note Following Preliminary Hearing, but it is understood that this relates to the period of the Claimant's secondment, which ended on 25 August 2022. The Respondent's position is that this is time barred under Section 123(1) of the Equality Act 2010.*

Accordingly, all the Claimant's discrimination complaints are time barred under Section 123(1). The Respondent therefore respectfully submits that it is line with the overriding objective that a stand alone time bar hearing is fixed. Whilst it is acknowledged it is often not appropriate for time bar to be dealt with at a preliminary stage, rather than forming part of the considerations at a full hearing, it is, in the Respondent's position, suitable for judicial determination in this case. Given the potential significant amount of evidence, witnesses and legal submissions that would be required for these discrimination complaints, if is proportionate to determine time bar at a preliminary stage. If any or all claims are time barred, then this will reduce the

length and complexity of a final hearing, which it is submitted would be in line with the overriding objective.

In addition, it is of note that the Claimant's constructive dismissal complaint relating to his resignation on 14 September 2022 is said to be by reason of the final straw of "unfair and unjust suspension". The Claimant has not provided any pleadings as to reliance on any of the alleged discriminatory acts as reasons for his resignation. If the Claimant does seek to rely upon on such acts, which is not pled, then we respectfully submit that there is a clear distinction between evidence being heard for the purposes of a constructive unfair dismissal claim, as opposed to the different legal tests and liabilities for the discrimination claim."

20. On my instructions, the Tribunal clerk wrote to both parties, on 31 May 2023, in the following terms:

"(1) The Judge has ordered that the claimant shall provide his written comments, as soon as possible, and certainly within the next 14 days at latest, on the respondents' application of 30 May 2023 to have a separate preliminary hearing to determine the issue of time bar in respect of the pled discrimination heads of complaint.

(2) Further, the Judge has ordered that the claimant shall supply the following additional information to the respondents' solicitor, by email, with copy sent at the same time to the Glasgow Tribunal office, as follows:-provide further and better particulars for the claimant responding to the respondents' submissions that parts of his claim are time-barred, as set forth by the respondents' solicitor on 30 May 2023, and why the claimant submits, if the Tribunal finds any part of his claim is time-barred, it should exercise its discretion to grant him an extension of time, in terms of Section 123 of the Equality Act 2010, and to narrate succinctly the individual factors that the claimant will rely upon to seek any extension of time. The claimant shall do so, as soon as possible, and certainly within the next 14 days at latest.

(3) When complying with the foregoing order of the Tribunal, the Judge has also ordered that the claimant shall supply the following further additional information to the respondents' solicitor, by email, with copy sent at the same time to the Glasgow Tribunal office, as follows:-provide clarification of whether or not the claimant intends to seek leave of the Tribunal, by way of an application to amend his claim form, so as to be allowed to proceed with a complaint of unfair constructive dismissal by the respondents. The claimant shall do so, as soon as possible, and certainly within the next 14 days at latest.

(4) In this regard, Judge McPherson notes that, in presenting his ET1 claim form, the claimant did not include any such head of claim at section 8.1.The first reference to constructive dismissal appears in the claimant's PH Agenda of 28 February 2023, where he refers to such a complaint under the Employment Rights Act 1996, but he provides no detail. Detail was later provided in his reply of 27 April 2023, where he stated: "Constructive unfair dismissal-being unfairly and unjustly suspended was the last straw."

(5) Does the claimant seek leave of the Tribunal to be allowed to add in such an additional head of complaint in terms of Sections 94 to 98 of the Employment Rights Act 1996? The case is not currently coded by the Tribunal administration for "UDL" (unfair dismissal). The claimant shall provide this required clarification as soon as possible, and certainly within the next 14 days at latest.

(6) In the event that the claimant confirms that he seeks leave to pursue an unfair constructive dismissal head of complaint, the Judge will then seek the respondents' solicitor's views on any necessary, further procedure.

(7) Finally, if the Tribunal, having considered both parties' positions, decides that there should be a discrete public Preliminary Hearing on time-bar, rather than reserve that matter, and roll it up into a single Final Hearing on all issues, the Judge will then seek the both parties' views on whether any such PH

should be in person, or conducted remotely by CVP video-conferencing, clarify any witnesses to be heard on that preliminary issue, and identify an appropriate duration for any such PH, and also any necessary, further procedure."

Claimant's application for leave to amend the ET1 claim form to add an additional head of complaint (constructive dismissal)

21. On 12 June 2023, the claimant replied to the Tribunal by email, with copy to Mr Milligan and Mr Byrom for the respondents, saying as follows: [The Tribunal notes and records that there was no paragraph 4 to the claimant's email.]

"*Dear Sir,*

1. I wish to lodge my objection to the Respondents application for a Preliminary Hearing to be fixed on time bar.

2. Firstly, my request for reasonable adjustments was refused without any consideration whatsoever on 24th August 2022. This discriminatory act and the absolute unjust suspension from work resulted in my resignation on 14th September 2022. I participated in the Early Conciliation process which delayed the time-frame and I submitted the Employment Tribunal claim on 9th December 2022, therefore I understand this claim is not time barred.

In April 2021 I provided the Company with a letter from my consultant with regard to my disability and the requirement to make reasonable adjustments, this was ignored for 4 months. This caused me significant stress and depression and really affected my mental health and I was placed at a substantial disadvantage. During this time I also had another seizure at work and dislocated both my shoulders.

The Discrimination and continual Harassment and Bullying by David Hill was a continuing Act and extended over a long period of time and until August 2022, just prior to my resignation.

Therefore as the Discrimination, Bullying and Harassment and failure to make reasonable adjustments was a continuing Act and extended over a long period of time I believe this should not be time barred.

I believe there would be no prejudice to the Respondent to allow these claims to proceed. It was also acknowledged by the respondent that it is not often appropriate for time bar to be dealt with at the preliminary stage.

I believe it would be just and equitable to allow the claims to proceed and I respectfully ask for the claims to proceed.

If the Tribunal finds any part of my claim is time-barred, I submit that the Tribunal should exercise its discretion to grant an extension of time, in terms of section 123 of the Equality Act 2010.

I had no knowledge of Employment Law and was not aware of my rights to make these claims whilst still in Employment. I was a hard working loyal employee and did not want to leave. I was and still am suffering with stress and depression due to my disability but also due to the appalling way I was treated throughout my employment. I was extremely ashamed and embarrassed to be treated in this awful way and I did not make my parents aware or discuss it with anyone and I was also very fearful of repercussions from David Hill.

I believe that there is absolute merit to my claims and deserves to be heard in front of a single Final Hearing.

3. With regard to the Constructive Unfair Dismissal claim, please find attached my ET1 claim form. In section 8.1 I have indicated that I am claiming Unfair Dismissal (including Constructive Dismissal) I believed this was sufficient. However, If I have made any administrative errors I seek leave of the Tribunal, to make an application to amend my claim form and be allowed to proceed with a complaint unfair constructive dismissal by the respondent.

5. I seek leave of the Tribunal to be allowed to add in such an additional head of complaint in terms of Sections 94 to 98 of the Employment Rights Act 1996."

Rejection of earlier Claim against the Respondents

22. Attached to that email of 12 June 2023, the claimant provided a PDF copy of his earlier ET1 claim form, presented by him on 26 January 2023, and rejected by the Tribunal administration under case number **8000035/2023**. It was submitted to the Tribunal, online, using ET1 claim form (11.22), a different version of that form as he had used in presenting his ET1 claim form in the present case on 30 January 2023, using ET1 claim form (06.21). He named Sam Lee as the respondent employer.

23. On 30 January 2023, a Legal Officer at the Tribunal decided that that **8000035/2023** claim should be rejected under **Rule 12** because the claimant had not complied with the requirement to contact Acas before instituting relevant proceedings. That claim was stated to be defective for the following reason : "***you have provided an early conciliation number but the name of the respondent on the claim form is different to that on the early conciliation certificate."***

24. The claimant applied, on 30 January 2023, for reconsideration of that rejection decision by the Legal Officer. On 2 February 2023, Employment Judge MacLean directed that the claimant's application for a reconsideration of the decision to reject the claim made on 30 January 2023 could not be considered because the claimant had not rectified the defect identified. The application for reconsideration was not accompanied with an amended ET1. The Judge appreciated that rather than emailing the amended ET1 the claimant had summitted a new claim via the portal. That new claim was accepted and allocated case number **8000042/2023** which would proceed.

25. Claim **8000035/2023** relied upon the same ACAS early conciliation certificate as in the present case, with WebHelp UK as the proposed respondent, and, unlike his claim form in the present case, the claimant did tick section 8.1 of the ET1 claim form to indicate that he had been unfairly dismissed, given, at section 5.1, he had indicated that his employment with the respondents had ended on 14 September 2022.

26. He further stated that he was making a claim for discrimination by the respondents against him on the grounds of disability and sexual orientation, but not that he was owed holiday pay, as is now claimed in the present claim **8000042/2023**.

27. In section 8.2 of that earlier ET1 claim form, the claimant set out the background and details of his claim, very, very briefly, and without any detail such as the dates when the events he was complaining about happened, as follows:

"***I was mocked for my disabilities (epilepsy)***

I was mocked for my shoulder dislocations related to seizures

Sexual discrimination

Bullying/ harassment

Physical harm"

28. That narrative is in different terms to what is stated at section 8.2 of the ET1 claim form in the present claim **8000042/2023**. On the matter of remedy, in the event of success with his earlier claim, the claimant sought compensation of **£25,000**, without any further explanation, as in the present case, but he also ticked the box at section 9.1 saying he sought a recommendation from the Tribunal, but without clarifying what at section 9.2.

Further Procedure in the Present Claim

29. In light of the claimant's email of 12 June 2023, and on my instructions, the Tribunal clerk wrote again to both parties, on 14 June 2023, in the following terms:

"(1) The Judge has ordered that the respondents' solicitor shall provide his written comments, as soon as possible, and certainly within the next 7 days at latest, on the claimant's email of 12 June, and his objection to the respondents' application of 30 May 2023 to have a separate preliminary

hearing to determine the issue of time bar in respect of the pled discrimination heads of complaint.

(2) While writing, the Judge has asked me to highlight to both the claimant, and the respondents' solicitor, that the claimant's ET1 presented on 26 January 2023 for a case which was rejected (8000035/2023) was due to differences between the respondents' name (Sam Lee) & the ACAS early conciliation certificate name. The claimant's application for reconsideration of that rejection was itself rejected by EJ Shona MacLean for the reasons given in the Tribunal's letter to the claimant dated 2 February 2023, namely:

"Employment Judge MacLean has directed your application for a reconsideration of the decision to reject the claim made on 30 January 2023 cannot be considered because you have not rectified the defect identified. The application for reconsideration was not accompanied with an amended ET1. The Judge appreciates that rather than emailing the amended ET1 the claimant has summitted a new claim via the portal. This claim has been accepted and allocated case number 8000042/2023 which will proceed."

(3) While that rejected claim ticked box 8.1 to say: "I was unfairly dismissed (including constructive dismissal", no details of that head of claim were provided.

(4) If the respondents intend to insist on their time-bar preliminary issue, and if the claimant intends to seek leave of the Tribunal to be allowed to add in an unfair dismissal head of claim, with full particulars of claim, and that is to be opposed by the respondents, then Judge McPherson proposes to list those matters for a one-day public Preliminary Hearing to be held remotely using the Tribunal's CVP (Cloud video platform) facility, in the course of July / August 2023.

(5) Both parties should advise the Tribunal, as soon as possible, and certainly within the next 7 days at latest, of any dates in July / August 2023 that are not available.

(6) As regards any amendment application by the claimant, that should be intimated as soon as possible, as timing and manner of an amendment application is one of the factors to be taken into account by the Tribunal.

(7) Judge McPherson takes the view that the existing ET1 does not contain sufficient particulars of claim to give the respondents fair notice of the constructive dismissal claim which the claimant seeks to pursue against them. As the claimant is an unrepresented party litigant, the Judge signposts him to where he might obtain advice / representation, particularly as regards submitting any application to amend the claim.

(8) If he wishes to amend, the claimant should provide additional wording, to be inserted at section 8.2 of the ET1 claim form, to give details of the dates, persons involved and events he is complaining about that caused him to resign from the respondents' employment, and why he complains of unfair constructive dismissal, as his previous email reply to Glasgow ET of 27 April 2023, detailing the "last straw", is very brief and lacks detail for the respondents to be able to sensibly respond to.

(9) By way of signposting for the claimant, because the Judge cannot act as advocate or representative for any party, each of whom should take their own independent advice, it is suggested that the claimant should seek independent and objective advice, if not representation, from a Citizens Advice Bureau, from a solicitor, or employment law consultant, or maybe a pro bono voluntary agency (such as the University of Strathclyde University Law Clinic) providing advice and assistance to individuals bringing Tribunal proceedings.

(10) The Judge specifically signposts the claimant to the Strathclyde University Law Clinic. It regularly provides student advisors who represent

claimants before this Tribunal, thus addressing an otherwise unmet need for legal advice and assistance. Its website contains much useful guidance for unrepresented parties, and it is suggested to the claimant to enquire further, with a view to setting up an early appointment for advice: further information is readily available online at https://www.lawclinic.org.uk/employment-law-resources.

(11) The Law Clinic website provides many valuable resources which will be of assistance to the claimant as an unrepresented party litigant, particularly as regards Tribunal procedure. The online resource is useful, even if the Law Clinic cannot provide representation for the claimant going forward."

30. In response to the Tribunal's letter of 14 June 2023, the claimant replied by email, on 16 June 2023, sent at 21:38, with copy to Mr Byrom for the respondents, attaching an updated version of "***Order of events that took place updated.docx***." In his covering email, the claimant wrote in the following terms:

"In response to your email below. To confirm that I intend to seek leave of the Tribunal to be allowed to add in an unfair dismissal head of claim to the ET1. Please see file below for the additional wording to be inserted at section 8.2 of the ET1 claim form. This is the details of the events that took place in chronological order that caused me to resign from employment at WebHelp and why I am complaining of unfair constructive dismissal."

31. In that updated document, so far as material for present purposes about his proposed amendment to his claim to add in constructive unfair dismissal, the claimant stated as follows:

"Constructive unfair dismissal- I was being treated unfairly and then was unjustly suspended was the last straw. I received absolutely no warning for as to why this was happening. This was upheld in grievance outcome, they acknowledged that alternative measures to minimise risk should have been explored first. The ET3 response is contradictory. It was also not a gross misconduct allegation; I was advised it was due to

performance issues and not being on agreed schedule however, I did not know schedule due to not having access to emails which the company were fully made aware of at the time. Then when I logged 15 minutes early, I received a message from a manager saying I was going to receive a call from himself when my shift began. This call that took place turned out to be a conduct hearing and I was suspended with immediate effect as they claimed that the rate, I was working the [sic] ***the training modules was not satisfactory to their standards. Any performance issues were due to lack of training."***

…

That was the last straw at WebHelp and I felt like I was left with no option but to resign. I believe the suspension and the threat of gross misconduct was completely and totally unjust also believe that WebHelp done this to force me into handing in my resignation."

Respondents' opposition to the claimant's application to amend the ET1 claim form

32. Mr Byrom, the respondents' solicitor, replied to the Tribunal's letter of 14 June 2023, by email, on 20 June 2023, sent at 16:13, with copy to the claimant, as follows:

"*We act for the respondent in relation to the above matter. We write to the Tribunal further to its correspondence dated 31 May 2023 and 14 June 2023, and the claimant's correspondence relating to the same.*

Comments on the claimant's objection to the respondent's application on time limits

We note the claimant's objection to there being a preliminary hearing listed to determination the issue of time bar in respect of the pled discrimination heads of complaint. Having reviewed the claimant's comments in his correspondence dated 12 June 2023, the respondent is still of the view that it would be appropriate to have a standalone preliminary hearing to determine

the matter of time bar. As set out in our application on the matter dated 30 May 2023, given the potential significant amount of evidence, witnesses and legal submissions that would be required for these discrimination complaints it is proportionate to determine time bar at preliminary stage. If any or all the claims are time barred, then this will reduce the length and complexity of a final hearing saving all parties time and expense, which it is submitted would be in line with the overriding objective.

Comments on the claimant's application to amend the ET1 claim form

We note the claimant's application to amend his ET1 claim form to include a claim for constructive dismissal. The claimant in his correspondence dated 16 June 2023 states that the additional wording to be inserted section 8.2 of the ET1 claim form with respect to the constructive dismissal complaint can be found in the "file below". It is assumed that the claimant is referring to the document attached to his email titled "Order of events that took place updated". If that is the case, the claimant is called upon to confirm which parts of the document he intends to rely upon for the wording to be inserted into section 8.2 with regards to his constructive dismissal complaint? It is clear that a lot of the document does not relate to constructive dismissal.

As the claimant's employment terminated by reason of resignation on 14 September 2022, an application submitted in June 2023 to include the new head of claim of constructive dismissal is significantly out-with the three month time limit. The respondent's view is that it was reasonably practicable for the claimant to have submitted this particular claim in time. The claimant was clearly aware of the potential option of submitting an unfair dismissal complaint in time, as he has admitted to, but only proceeded with those complaints as noted at section 8.1 of his ET1 claim form. The respondent therefore opposes the claimant's application on the basis that it will cause prejudice to the respondent in terms of additional costs in preparation for the final hearing, specifically the necessity to call additional witnesses and provide further documentary evidence. The balance of hardship would clearly be upon the respondent in this instance as if the claimant's application is not

granted he is still currently in a position to proceed with the other claims he has advanced in his ET1.

In terms of suggested further procedure to deal with this matter, we agree with the Employment Judge's comments in the correspondence to the parties dated 14 June 2023 that a one day public preliminary hearing to be held remotely by CVP should be listed to deal with both matters of time bar and the claimant's application to amend his claim."

33. In light of the claimant's email of 16 June 2023, and Mr Byrom's email of 20 June 2023, and on my instructions, the Tribunal clerk wrote again to both parties, on 27 June 2023, in the following terms:

"Judge McPherson has instructed that I inform both parties as follows:

(1) Their correspondence is noted.

(2) The claimant's "order of events "does not constitute a properly drafted application to amend his ET1 claim form seeking leave of the Tribunal to add a claim for constructive dismissal.

(3) Judge McPherson refers to the unreported Employment Appeal Tribunal judgment in the Scottish appeal of Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07–see hyperlink below for full EAT judgment:

https://www.bailii.org/uk/cases/UKEAT/2007/0067_06_0310.html.

(4) The Judge specifically refers the claimant to paragraphs 35 and 36 from Lady Smith's judgment in Traynor, stating:

"35. Fifthly, it is only once the wording of the proposed amendment is known that the Respondent can be expected to be able to respond to it.

36. Sixthly, once the wording of the proposed amendment is known, the Tribunal requires to allow both parties to address it in respect of the application to amend before considering its response."

(5) Until such time as the claimant clarifies precisely what text from his "order of events" what he seeks to add to his ET1 claim form, that relates only to alleged constructive dismissal, the Judge takes the view that there is no proposed amendment for the Tribunal or respondent to consider.

(6) The manner and timing of an application to amend is one of the Selkent factors for the Tribunal to take into account, as is the applicability of time limits. The Tribunal will also take into account the more recent judgment of the Employment Appeal Tribunal in Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535, by His Honour Judge Tayler, in particular what the learned EAT Judge states at his paragraphs 21 to 28: -see hyperlink below to the full EAT judgment-

https://www.gov.uk/employment-appeal-tribunal-decisions/mrs-g-vaughan-v-modality-partnership-ukeat-0147-20-ba-v.

(7) The claimant may wish to take guidance from the Strathclyde University Law Clinic to which he was previously signposted by the Tribunal, if he still seeks leave to amend. If he no longer seeks leave to amend, then he should so advise the Tribunal, and Mr Byrom.

(8) Meantime, so as to avoid any further delay in progressing this case, Judge McPherson is minded to list the case for a one-day CVP Open Preliminary Hearing ("OPH") on time-bar in respect of the pled discrimination heads of complaint, to be heard by any Employment Judge sitting alone. He has instructed our Listing team to assign a specific date from parties' stated availability, and Notice of that OPH will follow under separate cover, in due course, giving details as to how to participate in that CVP Hearing.

(9) If the claimant intimates a properly drafted proposed amendment, and if that is opposed by the respondents, then Judge McPherson, would suggest that any opposed amendment application is considered at the same time at the same OPH.

(10) In these circumstances, the Judge invites both parties' comments, within the next 7 days, at latest."

Claimants' amended wording for his amendment application

34. In reply to the Tribunal's correspondence of 27 June 2023, the claimant replied by email sent at 16:39 on 3 July 2023, with copy to Mr Byrom for the respondents, saying as follows:

"In response to your email below. To confirm that I intend to seek leave of the Tribunal to be allowed to add in an unfair dismissal head of claim to the ET1. Please see below for the amended wording be inserted at section 8.2 of the ET1 claim form. …

I believe it would be just and equitable to also allow this claim to proceed. I believe there is absolute merit to my claims and this is a very important part of my claim and would cause me great prejudice if the claim was refused because a vital component of the claim would be missing.

I believe there would be no prejudice to the respondent to allow this claim to proceed. This new pleading does not involve substantially different areas of inquiry.

***Wording to be inserted at section 8.2 of the ET1 claim form**.*

I had been employed With Telecom Service Centres Ltd t/ a Webhelp UK since 19th September 2019.

A series of discriminatory acts have taken place since April 2021 and I have provided full details in previous correspondence and this has also been discussed in the Preliminary Hearings.

The following events in addition to the above was the final straw and culminated in my resignation on 14/9/2022.

I was seconded to work on site to work as an IT technician for the IT department on the 28/8/21 which was due to end on 25/8/2022. On

18/8/2022, my laptop stopped working for remainder of secondment. I made everyone on site aware of this and can provide the evidence.

On 19/8/2022 I received confirmation that I had been accepted for a college course and I advised Natasha Sanders(Head of site) and Michael Cullen aware of this.

On 22/8/2022, I recommended a set shift pattern that I believed was mutually beneficial. This was declined immediately without serious consideration by Natasha Sanders. I have a condition known as Generalised Myoclonic Epilepsy and is a long term condition and protected under The Equality Act. The Company were fully aware of my condition. I provide a letter on 15/4/2021 from my Neurologist Doctor Amy Davidson advising that my condition causes significant levels of fatigue, can be worsened by periods of stress and disruption to diary and variation and recommendations that the working patter be regularised. However this was declined without any consideration and therefore was a failure to consider and make all reasonable adjustments.

On 24/8/2022, an email was sent from Natasha Sanders offering a shift pattern however I was unable to access my account and I had made all relevant managers aware of this on18/8/2022.

On 25/8/2022 my secondment ended and on 29/8/2022, I attempted to log into the system however the system would not connect to the internet due to not being synced to work with dongle. As a result I only received approximately one and a half hours training.

On 1/9/2022, I contacted my appointed trainer Kelly Beeken at the start of my shift, 8.00am. She advised me that her home broadband was not working and she told me to reach out to team leader Kate Sapwell . I did this but Kate did not respond. I contacted Kelly Beeken again at 9.00 to advise that I could not reach Kate and Kelly replied "Aw well then at least you reached out". At 12.39

I contacted Kelly again to advise that I had still not received a response from Kate. Kelly then advised that I contact Michael Cullen which I did. At 13.23 pm Michael Cullen created a group chat including myself and other team leaders, Rhys Ihenacho, Stephen Davidge and then 20 minutes later another Trainer Joseph Botwood was added to organise call listening for me. At 15.30pm I began call listening with Mark Thomas until the end of my shift.

On 5/9/22 and 8/9/22 I contacted both trainers Kelly Beeken and Joseph Botwood at 8.00am which was the start of my shift. At 8.32am I messaged the previously mentioned group chat which includes 2 team leaders and the Senior Operations Manager Michael Cullen to ask what my tasks were for today At 8.43 Michael Cullen responded advising to do the training task I had to do.I was just told to work through the training modules. On 8/9/2022 I contacted Michael asking if he would like me to continue working through my training tasks to which he replied yes.

On 12/9/2022 at 9.04am Natasha Sanders resent the previously mentioned email that I had not received regarding my new rota which had not been agreed to. I received a call between 15.14pm and 16.44pm to make me aware that I had been put on a set rota as soon as I had returned to working from home, however this was done without confirming that I had seen it. In the call with Kate Sapwell she said she expects me to be on shift at 17.00 the following day.

On 13/9/2022, I logged in 15 minutes before my shift was due to start to set up for my shift. I received contact from team leader Stephen Davidge who advised a call was being scheduled with Lee Paton. This call turned out to be a hearing and resulted in them confirming I was being suspended from work. However due to the fact that I was still under the IT department and my job role was still IT technician the suspension could not commence until the following morning. I have not received written confirmation of suspension reasons but was advised verbally it was due to performance issues and not being on agreed schedule. I have never been advised of any performance

issues or unauthorised absence. Any issues were absolutely due to the above issues and entirely the fault of the company. I was not on the agreed schedule as I only received confirmation of this on13/9/2022 due to not having access to my account which the company were fully aware of.

There was absolutely no just and reasonable cause to suspend me. I was absolutely appalled and devastated to have been suspended from a Company that I have been a loyal, hardworking employee for 3 years. I therefore resigned as the Company had breached the implied term of trust and confidence. Due to the absolutely appalling way I had been treated since April 2021 I had no faith that the Company would have followed a fair process in dealing with this matter and this would have had a further significant impact on my health and mental health. I would like to refer to the ACAS Code of practice on suspension. Suspension is not a 'Neutral act'. Employers should consider whether they have reasonable and just cause to suspend, see case law ***Agoreyo v London Borough of Lambeth****.*

I subsequently raised a grievance which was investigated by Ryan Arnold. His findings were that I had been unfairly and incorrectly suspended by the Company and that alternative measures should have been explored first. He acknowledged that I have been let down by the business in some circumstances and he offered a sincere apology for any upset and distress caused.

I therefore reiterate that this is a very important part of my claim and would cause me great prejudice and hardship if the claim was refused."

35. The claimant did not produce a copy of the **Agoreyo** judgment referred to by him. Through my own research, I located a copy on the **Bailli** website, where the judgment of the Court of Appeal (by Lord Justice Singh) is reported as **London Borough of Lambeth v Simone Agoreyo [2019] EWCA Civ 322 ; [2019] ICR 1572.**

36. By email to Glasgow ET on 28 July 2023, with copy to the claimant, Mr Byrom, the respondents' solicitor, intimated that the respondents conceded that the matters of both time bar and the claimant's amendment application could be dealt with at the upcoming Preliminary Hearing listed for 14 August 2023, and that the respondents objected to the claimant's amendment application of 3 July, saying further that "***substantive grounds of objection to follow separately".*** The respondent respectfully considered that the matter could be addressed at the upcoming Preliminary Hearing listed for 14 August 2023.

Preliminary Hearing before this Tribunal

37. When the case called before me, on Monday, 14 August 2023, while listed to start on CVP at 10:15am, in fact, the start of proceedings was delayed, and they did not commence with parties present until 10:58am.

38. When this Preliminary Hearing started, the claimant was in attendance, representing himself, while the respondents were legally represented by Mr Byrom. The claimant was accompanied by his mother, Mrs Catherine Milloy, for moral support, but not acting as his representative. While the Tribunal had been previously advised that a Ms Stacey Arch, Senior People Advisor, from WebHelp UK might attend as an observer, she did not do so.

39. On Sunday evening, 13 August 2023, by email sent at 18:17pm, by the claimant to Glasgow ET, and copied to Mr Milligan and Mr Byrom for the respondents, the claimant stated that he had prepared a written submission for discussion, and he enclosed various attachments, being his written submission, along with ET1, ET1 as amended, order of events, letter of April 2021 from his neurology consultant, e-mail from David Hill, and a statement that further communication between himself and management in the lead up to his resignation could be provided.

40. The claimant sent his e-mail and attachments requiring access by Google Drive. These documents could not be accessed by the Tribunal clerk for forwarding on to me for use at this Preliminary Hearing. At the request of the Tribunal clerk, on my instructions, on Monday morning, 14 August 2023, the

claimant forwarded a PDF version of his 5-pagewritten submission by email to Glasgow ET at 09:41am. The CVP clerk sent on a copy to Mr Byrom by email.

41. As a full copy of the claimant's written submission is held on the Tribunal's digital casefile, and I had access to it at this Hearing, and during my private deliberations, it is not necessary to repeat here the 5 pages of its full terms *verbatim*. That is neither appropriate, nor proportionate, as by and large, it was very much a "***copy and paste***" of what he had previously submitted to the Tribunal, on 12 June 2023, and 3 July 2023, as I have reproduced earlier in these Reasons, as his "***timeline of events***", but with some case law authority references added in.

42. I make these comments as an observation, and not as a criticism of the claimant, recognising that he is an unrepresented, party litigant, and he was doing what he thought appropriate to assist the Tribunal in understanding his case. I also place on record that in making his oral submissions, he did so in a calm and measured way, although clearly still aggrieved by what he says was the respondents' discriminatory and unfair treatment of him as an employee.

43. In his written submission, the claimant referred to **Selkent Bus Co Ltd v Moore** (1996) IRLR 661, as well as **De Lacey v Wechseln t/a The Andrew Hill Salon** (UKEAT/0038/20/VP) and **Williams v Governing Body of Alderman Davies Church in Wales Primary School**. While **Selkent** is a familiar authority, well-known to Tribunals and regularly cited, the other 2 cited cases were not known by the Judge, and the claimant had not provided copies of these 2 judgments cited by him.

44. Through my own research, I located on the EAT website, copy of both judgments : **Mr C Williams v The Governing Body of Alderman Davies Church in Wales Primary School** [2020] UKEAT/0108/19/LA, by His Honour Judge Auerbach, and **Lauren De Lacey v Wechseln Limited t/a The Andrew Hill Salon** [2021] UKEAT/0038/20/VP(V), by Mr Justice Cavanagh.

45. As an unrepresented, party litigant, the claimant had prepared his written submission, and stated that he would appreciate if it could be taken into account. I have had regard to it in my private deliberations. His salient points were that he did not believe his discrimination claim was time-barred, and he believed there would be no prejudice to the respondents to allow those claims to proceed, but if the Tribunal decided that those parts of the claim are time-barred, then it should nonetheless allow his claim to proceed, as it would be just and equitable to do so.

46. Further, the claimant submitted that the Tribunal should also let in his constructive dismissal complaint, as he had included it in this original ET claim form, where he named the wrong respondent, and when he submitted the current claim form, he mistakenly did not include constructive unfair dismissal, which he described as being "***a genuine error and it was always my intention to make this claim."*** He described it as "***a very important part of my claim and would cause me great prejudice and hardship if the claim was refused.***

47. In the course of this Preliminary Hearing, by email sent to the CVP clerk at 11:54am, the claimant sent a copy of a letter of 8 April 2021 from his neurology consultant, and this was copied to Mr Byrom too. It related to the matter of his disability status, conceded by the respondents, so it is not material for present purposes.

48. By email sent at 09:15am on Monday morning, 14 August 2023, Mr Byrom sent to Glasgow ET, with copy to the claimant, a respondents' Bundle, and he also attached 3 case law authorities to be used for his submissions, being (1) **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434 (CA); (2) **Wall's Meat Co Ltd v Khan** [1979] ICR 52 (CA), and (3) **Ms G Vaughan v Modality Partnership** [2020] UKEAT/0147/20/VP.

49. The respondents' Bundle, duly indexed, comprised 17 documents, extending to 69 pages, including many of the Tribunal documents (ET1 and ET3, PH notes & orders, claimant's further & better particulars, and Tribunal letters to parties), but also the claimant's resignation email of 13 September 2022,

submitted after an investigatory meeting with Stephen Davidge (Team Leader), claimant's grievance of 19 September 2022 submitted by email to Mr Davidge, claimant's grievance appeal email of 22 November 2022 to Ryan Arnold / Stacey Arch, and his grievance appeal outcome letter of 3 February 2023 from Sam Lee, Head of Sales, further to a grievance appeal hearing held on 8 December 2022. No copy of the grievance hearing outcome letter of 14 November 2022 from Ryan Arnold, Operations Manager (as referred to in the grievance appeal) was included in the Bundle.

50. On my instructions, the CVP clerk emailed Mr Byrom, with copy to the claimant, by email sent at 09:52am on Monday morning, 14 August 2023, to acknowledge receipt of his email to the Tribunal sent at 09:15am with the respondents' Bundle and case law authorities, stating that I had been expecting a written skeleton submission, given his previous email to Glasgow ET on 28 July 2023 saying "***substantive grounds of objection to follow separately".***

51. The clerk's email to him directed that Mr Byrom submit a respondents' written skeleton argument, with detailed grounds of objection, by no later than 10:45am that morning, and it further stated that to allow the claimant, as an unrepresented party litigant, time to read the respondents' Bundle, I had decided that this Hearing would now commence at 11:00am, rather than 10:15am.

52. By email sent at 10:36am on Monday morning, 14 August 2023, Mr Byrom sent to Glasgow ET, with copy to the claimant, his skeleton submissions. For the avoidance of doubt, his covering email stated that the respondents' Bundle contained only papers that the claimant has already had sight of and / or produced himself.

53. At the start of this Preliminary Hearing, the claimant confirmed that he had received Mr Byron's skeleton written argument for the respondents, printed off a copy, and made some notes on it, and he further stated that a friend of his mother had helped him out, rather than the Law Clinic, and although he had had one meeting with the Clinic, after the Tribunal had signposted him to

that resource, in its letter of 14 June 2023, the Clinic had not been able to represent him at this Hearing, hence he was representing himself.

54. A full copy of Mr Byrom's written submission is held on the Tribunal's digital casefile, and I had access to it at this Hearing, and during my private deliberations. While, ordinarily, I would not consider it is necessary to repeat the full terms of a party's written submissions, *verbatim*, only record the salient points, in summary, I have decided, for ease of reference, and to fully record his submissions, that I should reproduce its full terms, which I have included as an **Appendix to this Judgment**. Mr Byrom spoke to the terms of his written submission, referring me, as and when appropriate, to relevant pages in the Bundle.

55. After clarifying the issues before the Tribunal, for determination at this Preliminary Hearing, and before hearing oral submissions from Mr Byrom for the respondents first, then from the claimant, the claimant confirmed to me that he had sight of the respondents' Bundle, and he had already had most of it already.

56. The claimant did not seek to give oral evidence, open to cross-examination by the respondents, and Mr Byrom did not seek that either. Of consent of both parties, the Preliminary Hearing proceeded by way of oral submissions from both parties, there being consensus around the key dates, and joint agreement that copy documents in the Bundle were what they purported to be, both in terms of authorship, date, and content. As such, I have not required to make any findings in fact.

57. As per the claimant's email to Mr Byrom, on 31 May 2023, copy produced at page 69 of the Bundle, the claimant had confirmed, when asked to clarify the dates for his discrimination arising from disability head of complaint, as per paragraph 3 of Judge Wiseman's PH Note from 22 May 2023 (see pages 49 & 50 of the Bundle), the dates regarding his shoulder dislocations as being 6 August 2021 and 11 May 2022.

58. While not included in the Bundle, but not a matter of dispute between the parties, Mr Byrom drew my attention, in his oral submissions, to the fact that

from the claimant's schedule of loss, it was clear he had obtained a temporary role at Tesco between 5 November 2022 and 2 January 2023. He had been able to work over that period.

59. Further, Mr Byrom submitted, the claimant here had no acts pled of a continuing nature beyond the end of his secondment on 25 August 2022, he was aware of his protected characteristics from an early date, he had stated he had sought legal advice, and referred to doing so, and also that the claimant was not saying that any delay on his part in submitting his Tribunal claim was due to the respondents' internal grievance process. He had been able to participate in the grievance process.

60. Not only was what the claimant had pled insufficiently pled in the first place, Mr Byrom stated that all aspects of the discrimination complaints were out of time, the last date complained of was at the end of secondment on 25 August 2022, and the balance of prejudice and hardship fell upon the respondents, if those parts of the claim were allowed to proceed.

61. While Mr Byrom's submissions referred to the claimant having received "***legal advice***", the claimant clarified that he had not instructed a solicitor, and he had not obtained legal advice that way, but he had been helped out by his mother's friend, who was not identified by name, but simply referred to as being an HR practitioner at another, unidentified business, who he described as having helped him with case law, and to draft emails, and that she had helped him to prepare his written submission lodged with the Tribunal on 13 August 2023.

62. While he had spoken with the Law Clinic, the claimant stated that they could not support him due to their staffing issues, and he apologised that his terminology of "***legal advice***" was a problem here. Mr Byrom, in later reply, stated that the respondents had relied upon the actual words used by the claimant in his emails, and took the fact he referred to taking legal advice at face value.

63. While the claimant had, at this Hearing, explained it was not legal advice from a solicitor, Mr Byrom stated that that did not matter, as the claimant had taken

advice from an HR practitioner, but not acted upon it in presenting the present claim to this Tribunal. Further, he added, the claimant had still not provided sufficient explanation as to why his discrimination claims were brought out of time.

64. Parties were jointly agreed that the claimant's employment with the respondents ended on 14 September 2022 when his email resignation, intimated on the evening of 13 September 2022, was processed by the respondents the following morning as a leaver (as per Mr Davidge's email, at page 30 of the Bundle), and that date of 14 September 2022 is the effective date of termination of his employment.

65. Employed by these respondents as a contact centre associate, his start date having been 30 September 2019, the Tribunal understood from the respondents' ET3 response that the claimant was on a seconded role as an IT technician from 27 September 2021 until 25 August 2022, when he returned to his substantive role. The claimant's written submission confirms that his secondment ended on 25 August 2022.

66. The claimant's resignation email of 13 September 2022 (copy produced at page 31 of the Bundle) was addressed "***to whom this may concern***", and very brief in its terms, where it stated : "***I have made the decision to give my resignation. I'd*** (sic) ***to thank you for giving me the opportunities over the years. However, I feel now is the time for me to move on. Thank you once again."***

67. In the claimant's subsequent e-mail of 14 September 2022 (copy produced at page 29 of the Bundle), he stated that : "***Also my position clearly became untenable and resigning was my only option. I feel being suspended is an unfair recollection of events and I will be taking legal advice."***

68. Thereafter, in the claimant's grievance e-mail of 19 September 2022 (copy produced at pages 32 to 35 of the Bundle), he stated that :

" A series of events over an 18 month period culminated in my resignation as my position in the company was no longer tenable. The

final straw was on 13/9/2022 when I was called to a meeting and advised that I was being suspended due to performance issues and not being on agreed schedule. I am absolutely appalled and devastated to have been suspended from a company that I have been a loyal, hard working employee for three years…. As stated this was the final straw due to a series of events that have taken place since 12/4/2021…. I now wish to raise a formal grievance under the company's grievance procedure and if the matter is not rectified to my satisfaction I will be pursuing a claim of constructive dismissal, disability discrimination and failure to make reasonable adjustments under the Equality Act 2010."

69. Finally, in the claimant's grievance appeal email of 22 November 2022 (copy produced at pages 66 and 67 of the Bundle), having received Mr Arnold's emailed letter of 14 November 2022 confirming the outcome of his grievance hearing, the claimant stated in reply that :

"I am extremely disappointed in the findings…. Therefore whilst I am appealing against the outcome I also have absolutely no faith in the appeal process. I have taken legal advice and been advised that I do have a very strong case and I will be proceeding with claims of constructive unfair dismissal, disability discrimination and failure to make a reasonable adjustments. In addition I may also add a claim of discrimination due to perceived sexual orientation for the gay comments directed at me…. I do not wish to be reinstated due to the appalling treatment I have suffered. I will be contacting ACAS to begin the early conciliation process… if this is not resolved to my satisfaction I will proceed to the Employment Tribunal."

70. There was produced to the Tribunal, at page 15 of the Bundle, a copy of the ACAS early conciliation certificate issued on 20 January 2023, following up on the claimant's notification to ACAS on 9 December 2022. As per the copy ET1 claim form, copy produced at pages 3 to 14 of the Bundle, it showed the claim form having been received at the Tribunal on 30 January 2023.

71. In the course of Mr Byrom's oral submissions, he referred to extensions of time being the exception not the rule, and given the historic nature of the alleged discriminatory acts, there would be prejudice to the respondents, as matters were almost 2 years ago, and with multiple changes in the respondents' staff due to the nature of their business, there may be a difficulty in obtaining evidence from witnesses, given it is likely there may be some who will have left the business.

72. I commented, from my pre-read of the Tribunal's digital casefile, and while not included in the Bundle, the claimant's PH agenda had a lengthy list of 11 witnesses, and I asked what precognition of witnesses had taken place to date. In reply, Mr Byrom stated that the claimant's further and better particulars had only recently been intimated, since May 2023, and that the respondents were awaiting further clarity, and the Tribunal's decision on time-bar before undertaking any further investigation, and he recalled that he thought at least one employee was no longer employed by the respondents, but he could not recall which person.

73. We adjourned for a comfort break, at around 12:15pm, and resumed again at 12:35, after I had placed in the chatroom facility on the CVP platform a hyperlink to a case law authority on "***forensic prejudice***" : **Miller and Others v Ministry of Justice** [2016] UKEAT/0003/15/LA by Mrs Justice Elisabeth Laing, about the forensic prejudice which a respondent may suffer if a limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses.

74. On resuming, Mr Byrom stated that he understood Mr David Hill had left the respondents' business, but stated he did not know where he was now, and there had been no contact with him, but due to the passage of time, anybody's memory will not be as good as in or around the time of the alleged incidents. The claimant stated that if his discrimination claims were out of time, then the Tribunal should still let them in, as otherwise, if nothing was done about the bullying behaviours, it would continue, and he stated that there were other vulnerable employees at the respondents.

75. We adjourned for lunch break at 12:50pm, and resumed at 13:58, when the Tribunal heard from the claimant in reply. He stated that he wanted to add in a constructive dismissal head of complaint, and that it had been an error on his part not to tick the appropriate box when presenting the ET1 claim form in the present case.

76. The claimant spoke to the order of events documentation in the Bundle, and invited me to read the time line provided. He apologised that he could not say anything about the case law authorities cited on his behalf, and that he could not address me on the legal principles involved, and he had nothing further to say than what was in his written submission.

77. I explained to him that, as an unrepresented party litigant, I did not expect him to address me on matters of law and that it was my role to apply the relevant law to the facts of the case, but I would allow him to make any reply he felt appropriate to the case law cited by Mr Byron, as part of his professional obligation as a solicitor, and officer of the court, to assist the Tribunal, and address me on what he saw as the relevant law from the respondents' perspective.

78. Likewise, when noting Mr Byrom's objections to the amendment application, the claimant stated that he left the case law authorities cited to Mr Byrom to me, as the Judge, to consider, but, in a nutshell, he wanted me to let in his amendment, and that I should take into account that he had ticked section 8.1 in his other, rejected claim, to say he wanted to complain about dismissal, including constructive dismissal.

79. He added that it was a genuine error on his part, due to him being under stress, and not having representation for the Tribunal. Further, the claimant stated he believed bullying behaviour would happen again to somebody else, and allowing his case to go forward, by extending the time limit if required, would help somebody in the future.

80. It then being 14:21pm, Mr Byrom addressed me on the respondents' opposition to the claimant's amendment application, where he referred me to his written submissions already provided to the Tribunal and noted that the

claimant should have completed a final check on his ET1 form before submitting it to the Tribunal.

81. Mr Byrom submitted that it was only the ET1 claim form in the present case that was relevant for these proceedings, and that the claimant was on notice, when his first claim form was rejected, about the accuracy of what was being submitted, and of the need to get it right. Further, once the claimant had submitted his claim form on 30 January 2023, a copy was sent to him by the Tribunal, and he would have had the opportunity to check it and identify any errors, but nothing came back from him to the Tribunal suggesting there had been any error or omission on his part by failing to include a complaint of constructive dismissal.

82. In his further submission, Mr Byrom stated that the claimant had had multiple opportunities to identify or correct any error at an earlier stage of the claim, but he had failed to do so, and it was his responsibility to ensure all points that he wanted to raise before the Tribunal were raised, and he had not done so in this case.

83. Whilst appreciating that the claimant is an unrepresented party litigant, Mr Byrom there stated that, once the respondents' ET3 response had been accepted, and there was an absence of any reference in that response to any constructive dismissal, the claimant still did not raise it at that time. Indeed, he submitted, it was not until the respondents solicitor addressed the matter on 30 March 2023, with Employment Judge Cowen, that the claimant was then alerted to the fact that there was no constructive dismissal complaint before this Tribunal.

84. Mr Byrom further submitted that there had been no intimation of any amendment after 30 March 2023 until 3 July 2023, and if this had been a new claim, any complaint of constructive dismissal would have been out of time. Given it was reasonably practicable for the claimant to have made an application within time, he added that it would not be appropriate to extend time limits to allow him in by way of an amendment.

85. Also, on the matter of the balance of prejudice, he submitted that the pleadings submitted by the claimant are lengthy in nature, and his amendment is not a simple correction, or a minor addition. It will add to the time and expense for the respondents in answering the amendment, if it is granted by the Tribunal.

86. It then being 14:34pm, the claimant replied to Mr Byrom's submissions. He stated that he had complained of constructive dismissal in his original, rejected claim and that he had made all the points he wanted to make already which should be considered by the Tribunal.

87. In response, Mr Byrom stated that while the claimant says there was an error on his part in not indicating constructive dismissal at section 8.1 of the ET1 claim form in the present case, it should be recalled that no information about the detail of any such claim had been included at section 8.2. The claimant had previously provided a grievance to the respondents with details. As such, submitted Mr Byrom, the claimant could have relied upon those facts.

88. At this stage, I referred to the judicial guidance from the Employment Appeal Tribunal, in particular the then President, Mr Justice Langstaff, in the **Chandhok v Tirkey** judgement, and I placed a hyperlink to that case in the chat room facility on CVP to allow the claimant, and Mr Byrom, to decide if they wished to make any further submissions on the importance of what should be contained in an ET1 claim form.

89. After an adjournment, Mr Byrom referred to paragraph 16 of the **Chandhok** judgement, and that an ET1 claim form was not just to set the ball rolling, and the ET3 response had been prepared on the basis of there being no constructive dismissal claim. While it may have been the claimant’s intention to bring a constructive dismissal claim, Mr Byrom stated that the respondents could only reply to what the claimant had put forward in his ET1 claim form.

90. The claimant, also referring to paragraph 16, stated that Mr Byrom has a law background, which he does not have, and the fact that he had missed certain things should be taken into account, as the Tribunal should take account of the bullying he alleges he received as an employee of the respondents, and

the Tribunal should take that into account as also the fact that he is not legally qualified, and that he has no legal experience, meaning it made things so much more difficult for him. While he knew that he had missed out things, and maybe his claim was out of time, the claimant stated but that should not detract from how he had been treated by the respondents.

91. Having heard both parties' submissions, I noted how the Notice of Preliminary Hearing, issued on 11 August 2023, had referred to the possibility of discussing case management issues, and so I asked Mr Byron what, if anything, he wished to say as regards further procedure before the Tribunal.

92. In reply, Mr Byrom stated that if the amendment were allowed, then the respondents would seek to make a response to address the claimant's further and better particulars in the amendment, and seek a period of 14 days to do so, post receipt of the Tribunal's Judgement from this Hearing.

93. Further, as the claimant is unrepresented, Mr Byrom suggested that it would be in the interests of justice for a further telephone conference call Case Management Preliminary Hearing to be fixed to discuss matters in advance of any Final Hearing. The claimant stated that he had nothing further to say about further procedure at this moment.

Reserved Judgment

94. At the close of proceedings, at 15.23pm on the afternoon of Monday, 14 August 2023, I advised both parties that I was reserving my Judgment, which would be issued in writing, with Reasons, in due course, after private deliberation in chambers.

95. In the Tribunal's follow-up letter of 14 August 2023 sent by the clerk on my instructions, following close of the Preliminary Hearing, it was confirmed that, following parties' written and oral submissions at the Hearing, I had reserved judgment, and that Judgment would in due course be placed on the internet via the Gov.UK website for ET Decisions.

96. In that letter of 14 August 2023, an enquiry was made whether the claimant had any case management application to make to the Tribunal for any Order under **Rule 50 of the Employment Tribunals Rules of Procedure 2013.** Written representations on the claimant's application for an Anonymity Order were thereafter received by the Tribunal dated 16 and 17 August 2023 from the claimant, and respondents' solicitor respectively.

97. The Tribunal's letter of 14 August 2023 had indicated that a deliberation day, in chambers, had been allocated the following Monday, 21 August 2023, for me as the Judge to consider parties' competing submissions, on the two matters of time bar, and the claimant's opposed application to amend the claim, and thereafter I would proceed to draft my Judgment & Reasons, with a view to it being issued within the Tribunal's target date of around a further 4 weeks.

98. Unfortunately, due to a combination of factors, including other judicial business, and annual leave, while, as indicated in the Tribunal's letter of 4 September 2023, I had hoped to be able to proceed to finalising my written Judgment and Reasons, before going on annual leave for week commencing 18 September 2023, I was then unable to further consider the case, and conclude drafting this Judgment until fairly recently, following return from two week's absence from the office on sick leave. I sincerely apologise to both parties for the consequential delay, and for any anxiety that may have been caused to either party by that delay.

99. On 2 November 2023, the respondents' solicitor wrote to the Tribunal seeking an update on issue of the Judgment. An update was provided to both parties by the Tribunal, by letter dated 10 November 2023, stating that the case would be referred to me on my return to the office.

100. Having returned to the office, week commencing 20 November 2023, I was given additional writing time to finalise this Judgment, and deal with the **Rule 50** application. I refused to grant a **Rule 50** Order, for the reasons given in my

written PH Note and Order dated 24 November 2023, as sent to both parties on 27 November 2023.

101. As I stated in that Note and Order, having considered both parties' written representations on the claimant's application, dated 16 August 2023, for an Anonymisation Order pursuant to **Rule 50(3)(b),** the respondents not opposing that application, I decided that it is not necessary in the interests of justice, nor to protect the claimant's Convention rights, to make an Anonymity Order.

102. In this reserved Judgment, I now deal with the substantive matters listed for this Preliminary Hearing, being time-bar, in respect of his discrimination heads of complaint, and the claimant's opposed application to amend his ET1 claim form to include an additional complaint unfair constructive dismissal.

Relevant Law: Time Bar and Amendment

103. While the Tribunal received a detailed written submission from Mr Byrom with some statutory provisions and some case law references cited by him on the respondents' behalf, the Tribunal has nonetheless required to give itself a fuller self-direction on all aspects of the relevant law, on extensions of time in a discrimination complaint, and on how to deal with amendment applications.

104. Mr Byrom's written submissions refer to the relevant statutory provisions, being **Section 123 of the Equality Act 2010** as regards time limits in discrimination claims, and **Section 111 of the Employment Rights Act 1996** as regards time limits for an unfair dismissal complaint.

105. The statutory test for an extension of time in a discrimination complaint is to be found in **Section 123 (1) of the Equality Act 2010** which provides that, subject to **Section 140B** (extension of time limits to facilitate conciliation before initiation of proceedings) proceedings before the Employment Tribunal may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

106. In his disability discrimination claim against the respondents, the 3-month time limit therefore runs from the date of the acts complained of. The key dates and events, in this part of the claimant's case against the respondents, are all in the period of the claimant's secondment as an IT technician, which ended on 25 August 2022.

107. There is no dispute that the claimant did not notify ACAS for the purposes of early conciliation until 9 December 2022, so after the expiry of the 3-month time limit for alleged acts which ended on 25 August 2022. The 3-month time limit had expired, at latest, by 24 November 2022, being 3 months less one day after the end of his secondment on 25 August 2022.

108. An extension of time to facilitate ACAS conciliation for such alleged acts before instituting ET proceedings therefore does not arise. Although time may be extended to allow for ACAS early conciliation, this is only possible where the reference to ACAS takes place during the primary limitation period.

109. I refer in this respect to paragraph 23 in the EAT judgment of Her Honour Judge Eady QC (as she then was, now Mrs Justice Eady, EAT President) in **Mr Ian Pearce v 1) Bank of America Merrill Lynch 2) Bank of America Merrill Lynch International Ltd 3) Merrill Lynch:** [2019] UKEAT/0067/19/ LA.

110. The "***just and equitable***" test applies to a claim for discrimination, if a claimant seeks an extension of time. It is broader than the "***reasonably practicable test***" found in the **Employment Rights Act 1996,** such as applies in a complaint of unfair dismissal. It is for the claimant to satisfy the Tribunal that it is just and equitable to extend the time limit and the Tribunal has wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant. It is the exception rather that the rule – per **Robertson v Bexley Community Centre [2003] IRLR 434.**

111. There is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. These are statutory time limits, which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a

question of either policy or law; it is a question of fact and judgment, to be answered case by case by the Tribunal of first instance which is empowered to answer it: **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327** per Sedley LJ at [31-32].

112. In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley Community Centre (t/a Leisure Link) [2003] IRLR 434** is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule.

113. At paragraph 25, Lord Justice Auld stated:

"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

114. In **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327,** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17:

"…the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and equitable to exercise it in the claimant's favour."

115. The Tribunal may have regard to the checklist in **Section 33 of the Limitation Act 1980** as modified by the EAT in **British Coal Corporation v Keeble and Ors 1997 IRLR 336**, EAT:

- The length and reasons for the delay.
- The extent to which the cogency of the evidence is likely to be affected by the delay.
- The extent to which the party has cooperated with any requests for information.
- The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.
- The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

116. However, in the applying the just and equitable formula, the Court of Appeal held in **Southwark London Borough v Alfolabi 2003 IRLR 220** that while the factors above frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion.

117. This was approved by the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 IRLR 1050** when the Court noted that "***factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).''***

118. In deciding whether or not to extend time, there are a number of factors which a Tribunal has to take into account in the balancing exercise that it requires to carry out. I have had particular regard to the Court of Appeal judgment in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.**

119. I have taken account of Lord Justice Underhill's' judgment, at paragraph 37 in **Adedeji,** where the learned Lord Justice (himself a former President of the EAT) warned against the mechanical working through of a checklist, and instead advised that:

"***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… the length of, and the reasons for, the delay".***

120. The Tribunal must therefore consider:

- The length and reasons for the delay;
- The extent to which the cogency of the evidence is likely to be affected by the delay; and
- The prejudice that each party would suffer as a result of the decision reached.

121. I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation (Scotland) Act 1973**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19A** simply stating:

"***19A Power of court to override time-limits etc.***

(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."

122. **Section 123 of the Equality Act 2010** does not make reference to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

123. As the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

"…. There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"

124. In the context of discrimination cases, the importance of recalling not only what is done but the thought processes involved make it all the more likely that memory fade will have an impact on the cogency of the evidence: **Redhead v London Borough of Hounslow UKEAT/0086/13/LA** per Simler J at paragraph 70.

125. In writing up this Judgment, I have noted, from the copy of the grievance appeal hearing outcome letter, dated 3 February 2023, from Sam Lee, Head of Sales, copy produced to the Tribunal at pages 36 to 38 of the Bundle, that she obtained witness statements from various people, including David Hill, as part of her appeal investigations, after the grievance appeal hearing held by her with the claimant on 8 December 2022. Such witness statements were not produced in the Bundle provided to the Tribunal.

126. The claimant's amendment application, and the respondents' objections, both make reference to the well-known **Selkent** test for considering amendment applications, but I have given myself a fuller self-direction on the relevant law by considering various case law authorities, which I now set out in the following paragraphs of this section of this Judgment.

127. The **Williams**, and **De Lacey**, EAT judgments cited by the claimant, in his written submission intimated on 13 August 2023, relate to facts and circumstances wholly different from the facts and circumstances of the present case, and I found them of no practical assistance to me in deciding

the present case. At this Preliminary Hearing, I heard no evidence, and so I have made no findings in fact, as to whether the incidents which the claimant seeks to rely upon to make up the sequence of events which resulted in his "last straw" constructive dismissal are acts of discrimination, and, if so whether any constructive dismissal itself might be discriminatory.

128. Similarly, with the **Agoreyo** judgment from the Court of Appeal, referred to in the claimant's amendment application of 3 July 2023. Its facts and circumstances are wholly different from the facts and circumstances of the present case, and I found that judgment of no practical assistance to me in deciding the present case. At this Preliminary Hearing, I heard no evidence, and so I have made no findings in fact, as to whether the claimant's suspension on 13 September 2022 was a neutral act, or a breach of the implied term of mutual trust and confidence.

129. In terms of **Rule 29 of the Employment Tribunals Rules of Procedure 2013**, the Tribunal may at any stage in the proceedings, on its own initiative or on the application of a party, make a Case Management Order. This includes an Order that a party is allowed to amend its particulars of claim or response. The usual starting point for consideration of any application to amend is the guidance given by the Employment Appeal Tribunal in the seminal case of **Selkent.**

130. In many instances where there is an application to amend a claim form, it is done because a particular head of claim has not been fully explored or clarified in the initial claim. **Harvey on Industrial Relations and Employment Law** ("***Harvey"***) at section P1, paragraph 311.03 distinguishes between three categories of amendments:

    (1) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;

    (2) amendments which add or substitute a new cause of action but one which is linked to, arises out of the same facts as, the original claim; and

(3) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

131. In **Transport and General Workers Union v Safeway Stores Ltd UKEAT/009/07,** Mr Justice Underhill, then President of the Employment Appeal Tribunal, noted that although **Rule 10(2) (q) of the then Employment Tribunal Rules of Procedure 2004** gave Tribunals a general discretion to allow the amendment of a claim form, it might be thought to be wrong in principle for that discretion to be used so as to allow a claimant to, in effect, get round any statutory limitation period. He went on to say that the position on the authorities however is that an Employment Tribunal has discretion in any case to allow an amendment which introduces a new claim out of time.

132. In a detailed review of the case law, Mr Justice Underhill considered the appropriate conditions for allowing an amendment. In particular, he referred to the guidance of Mr Justice Mummery (as he then was) in **Selkent Bus Company Ltd v Moore [1996] IRLR 661** where he set out some guidance. That guidance included the following points: -

"(2) *There is no express obligation in the Industrial Tribunal Rules of Procedure requiring a Tribunal (or the Chairman of a Tribunal) to seek or consider written or oral representations from each side before deciding whether to grant or refuse an application for leave to amend. It is, however, common ground for the discretion to grant leave is a judicial discretion to be exercised in a judicial manner, i.e. in a manner which satisfies the requirements of relevance, reason, justice and fairness and end in all judicial discretions.*

……

(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) ***The nature of the amendment****. Applications to amend are of many different kinds, ranging,* on *the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of a minor matter or is a substantial alteration pleading a new cause of action.*

(b) ***The applicability of time limits.*** *If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal, Section 67 of the 1978 Act.*

(c) ***The timing and manner of the application.*** *An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments and additional costs, particularly if they are*

unlikely to be recovered by the successful party, are relevant in reaching a decision."

133. In that **Safeway** judgment, Mr Justice Underhill also referred to the judgment of the Court of Appeal in England and Wales in **Ali v Office of National Statistics [2005] IRLR 201** where Lord Justice Waller referred to Mr Justice Mummery's guidance in **Selkent**, pointing out that, in some cases, the delay in bringing the amendment where the facts had been known for many months made it unjust to do so. He continued: ***"There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time."***

134. Further, Mr Justice Underhill also considered the relevant extract from ***Harvey*** in relation to the threefold categorisation of proposed amendments. He referred to the fact that the discussion in ***Harvey*** points out that there is no difficulty about time-limits as regards categories 1 and 2, since one does not involve any new cause of action and two, while it may formally involve a new claim, is in effect no more than "***putting a new label on facts already pleaded".*** He went on to clarify that the decision in **Selkent** is inconsistent with the proposition that in all cases which cannot be described as "***relabelling"*** an out of time amendment must automatically be refused; even in such cases he stated that the Tribunal retains a discretion.

135. A further authority that is of assistance to a Tribunal considering an amendment application is **Ahuja v Inghams [2002] EWCA Civ 192.** At paragraph 43 of the Court of Appeal's judgment in **Ahuja,** Lord Justice Mummery stated that: ***"the tribunal has a very wide and flexible jurisdiction to do justice in the case, as appears from [old] Rule 11 of their regulations and they should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently than was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it***

rather than allow what might otherwise be a good claim to be defeated by the requirements that exist - for good reasons - for people to make clear what it is they are complaining about, so that the respondents know how to respond to it with both evidence and argument."

136. Further, there is the Judgment of the Employment Appeal Tribunal in **Chandhok –v- Tirkey [2015] IRLR 195**, and in particular at paragraphs 16 to 18 of Mr Justice Langstaff's Judgment in **Chandhok**, where the learned EAT President referred to the importance of the ET1 claim form setting out the essential case for a claimant, as follows:

16. ..The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.

17. I readily accept that Tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before Employment Tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become

unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute.

18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

137. Also, of assistance to a Tribunal considering any amendment, there is the Court of Appeal's Judgment in **Abercrombie & Others –v- Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953**, and in particular, the Judgment of Lord Justice Underhill, at paragraphs 42 to 57. As Lord Justice Underhill pointed out in **Abercrombie,** at paragraph 47, the

Selkent factors are neither intended to be exhaustive nor should they be approached in a tick-box fashion. There is nothing in the Rules or the case-law to say that an amendment to substitute a new cause of action is impermissible.

138. Further, at paragraphs 48 and 49 of the **Abercrombie** judgment, Lord Justice Underhill went to say as follows:

48. Consistently with that way of putting it, the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put a different legal label on facts which are already pleaded permission will normally be granted: see the discussion in Harvey on Industrial Relations and Employment Law para. 312.01-03. We were referred by way of example to my decision in Transport and General Workers Union v Safeway Stores Ltd (UKEAT/0092/07), in which the claimants were permitted to add a claim by a trade union for breach of the collective consultation obligations under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 to what had been pleaded only as a claim for unfair dismissal by individual employees. (That case in fact probably went beyond "mere re-labelling" – as do others which are indeed more authoritative examples, such as British Printing Corporation (North) Ltd v Kelly (above), where this Court permitted an amendment to substitute a claim for unfair dismissal for a claim initially pleaded as a claim for redundancy payments.)

49. It is hard to conceive a purer example of "mere re-labelling" than the present case. Not only the facts but the legal basis of the claim are identical as between the original pleading and the amendment: the only difference is, as I have already said, the use of the section 34 gateway

rather than that under section 23. In my view this factor should have weighed very heavily in favour of permission to amend being granted. As the present case only too clearly illustrates, some areas of employment law can, however regrettably, involve real complication, both procedural and substantial; and even the most wary can on occasion stumble into a legal bear-trap. Where an amendment would enable a party to get out of the trap and enable the real issues between the parties to be determined, I would expect permission only to be refused for weighty reasons – most obviously that the amendment would for some particular reason cause unfair prejudice to the other party. There is no question of that in the present case.

139. As is evident from the observations of Mr Justice Mummery, as he then was, in **Selkent,** in the case of the exercise of discretion for applications to amend, a Tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it.

140. Further, despite it being unreported, there is also Lady Smith's EAT judgment in the Scottish appeal of **Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07.** It is detailed in chapter 8 of the **IDS Handbook on Employment Tribunal Practice and Procedure**, at section **8.50.** At paragraph 20 of her judgment, Lady Smith, as well as noting the **Selkent** principles, stated as follows:

"When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing. That involves it considering at least the nature and terms of the

amendment proposed, the applicability of any time limits and the timing and the manner of the application. The latter will involve it considering the reason why the application is made at the stage that it is made and why it was not made earlier. It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier."

141. I have also taken account of the Court of Appeal judgment in **Kuznetsov v The Royal Bank of Scotland Plc [2017] EWCA Civ 43**, at paras 19 & 20, where Lord Justice Elias, himself a former President of the EAT, stated as follows:

19. First, employment tribunals have a broad discretion in the exercise of case management powers and the appellate courts will not interfere unless there is an error of law or the decision is perverse: Carter v Credit Change Ltd [1980] 1 All ER 252 (CA). Errors of law include failing to take into account relevant considerations and having regard to irrelevant ones.

20. Second, in the case of the exercise of discretion for applications to amend, a tribunal should take into account all the circumstances and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it: see the observations of Mummery J, as he then was, in Selkent Bus Co. v Moore [1996] ICR 836 (EAT). Factors to be taken into consideration include the nature of the amendment, so that for example an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts; the question whether the claim is out of time and if so, whether

time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it. As Underhill LJ pointed out in Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2014] ICR 209 at para.47, these are neither intended to be exhaustive nor should they be approached in a tick-box fashion."

142. Further, there is the judgment of the Employment Appeal Tribunal in **Mrs G Vaughan v Modality Partnership [2020] UKEAT/0147/20, [2021] ICR 535,** by His Honour Judge James Tayler, who stated as follows, at paragraphs 21 to 28:

*"21. Underhill LJ focused on the practical consequences of allowing an amendment. Such a practical approach should underlie the entire balancing exercise. Representatives would be well advised to start by considering, possibly putting the **Selkent** factors to one side for a moment, what will be the real practical consequences of allowing or refusing the amendment. If the application to amend is refused how severe will the consequences be, in terms of the prospects of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions. It requires representatives to take instructions, where possible, about matters such as whether witnesses remember the events and/or have records relevant to the matters raised in the proposed amendment. Representatives have a duty to advance arguments about prejudice on the basis instructions rather than supposition. They should not allege prejudice that does not really exist. It will often be appropriate to consent to an amendment that causes no real prejudice. This will save time and money and allow the parties and tribunal to get on with the job of determining the claim.*

22. Refusal of an amendment will self-evidently always cause some perceived prejudice to the person applying to amend. They will have been refused permission to do something that they wanted to do, presumably for what they thought was a good reason. Submissions in favour of an application to amend should not rely only on the fact that

a refusal will mean that the applying party does not get what they want; the real question is will they be prevented from getting what they need. This requires an explanation of why the amendment is of practical importance because, for example, it is necessary to advance an important part of a claim or defence. This is not a risk-free exercise as it potentially exposes a weakness in a claim or defence that might be exploited if the application is refused. That is why it is always much better to get pleadings right in the first place, rather than having to seek a discretionary amendment later.

*23. As every employment lawyer knows the **Selkent** factors are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. The examples were given to assist in conducting the fundamental balancing exercise. They are not the only factors that may be relevant.*

*24. It is also important to consider the **Selkent** factors in the context of the balance of justice. For example:*

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2 An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3 A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key.

26. Rather like Charles Darwin who, when pondering matrimony, wrote out the pros and cons, there is something to be said for a list. It may be helpful, metaphorically at least, to note any injustice that will be caused by allowing the amendment in one column and by refusing it in the other. A balancing exercise always requires express consideration of both sides of the ledger, both quantitively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.

27. Where the prejudice of allowing an amendment is additional expense, consideration should generally be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party will be able to meet it.

28. An amendment that would have been avoided had more care been taken when the claim or response was pleaded is an annoyance, unnecessarily taking up limited tribunal time and resulting in additional cost; but while maintenance of discipline in tribunal proceedings and avoiding unnecessary expense are relevant considerations, the key factor remains the balance of justice."

143. Mr Byrom, in his written submissions, made a passing reference to some parts of the EAT judgment in **Vaughan**. In addition to **Vaughan**, I have also had regard to the further guidance to Tribunals considering applications to amend, given by His Honour Judge James Tayler in **Amjid Chaudhry v Cerberus Service Security and Monitoring Services Limited [2022] EAT 172.**

144. At his paragraphs 24 and 25, Judge Tayler in **Chaudhry** considers the possible decisions that can be made when considering an amendment application, and he cites from an earlier EAT judgment by Lady Wise in 2016, in **Amey,** as follows:

"24. When considering each amendment there are a number of possible decisions:

24.1. the whole application may be allowed

24.2. the application may be allowed in part

24.3. the whole application could be refused

24.4. the party seeking the amendment may be required to set out the proposed amendment in writing and / or clarify the proposed amendment before the application is determined

25. The options for each proposed amendment are allow, refuse or clarify. The last of those possibilities was considered by Lady Wise in ***Amey Services Ltd and another v Aldridge and others UKEATS/0007/16/JW*** *[23]*

"I do not consider that the only option available to the judge was to refuse the amendments. Again, if there is known to be a problem with particularisation, as there was here, an opportunity could be given to remedy that before any decision is reached and a determination of the proposal to amend deferred. There is a clear inconsistency in allowing amendments at the same time as requiring them to be further particularised, but where outright refusal of the amendments would lead to undue hardship I see no reason in principle why adjustment of the proposed terms of the amendments cannot take place prior to the determination being made. The focus of the arguments might then be on whether and in what time frame such refinement of the proposed amendments should be allowed but those arguments would take place before the single stage decision on the granting or refusal of amendment itself."

145. So too I have considered the "***2 step approach***" set out by Judge Tayler, at paragraphs 37 and 38 of his judgment, in **Chaudhry**, as follows:

37. The appellate courts have repeatedly warned against using the factors referred to in ***Selkent*** *as a checklist, but they often are, possibly because amendment applications are regularly considered as part of lengthy case management hearings under considerable time*

pressure, and having an analytical structure is thought to be beneficial. In case some judges might find a checklist helpful when considering applications to amend a claim form, one could do worse than: 1) ***identify the amendment or amendments sought,*** *which should be in writing 2) in express terms,* ***balance the injustice and / or hardship of allowing or refusing the amendment or amendments****, taking account of all the relevant factors, including, to the extent appropriate, those referred to in* ***Selkent****.*

38. There is, of course, no requirement that such a check list be used. Some may feel that it is stating the obvious; but it might be a helpful reminder when dealing with an application to amend as part of a busy preliminary hearing for case management."

Discussion and Deliberation

146. In considering, in the present case, whether or not it is appropriate to allow the claimant an extension of time for his disability discrimination heads of complaint, and whether or not to allow his opposed application to amend his ET1 claim form to add in a complaint for unfair, constructive dismissal, I have had regard to both parties' written submissions, as also their oral submissions at this Preliminary Hearing.

Time Bar

147. Dealing first with the time-bar point, the claimant's effective date of termination of employment was 14 September 2022. As such, the normal three-month time limit for presentation of an Employment Tribunal claim alleging unfair dismissal ended on 13 December 2022, subject always to the extension of time afforded by virtue of ACAS early conciliation.

148. Notification was made to ACAS on 9 December 2022, and the ACAS certificate was issued to the claimant on 20 January 2023, thus giving him a new deadline date of 20 February 2023 by which to present his Tribunal claim.

149. The ET1 claim form presented on 30 January 2023 in the present case, and the earlier form presented on 26 January 2023 in the rejected case, were both submitted within time as regards any complaint of unfair dismissal about termination of employment on 14 September 2022.

150. The original claim included such a complaint, although unparticularised, but it was rejected, while the present claim did not include such a complaint. On reconsideration of that rejection, it was refused by Employment Judge MacLean as the claimant did not submit an amended claim, correcting the name of the respondents, but he chose instead to present a new claim form, which did not indicate unfair dismissal as a head of claim.

151. All alleged discriminatory acts complained of by the claimant are prior to the end of his secondment on 25 August 2022. The last act complained of relates to reasonable adjustments that he says he requested on 22 / 24 August 2022. His ET1 claim form contains no acts beyond 25 August 2022.

152. The claimant did not complain that his resignation, intimated on 13 September 2022, from the respondents' employment was itself a discriminatory act. Instead, by his amendment application, he seeks to be allowed to argue that his resignation was a constructive dismissal, and to complain of unfair dismissal.

153. From the copy of the claimant's grievance email of 19 September 2022, copy produced in the Bundle at pages 32 to 35, submitted to Mr Davidge, the claimant refers to his resignation on 13 September 2022, and a series of events over an 18-month period culminating in his resignation. Specifically, he says that if the grievance is not rectified to his satisfaction, he will be pursuing a claim of constructive dismissal, disability discrimination and failure to make reasonable adjustments. From the terms of that grievance e-mail, it is clear that the claimant knew of his right to complain of constructive dismissal as of 19 September 2022.

154. Further, in submitting his grievance appeal to the respondents, on 22 November 2022, as per the copy email produced at pages 66 and 67 of the Bundle, the claimant refers to having taken legal advice, being advised that he has a very strong case, and that he will be proceeding with claims of constructive unfair dismissal, disability discrimination and failure to make reasonable adjustments, and in addition, he may also add a claim of discrimination due to perceived sexual orientation for the gay comments directed at him. Again, if not resolved to his satisfaction, after contacting ACAS to begin the early conciliation process, the claimant states that he will proceed to the Employment Tribunal.

155. While I am satisfied that the claimant knew of his right to complain to an Employment Tribunal, the position is less clear about whether or not he knew about time limits for bringing a Tribunal claim. However, given he refers to ACAS early conciliation, I infer that he must have made some enquiry, or received some advice, about applicable time limits. Such information is, in any event, readily available on the internet from a variety of sources that can be accessed by members of the public.

156. The discriminatory acts that his further and better particulars detail span a long period, covering 18 months up to end of his secondment. I am not satisfied that the claimant has provided sufficient explanation as to why his discrimination claims are brought out of time.

157. He refers to what happened with his first, rejected claim, presented on 26 January 2023, and submits that it was an error on his part not to include unfair dismissal in the claim presented on 30 January 2023, the same day as his original claim was rejected by the legal officer at the Employment Tribunal. He prays in aid that he is an unrepresented, party litigant, but acknowledges that he was in receipt of advice from his mother's HR friend.

158. The fact that the claimant is an unrepresented, party litigant is a factor to take into account, but it does not allow him to depart from the normal standards expected of any litigant before the Tribunal. It is for a claimant to properly state

their case, by giving fair notice, and not have the Tribunal or respondents second guess what it might be.

159. In considering whether or not an extension of time should be granted, I have considered the various **Keeble** factors, as follows:

- The length and reasons for the delay : The alleged discriminatory acts complained of range in date between April 2021 and August 2022, as per the claimant's further and better particulars intimated on 26 April 2023.

- The extent to which the cogency of the evidence is likely to be affected by the delay : the acts complained of are historic in nature, and given the passage of time, witness recollection is likely to be affected, in circumstances where the acts complained of were not raised by the claimant at the time, whether by grievance procedure, or otherwise, with the respondents. As I have not been advised what is in the witness statements taken by Sam Lee, as part of her grievance appeal investigations, after the grievance appeal held on 8 December 2022, I cannot assess what forensic prejudice may arise for the respondents.

- The extent to which the party has cooperated with any requests for information : not applicable, on the information available to the Tribunal.

- The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action : the claimant delayed in bringing the matters now complained of to the respondents' attention, at the relevant time, and only particularising them in his further and better particulars. Even in his ET1 claim form, they were not particularised until after Judge Cowen's order of 30 March 2023.

- The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action : the claimant's correspondence to the respondents of 19 September and 22 November 2022 refers to going to ACAS for early conciliation, and him having taken advice.

160. In all the circumstances, I have decided that all discrimination allegations against the respondents, relating to alleged acts of the respondents in the period of the claimant's secondment as an IT technician, which ended on 25 August 2022, are time-barred, in terms of **Section 123 of the Equality Act 2010.**

161. Indeed, it seems to me that the claimant himself recognises that those allegations are time-barred. In his e-mail of 12 June 2023 to the Tribunal, reproduced earlier at paragraph 21 of these Reasons, he stated as follows: ***"The Discrimination and continual Harassment and Bullying by David Hill was a continuing Act and extended over a long period of time and until August 2022, just prior to my resignation. "***

162. Further, I do not consider it is just and equitable to allow an extension of time to the claimant to permit him to proceed with those heads of complaint against the respondents, alleging discrimination arising from disability, failure to make reasonable adjustments, and harassment. As such, all those discrimination allegations against the respondents are all dismissed as being outwith the Tribunal's jurisdiction.

163. The objections stated by Mr Byrom, on behalf of the respondents, are in my view well-founded, and that is why the extension of time sought by the claimant is refused by this Tribunal.

Amendment

164. Turning then to look at the opposed amendment application, as His Honour Judge Tayler says, at paragraph 15 of the EAT judgment in **Vaughan**: "***No***

one factor is likely to be decisive. The balance of justice is always key". At paragraph 29 of his subsequent EAT judgment in **Chaudhry**, he again emphasises "***the paramount importance of balancing the injustice and / or hardship of allowing or refusing the amendment****.";* and at paragraph 30, that *"**Balancing requires consideration of both sides of the scales of justice."***

165. In considering the opposed amendment application, I have taken into account not just the interests of the claimant, but also those of the respondents. So too have I considered hardship and injustice to both parties in allowing or refusing the amendment, as also the wider interests of justice in terms of the Tribunal's overriding objective to deal with the case fairly and justly under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**.

166. At my in chambers private deliberation, I have considered the various points made on behalf of the claimant and respondents most carefully. In particular, I have considered the 3 specific relevant factors that both parties have addressed in their respective submissions to the Tribunal, and I deal with each of them in turn.

Nature of the Amendment

167. I agree with Mr Byrom's submission that the claimant seeks to add an entirely new head of claim and introduce new pleadings and that this is not simply a minor amendment to existing pleadings or even a relabelling of facts.

Applicability of Time Limits

168. **Section 111 of the Employment Rights Act 1996** refers. Having considered matters, in light of both parties' submissions, it is clear to me that there was no reason at all why the ET1 claim form presented on 30 January 2023 could not have ticked the box at section 8.1 to say that the claimant was complaining of unfair dismissal, including constructive dismissal.

169. The responsibility for what the claimant now says was an error on his part must lie with the claimant . He had all the relevant information and knowledge as at that date, having taken advice. Only a few days earlier, he had ticked the correct box in his ET1 claim form presented on 26 January 2023. In all the circumstances, I am not satisfied that it was not reasonably practicable for the claimant to present the complaint of unfair dismissal on 30 January 2023 in his ET1 claim form in the present case.

170. As such, I find and declare that it was reasonably practicable for the claimant to have included such a head of complaint, alleging unfair constructive dismissal, in his ET1 claim form in the present case, presented on 30 January 2023, as he had included such a head of complaint, albeit unparticularised, in his earlier Tribunal claim (case number **8000035/2023**) presented on 26, and rejected by the Tribunal on 30, January 2023.

171. Further, and, in any event, even if I had decided that it was not reasonably practicable for him to do so, the further period until 3 July 2023 to make the present application to amend to include such a head of complaint was not reasonable in all the circumstances.

172. The claimant had in his possession the ACAS certificate issued on 20 January 2023 and so he knew from that certificate the date by which his Tribunal claim had to be presented, by the extended deadline date of 20 February 2023.

173. He had all the relevant information and knowledge as of 26 January 2023, having taken advice, and he had included such a head of complaint, alleging unfair constructive dismissal, in his ET1 claim form presented on 26 January 2023.

<u>Timing & Manner of the Application</u>

174. The claimant first mentioned constructive dismissal at the first Case Management Preliminary Hearing before Employment Judge Cowen on 30 March 2023, and he had provided further specification by the time of the

second Case Management Preliminary Hearing before Employment Judge Wiseman on 22 May 2023.

175. The claimant had set forth details in his further and better particulars produced in the original "***Order of events***" document intimated on 26 April 2023, and updated in the further such titled document intimated on 16 June 2023. It will be recalled, of course, that that email was further to his email of 12 June 2023 seeking leave to be allowed to add in an additional head of complaint of constructive dismissal, and then followed up by his subsequent email of 3 July 2023 providing the amended wording to be inserted at section 8.2 of the ET1 claim form in the present case.

176. As an amendment can be sought at any stage of proceedings, the fact that the claimant has not previously formally indicated that he was making such a further head of complaint is not, of itself, a barrier for all time coming. It is not disputed that the new head of complaint is late. The length of the delay is a relevant, but not a determining, factor.

177. It is clear that the proposed amendment is significant in nature, not minor, and it constitutes a new cause of action, and not a new label on already pleaded facts. There are real and practical consequences of allowing the amendment sought. To allow it in, there will need to be further response by the respondents, after further investigation. That inevitably means further time and expense, and delay before any Final Hearing. There is no good reason why the complaint sought to be advanced now could not have been advanced at a much earlier stage.

178. The obvious prejudice to the claimant, if this new head of complaint is not allowed in, by granting his amendment application, is that his further allegations against the respondents will be stopped in their tracks, and there will be no evidentiary Hearing on those allegations. He is, however, very much the author of his own situation.

179. I have, of course, taken into account the fact that the claimant has throughout been acting as an unrepresented, party litigant, with no previous experience of this Tribunal, its practices and procedures, and how to bring a claim against

the respondents. He has however taken some advice from the HR practitioner who is his mother's friend. The precise nature and extent of that advice is not known to the Tribunal – I know only what the claimant informed me of at this Preliminary Hearing.

180. As regards the manner and timing of this application to amend, I do share the respondents' concern that this application has come, on one view, very late in proceedings, being formally intimated on 3 July 2023, and, looked at from that perspective, it can be seen why the respondents consider that the claimant has perhaps not dealt with matters expeditiously, in all the circumstances, and why it appears that there has been unexplained, undue delay in seeking amendment.

181. As the first ET1 claim form presented on 26 January 2023 was rejected, it was not served on the respondent. They were thus unaware of it until I raised it as part of the Tribunal's correspondence with parties on 14 June 2023.

182. Further, it was in the Tribunal's subsequent letter of 27 June 2023 that the claimant was informed as per Lady Smith's EAT judgment, in **Ladbrokes Racing Limited** v **Traynor** [2007] UKEATS/0067/07, that precise wording was required for his proposed amendment, and, until such time as the claimant clarified what he sought to add to his existing claim form, there was no proposed amendment for the Tribunal or respondents to consider.

183. In all the circumstances, in relation to the claimant's opposed application of 3 July 2023 to amend the ET1 claim form presented on 30 January 2023, by adding additional text to include an additional head of complaint of constructive dismissal in terms of **Sections 94 to 98 of the Employment Rights Act 1996,** relating to his resignation from the respondents' employment with effect from 14 September 2022, said to be by reason of a final straw of an unfair and unjust suspension on 13 September 2022, I have decided to refuse to allow the amendment sought by the claimant in his amendment application. It is not in the interests of justice to allow that amendment.

184. The objections to the proposed amendment stated by Mr Byrom, on behalf of the respondents, are in my view well-founded, and that is why the amendment sought by the claimant is refused by this Tribunal.

Further Procedure

185. In these circumstances, the claimant's whole claim against the respondents is dismissed in its entirety, under exception of the outstanding complaint, in terms of **Regulation 30 of the Working Time Regulations 1998**, of the respondents' alleged failure to pay him holiday pay accrued but untaken as at the effective date of termination of his employment on 14 September 2022.

186. Accordingly, I have ordered that the claimant's claim for holiday pay, as the only remaining head of complaint left before the Tribunal, shall proceed to a one-hour Final Hearing before any Employment Judge sitting alone at Glasgow Tribunal Centre, and to be conducted remotely using the Cloud Video Platform (CVP), on a date to be hereinafter assigned by the Tribunal, in the proposed listing period of **January, February, and March 2024**.

187. Further, I have directed the clerk to the Tribunal to delay issue of Notices of Final Hearing by CVP from the Tribunal to allow both parties to discuss further procedure within no more than 14 days from date of issue of this reserved Judgment, and for the respondents' solicitor to update the Tribunal within that 14-day period.

188. I have done so because there remains outstanding the claimant's claim for holiday pay. In his ET1 claim form, section 8.1, presented on 30 January 2023, he ticked this as being part of his claim, and owed to him, but he did not then quantify it.

189. The claimant later quantified it, in section 3.3 of his PH Agenda of 28 February 2023 as being **£1144.80** for 15 days holiday pay. Thereafter, in his schedule of loss, intimated on 11 April 2023, the claimant stated, at item 4.2, that he sought **£426.91** for 2022 holiday entitlement stated to be 44.75 hours.

190. Subsequently, in his "***order of events***" documentation, intimated on 26 April 2023, and again on 3 May 2023, the claimant stated as follows:

"Holiday pay. I have recognised that I have made an error with the amount, but I am still owed 44.75 hours x £9.54 = £426.91. I had 240 hours for the whole year and of this I had accrued 169 hours to date of leaving. I used 124.25, leaving a remaining total of 44. 75 hours."

191. The parties and their representatives shall, as per **Rule 2**, bear in mind their duty to assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

192. Rather than list the holiday pay head of claim for a Final Hearing, I have decided that as the respondents' ET3 simply denied that the claimant had been subject to any unlawful deduction from wages in relation to holiday pay, and their correspondence with the Tribunal, after intimation of his schedule of loss, has not responded to the amount now claimed at **£426.91**, Mr Byrom should now take instructions from his clients.

193. In particular, Mr Byrom should clarify, within 14 days of issue of this reserved Judgment, whether this matter of unpaid holiday pay is still contested and, if not, whether it can be settled extra-judicially between the parties, or whether it requires to be listed for a short one hour Final Hearing by CVP on a date in spring 2024.

194. Should parties have any unavailable dates within the proposed listing period, then as date listing letters will not be issued, given that what is left is now suitable for a fast track short Final Hearing, they should advise the Tribunal within that 14-day period.

G. Ian McPherson

_____

Employment Judge

29 November 2023

_____

Date of Judgment

Date sent to parties _____

APPENDIX:

The following is a full copy of the respondents' written submissions provided to the Tribunal at this Preliminary Hearing.

Time limits

Section 123 Equality Act 2010

"(1) Proceedings on a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable."

All acts complained of occurred during the secondment, so before 25 August 2022 when it ended.

Contacted Acas on 9 December 2022, so 3 months before less one day is 10 September 2022.

The acts complained of are out of time.

No continuing acts beyond 25 August 2022 are pled; the last event relied on is the decision on reasonable adjustments made on 24 August 2022.

Claimant knew of his rights as of 19 September 2022. He had received legal advice by 22 November 2022. He chose to delay.

Robertson v Bexley, page 1, 722

As per in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, when Employment Tribunals consider exercising the discretion under section 123(1)(b) the Equality Act 2010, *"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule".*

The claimant has not provided sufficient explanation as to why his discrimination claims are brought out of time.

Should the **[sic]** with respect to the above, then Respondent will be prejudiced in terms of having to investigate matters that fall out-with the initial enquiries conducted for the preparation of the ET3 response. The majority of these events are historic in nature, brin(g)ing **(sic)** into question the reliability of witness evidence due to the passage of time.

[**Note by Tribunal** : this is reproduced from the original. Read in context, and consistent with a later statement on page 3 of Mr Byrom's submission, the Judge has read this opening sentence as likewise intended to say "*Should the amendment application be granted with respect to the above…."*]

Furthermore, the Respondent will be burdened by the costs and time required to obtain addition documentary evidence and witness testimony, as well as the additional preparations for and conducting defences of the same at the final hearing.

With regards to any prejudice to the Claimant, it is of note that the ET1 already contains complaints for which the Claimant is able to advance based upon the pleadings in the ET1, notably holiday pay. The Claimant will have an opportunity to lead evidence on these matters and seek an award from the Tribunal; he will not be prevented from doing so should this application be refused. On this basis, the balance of hardship falls upon the Respondent should the Claimant's amendment application be granted.

Respectfully submit there is insufficient evidence for the Tribunal to exercise its direction **(sic)** in this instance.

[**Note by Tribunal** : this is reproduced from the original. Read in context, the Judge has read the word "***direction"*** in this sentence as meant to say "***discretion"*** , consistent with a later statement on page 3 of Mr Byrom's submission.]

Amendment application

With respect to addressing the ground for objection to the application itself, further to the factors outlined in Selkent Bus Co Limited v Moore [1996] ICR 836, EAT I note the following:

The Nature of the Amendment

The Claimant seeks to an entirely new head of claim and introduce new pleadings. This is not simply a minor amendment to existing pleadings or eve(n) relabelling of facts.

Applicability of Time Limits

Section 111(2) Employment Rights Act 1996

"*An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—*

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

The amendment application was made on 3 July 2023, over 4 months past the last point a claim could be submitted in time (20 February 2023). Had a new claim have been submitted it would be out of time.

The claimant knew of his rights as of 19 September 2022. He had received legal advice by 22 November 2022. He ought to have been aware of time limits. He chose to delay, submitting contacting Acas towards the end of the 3 months post dismissal.

The claimant cannot reasonably rely on having submitted a separate ET1 claim form. He was aware as of 2 February that this had been rejected by the Tribunal. The onus was on the claimant to know his case and check what claim was progressing. He failed to do so.

Timing and manner of the amendments

The claimant had an opportunity to review his claim before submitting, as required by the form. It was sent to him afterwards too. No issue was raised to the Tribunal about exclusion of a constructive dismissal complaint. He was alerted to the issue as early as 30 March 2023.

Walls Meat Co Ltd v Khan, page 5 D and G

"*Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."*

"So the tribunal had then to go on and consider whether it was presented "within such further period as the tribunal considers reasonable." This was very much a matter for the industrial tribunal."

It was reasonably practicable to bring his claim in time. He failed to do so. He then did not submit it in a reasonable time thereafter, having been alerted to the issue since 30 March 2022 **(sic).**

[**Note by Tribunal** : this is reproduced from the original. Read in context, and consistent with the earlier text of Mr Byrom's submission, the Judge has read this date as an obvious typographical error and that it should have said : "30 March **2023.**"]

Vaughan v Modality Partnership: page 9, para 24

"24. It is also important to consider the Selkent factors in the context of the balance of justice. For example:

24.1. A minor amendment may correct an error that could cause a claimant great prejudice if the amendment were refused because a vital component of a claim would be missing.

24.2. An amendment may result in the respondent suffering prejudice because they have to face a cause of action that would have been dismissed as out of time had it been brought as a new claim.

24.3. A late amendment may cause prejudice to the respondent because it is more difficult to respond to and results in unnecessary wasted costs.

25. No one factor is likely to be decisive. The balance of justice is always key."

Should the amendment application be granted with respect to the above, then Respondent will be prejudiced in terms of having to investigate matters that fall out-with the initial enquiries conducted for the preparation of the ET3 response. Furthermore, the Respondent will be burdened by the costs and time required to obtain addition documentary evidence and witness testimony, as well as the additional preparations for and conducting defences of the same at the final hearing.

With regards to any prejudice to the Claimant, it is of note that the ET1 already contains complaints for which the Claimant is able to advance based upon the pleadings in the ET1, notably holiday pay and potentially discrimination. The Claimant will have an opportunity to lead evidence on these matters and seek an award from the Tribunal; he will not be prevented from doing so should this application be refused. On this basis, the balance of hardship falls upon the Respondent should the Claimant's amendment application be granted.

Respectfully submit the Tribunal should not exercise its discretion in this instance.