EMPLOYMENT TRIBUNALS

Claimant: Christian Echendu (as personal representative of the Estate of Dr. Obiukwu Iwuchukwu)

Respondents: (1): Lewisham and Greenwich NHS Trust (2) Ms G. Leeks

Heard at: London South (by CVC) **On:** Friday 17 November 2023

Before: Employment Judge G Phillips

Appearances
For the claimant: In person
Respondent: Ms R Snocken, of Counsel

JUDGMENT

1. For the reasons given below, the ET1 is struck out in its entirety because, in regard to the existing claims made therein, and the new claims that have subsequently been identified, either (1) the Tribunal has no statutory jurisdiction to hear them; and/or (2) they are out of time; and/or it is not just and equitable to extend time; and/or it was reasonably practicable for them to have been submitted within time; and/or they were not submitted within such further reasonable time.

REASONS

1. This was an open public preliminary hearing to consider the Respondent's applications as to whether

a. the Tribunal has jurisdiction to hear the claims under s 13 of Employment Rights Act 1996; and/or under the WTR ("the Jurisdictional issue")

b. as a matter of law, it was possible for the estate of a deceased person to claim that it has been victimised within the meaning of Equality Act 2010, s. 27 ("the Victimisation Issue");

c. the claims were out of time, and whether time could be extended ("the Timing issue"); and

d. the Claimant should be permitted to amend the Claim to add the new claims identified at the October CMH ("the Amendment Issue").

Introduction

2. This is, I acknowledge, a lengthy decision, but this case encompasses some novel issues and required some complex analysis of the relevant legal issues as well as the procedural landscape behind, and the factual matrix to, the case. I was also referred to very comprehensive lists of authorities from both sides. In order to do justice to the arguments that were advanced by the parties, and the reasoning behind my decisions, it was necessary to go into some matters in quite considerable detail.

Background

3. Mr Echendu is the estate administrator for Dr Obiukwu Chigozie Iwuchukwu, who was employed from 17 June 2019 as a consultant breast surgeon at the Respondent hospital trust, via a "Bank" contract, until his death on 24 August 2021. Prior to starting his employment with the Respondent, Dr Iwuchukwu had restrictions placed on his practice by the General Medical Council (GMC) to the extent that he must be supervised by a fellow consultant surgeon in the same organisation.

4. Prior to commencing his employment with the Respondent, the Claimant says that Dr Iwuchukwu had been diagnosed with hypertension, mixed anxiety (depressive disorder), sleeping apnoea and had had epilepsy/seizures in 1997 and 2016. The Claimant alleges that Dr Iwuchukwu was subjected to excessive workloads whilst working at the Respondent, which he says caused or contributed to his death.

5. Mr Echendu submits that, by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 ('the 1934 Act'), all causes of action vested in Dr Iwuchukwu survived or, as the case may be, were for the benefit of his estate, and were transferred to Mr Echendu, so that all the causes of actions could be continued by him as the appointed personal representative of Dr Iwuchukwu. Some of the acts Mr Echendu relies upon "started during [Dr Iwuchukwu's] life time" and others, he submits, continue as a "continuing state of affairs".

6. Mr Echendu's ET1 was dated 6 January 2023. At box 8.2 of the ET1, Mr Echendu stated that the claims he was bringing were "race/disability discrimination, victimization, common law negligence causing death, holiday pay and arrears of payment".

7. There are a number of "groups" of claims in this case, relating to disability discrimination, race discrimination, various money claims (which appear to relate to both prior to Dr Iwuchukwu's death and arising upon his death), and victimisation claims in relation to acts occurring after Dr Iwuchukwu's death. It appears that only the latter group of claims is made against the Second Respondent, whereas all of the claims are also made against the First Respondent. For ease of reference, I will refer throughout this judgment to the First Respondent as 'the Respondent'.

8. ET3/Grounds of Resistance were submitted on behalf of both Respondents on 8 March 2023. In its ET3/Grounds of Resistance, the Respondent did not admit that Dr Iwuchukwu was disabled within the meaning of Section 6 of the Equality Act, nor that he had been discriminated against or victimised (as alleged or at all). The Respondent also stated that the Claimant had failed to identify any detriment to which Dr Iwuchukwu could have been subjected and said that the Tribunal had no jurisdiction in relation to a

complaint of victimisation committed against the Claimant himself. The Respondent also did not admit that it made unauthorised deductions from Dr Iwuchukwu's wages contrary to Section 13 of the Employment Rights Act 1996, whether in respect of arrears of salary, or in respect of the underpayment of holiday pay.

9. The Respondent also in its ET3/Grounds of Resistance made complaint that a number of the Claimant's claims were not properly or fully particularised (para 17). It also raised issues relating to the need for an Open Preliminary Hearing to consider a Strike Out and/or a Deposit Order of the claim **(**Rule 37(1)(a) and/or Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Tribunal Rules')) on the basis of the claim having, it said, no or little reasonable prospect of success on the grounds that: (i) matters complained about were out of time; and/or (ii) the Tribunal had no jurisdiction to consider a common law negligence claim in respect of personal injury to Dr Iwuchukwu. The Respondent also sought the removal of the Second Respondent as a named individual Respondent, on the grounds that (1) Ms Leeks did not commence employment at the Trust until December 2021 (after Dr Iwuchukwu's death); (2) her involvement in the matter was limited to responding to a complaint made by the Claimant that the Respondent had not updated the NHS England Pension team with Dr Iwuchukwu's payroll information and this was carried out in the course of her employment; and (3) that the Respondent trust accepted vicarious liability.

10. After the ET3 had been served, a Notice of Listing was sent to the parties in March 2023, listing the case for a 5 days hearing in October 2024**,** and setting out a suggested set of Case Management Orders, which included that the Claimant must, by 17/11/2023, send to the Respondent a Schedule of Loss. A 2-hour preliminary hearing was also listed for 27 October 2023.

11. On 18 October 2023, Mr Echendu indicated that he was withdrawing the common law negligence claim.

12. On the same date, Mr Echendu also submitted his response to the Respondent's request for further better and particulars (para 17 of the Grounds of Resistance). He also indicated that he was "tentatively apply[ing]" under Rule 30 of the Tribunal Rules for amendments of claim "should there be any issue raised in the details of claims document provided". In this document, the Claimant said he was appointed by the High Court in London as a personal representative on 16 August 2022. Most of the particulars supplied related to Dr Iwuchukwu's time working for the Respondent, (which I do not need to go into in the details of here for the purposes of determining the applications before me). In this document, Mr Echendu also set out further details ((a) to (k)) of the claims he said he was making. These included that the victimisation claim was based on a number of events that post-dated Dr Iwuchukwu's death (including the disregarding of a letter Mr Echendu had sent on 7 September 2022, and a refusal to provide payroll information to the NHS pension team).

13. All of the Claimant's claims - both as made in the ET1 and as made in the 18 October details of claims document - were clarified at a Case Management Hearing on 27 October 2023, (the 'October CMH') before EJ Jones. At paragraph 18 of the CMO, 13 claims were set out and identified (some of which included **new** claims, (highlighted in **bold** below). Those 13 claims – which are set out in full as an Appendix at the end of this decision - included claims being made under the following legal grounds:

a. Section 13 of the Equality Act 2010 - direct race discrimination (**18.1**, **18.2**, **18.3**, 18.6, 18.7)

b. Section 13 of the Equality Act 2010 - direct disability discrimination (**18.2**, 18.6, 18.7)

c. Section 21 of the Equality Act 2010 - a failure to consider reasonable adjustments (**18.4**, 18.5)

d. Section 15 of the Equality Act 2010 - unfavourable treatment which was because of something arising from disability (**18.8**)

e. Section 13 of the Employment Rights Act 1996 - unlawful deduction from wages consisting of underpayments of salary and/or overtime (18.9)

f. Section 13 of the Employment Rights Act 1996 / Working Time Regulations 1998 - unlawful deduction from wages and/or breach of the Working Time Regulations 1998 consisting of a failure to pay holiday pay (18.10)

g. Section 27 of the Equality Act 2010 - victimisation of the estate (18.11, 18.12, **18.13**)

14. The Claimant was ordered that, if he wanted to amend his claim with regard to any of the **new** claims that had been identified, he must make an application in writing by 10 November 2023, (so that it could be considered at the Preliminary Hearing on 17 November 2023 ('the November PH')). It was stated that the written application should include a proposed amended version of the particulars of claim.

15. The October CMO also indicated, following applications made by the Respondent, that the November PH would consider whether:

a. the claims were out of time, and whether time could be extended "the Extension of Time Issue";

b. as a matter of law, it was possible for the estate of a deceased person to claim that it has been victimised within the meaning of Equality Act 2010, s. 27 ("the Victimisation Issue"); and

c. in the event of an application being made, the Claimant should be permitted to amend the Claim ("the Amendment Issue").

16. At paragraph 4 of the October CMO, the Claimant was given permission to serve a witness statement setting out any evidence relevant to the Extension of Time issue. Any witness statement was to be served on the Tribunal and the Respondent on or before 6 November.

17. The October CMO also amended the name of the First Respondent to correct its name to Lewisham and Greenwich NHS Trust.

18. On 9 November, further to the October CMH, the Respondent's solicitors wrote to the Tribunal to indicate that, "In the course of preparing for the PH listed to be

heard on 17 November 2023, ... we have identified a further associated issue regarding jurisdiction that we submit it would be in the interests of justice to also be heard at the PH." This issue related to whether "a personal representative of an estate of a deceased employee could bring a claim for breach of s13 Employment Rights Act 1996 (and by analogy claims under the Working Time Regulations) because those claims are not covered by the list of claims which can be brought by personal representatives under section 206 Employment Rights Act 1996" (hereinafter referred to as the Jurisdictional Issue"). It was submitted that considering this further ground at the November PH would be in accordance with the overriding objective in dealing with the case in a manner proportionate to the complexity and importance of the issues and in the interests of saving time and expense (noting that the Respondent was a publicly funded NHS Trust). Furthermore, it was stated, the arguments to be made here, potentially overlapped with those that may be relevant to the Victimisation Issue which was due to be considered at the PH in any event.

19. On 9 November, Mr Echendu responded to the "further issues raised by the Respondents" to say that "Recorder Jones KC has ordered the parties to address the Tribunal on certain issues listed in his record of Preliminary hearing which includes primarily issue of jurisdiction which the central issue, is whether or not the ET has jurisdiction to hear any of the claims raised in this matter and if it does whether the deceased employee would have had the right to claim for unlawful deduction of wages and holiday pays as employee under employment contract if he were alive?" "Once there is determination on these, every other matter is a substantive issue which falls for the determination during the substantive hearing in a full tribunal." He added that he did "not have any objection to any Employment Rights Act 1996 issue the Respondents may want to raise or submit in their Skeleton argument or oral submission for the Preliminary hearing in so far as they conduct this matter reasonably and professionally without any vexatious or obstructive undertone. But asking the Tribunal to add further preliminary issues when the parties have had almost 3 hours hearing on 27 October 2023 and orders and list of issues sent to the parties for determination at the Open Preliminary hearing can never be in the interest of the Overriding Objective as it is disruptive of the process and procedures."

20. On 10 November, in accordance with Rule 30 of the Tribunal's Rules and the directions made at the October CMH, Mr Echendu filed an application for the amendment of his claim, to include the **new** claims identified above. He did not however include a proposed amended version of the particulars of claim, as had been ordered.

21. No decision had been made by the commencement of the November PH on the Jurisdictional Issue. It was therefore something that I needed to decide at the outset of this PH.

22. In that regard, I noted what the Respondent said about the relevance of this. I also noted what the Claimant said in response. As I read his email, while he did not as such object to the new issue being raised ("I do not have any objection to any Employment Rights Act 1996 issue the Respondents may want to raise or submit in their Skeleton argument or oral submission for the Preliminary hearing in so far as they conduct this matter reasonably and professionally without any vexatious or obstructive undertone"), he took issue with the substance of it, and did have some concerns in the light of the "overriding objective" about the disruption this would cause to "the process and procedures."

23. Having considered both side's arguments, in my assessment, the Jurisdictional Issue was a matter that went to the heart of the jurisdiction of the Tribunal, and as such it did need to be considered at an early juncture. As an Employment Tribunal is purely a creature of statute, its jurisdiction is limited thereby. The Claimant had had notice of the application, had made submissions with regard to the substance of it and had come to today's hearing prepared to deal with it. It was therefore my decision that this issue should be heard today, and indeed, given its potential jurisdictional impact, that it should be dealt with first.

24. As far as the Amendment Issue was concerned, it seemed sensible and in accordance with the overriding objective that this should be dealt with after the Jurisdictional, Victimisation and Timing issues had been dealt with, because those applications would determine what claims remained, and so what might need to be amended.

25. My approach therefore was that there were the following extant issues to be dealt with, which should be dealt with (in accordance with the overriding objective), in the following order:

a. Whether the Tribunal has jurisdiction to hear the claims under s 13 of Employment Rights Act 1996; and/or under the WTR ("the Jurisdictional issue")

b. whether, as a matter of law, it was possible for the estate of a deceased person to claim that it has been victimised within the meaning of Equality Act 2010, s. 27 ("the Victimisation Issue");

c. whether the claims were out of time, and whether time could be extended ("the Timing issue"); and

d. whether the Claimant should be permitted to amend the Claim to add the new claims identified at the October CMH ("the Amendment Issue"); and

e. depending on my findings on the issues at a. – d. above, there were potentially a number of the further case management issues which may arise, including whether the Second Respondent should be removed as a named Respondent, whether there should be a further PH to address the question of disability and/or Judicial Mediation. A provisional further PH has been listed, by agreement, for 18 January 2024.

26. I had before me:

a. A hearing Bundle, which contained all the relevant procedural Tribunal documents and correspondence (the pages numbers of which are referred to hereafter as [xx]; together with Skeleton Arguments from Ms Snocken and Mr Echendu (which set out their arguments on the issues listed at a – c above);

b. The Respondent's Index to and Bundle of Authorities [referred to hereafter by reference to RBA [xx] in regard to the relevant page numbers];

c. Further Skeleton Arguments from both parties in response to the Amendment Issue;

together with the following additional documents, (which were all received very shortly before or as the hearing was due to commence):

d. A copy of the case of *Andrews (Deceased) v Lewisham and Guys Mental Health NHS Trust* [2000] ICR 707, [2003] 3 All ER 769 (also known as *Harris (Personal Representative of Andrews (Deceased)) v Lewisham and Guys Mental Health NHS Trust) (*referred to hereafter as '*Andrews/Harris')*; Mr Echendu submitted the copy in the Respondent's bundle was "incorrect" and should not be used (in the event it transpired they were simply different versions of the same judgment – the Respondent's version being a formal case report, and Mr Echendu's being the judgment alone, taken from Bailii);

e. A supplemental bundle from Mr Echendu with an updated Index, and some further additional documents, including a copy of the Letter of Administration dated 16 August 2022 [125], a Pre-action letter to the Respondent dated 7 September 2022 [126], the Claimant's correspondence with the Respondent in December 2022, and a number of documents relating to Dr Iwuchukwu's employment with the Respondent;

f. A separate Bundle of Authorities from Mr Echendu;

g. An extract from Clerk and Lindsell on torts from Ms Snocken.

27. Some time was taken up at the beginning of the hearing with identifying what documents there were, whether there were overlaps and which version of *Andrews/Harris* (see above) should be used.

28. Although a direction was given at the October PH for Mr Echendu to serve a witness statement on the Extension of Times issue on or before 6 November, he had not done so by the morning of the hearing. He did not therefore formally give evidence. He was not cross-examined. He did however, in the course of his written and oral submissions, as supported by some of the additional documents he provided on the morning of the hearing, make a number of factual assertions which are relevant to the factual background to some of the matters I have to decide, which I will refer to where relevant below.

29. Turning now to deal with the various applications that were before me, I will deal with each of these matters in turn below.

30. Both Mr Echendu and Ms Snocken produced helpful, well-argued and well researched arguments in support of their respective positions, which I had in written form. As such there exists a documented written record of their arguments, which were also augmented orally. I have endeavoured to summarised these arguments below, at the relevant places. I hope I have done their arguments fair justice, in so doing. I have also, where I considered it appropriate and relevant, added anything added orally at the hearing.

A. <u>Does the Tribunal have jurisdiction to hear the claims under s 13 of Employment Rights Act 1996; and/or under the Working Time Regulations ("the Jurisdictional issue")</u>

The law

<u>The Law Reform (Miscellaneous Provisions) Act 1934 (the '1934 Act')</u>

31. The 1934 Act 1934 addresses the effect of the death of an individual on causes of action. Section 1 states (my emphasis added):

> '(1) *Subject to the provisions* of this section, on the death of any person after the commencement of this Act *all causes of action* subsisting against or *vested in him shall survive* against or, as the case may be, *for the benefit of his estate*. Provided that this subsection shall not apply to causes of action for defamation.
>
> (2) where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person— (a) shall not include (i) any exemplary damages; (ii) any damages for loss of income in respect of any period after that person's death; …. (c) Where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.
>
> …..
>
> (5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts 1846 to 1908, . . . and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section..

32. The effect of this Act, in the employment context is therefore that if an employee (or former employee) has died, all causes of action that were vested in that employee at the time of his death – whether they had been commenced or could have been brought - may be continued or instituted by the personal representative of the deceased.

33. In the case of *Andrews/Harris*, which both parties referred me to, the Court of Appeal confirmed that claims for compensation for discrimination are causes of action within s.1(1) of the 1934 Act and therefore survive for the benefit of the deceased employee's estate. This case related to a complaint under the then Race Relations Act 1976, which had been commenced by Mrs Andrews before she died, but which had not proceeded to a hearing, and which her personal representative, Mrs Harris, wanted to continue. Mrs Harris had been able to commence a claim of unfair dismissal, which was determined in her favour. The Employment Tribunal held that Mrs Andrew's claim under the RRA could survive her death. The EAT overturned that decision and the case went to the Court of Appeal, who overturned the EAT's "narrow" construction of the term

"cause of action", and held that the 1934 Act was "concerned with causes of action, not actions". They referred, for example to Lord Diplock in *Letang v Cooper*, 1965, where he said that a cause of action was "simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". The Court of Appeal noted [§18] that the 1934 Act was passed to abolish the common law rules that actions in tort did not survive for the benefit of the estate of a deceased person. They held that [§19] the right to claim for pecuniary compensation for racial discrimination was a cause of action under the 1934 Act, which would stand unless there was an express statutory provision which took that right away. The Court of Appeal held there was no such relevant provision in the RRA. The Court of Appeal also noted [§ 20] that the EAT had, correctly in their view, rejected an argument that "any person" in s 54(1) of the RRA was wide enough to cover a personal representative. They also specifically noted that parliament had thought it fit to deal with the matter of what claims could be brought under the ERA expressly in s 206 thereof.

Section 206 Employment Rights Act (ERA) 1996

34. Section 206 ERA 1996 is headed "Institution or continuance of tribunal proceedings". Section 1 (3) provides "Where an employee has died, any tribunal proceedings arising under any of the provisions of this Act to which this section applies may be instituted or continued by a personal representative of the deceased employee". Subsection (2) expressly states that "This section and section 207 apply to" and there then follows a list of various Parts and sections of the ERA 1996.

35. That list includes, for example, unfair dismissal under Part X. However, ERA Part II (dealing with wages act protections and unlawful deductions from wages) is not included in this list.

Submissions

36. **Respondent.** Ms Snocken argues there is no jurisdiction for the Claimant to bring the s13 ERA and WTR claims because, she says, there is no right for an estate of a deceased employee to do so because:

a. S13 ERA claims cannot be brought by an estate of a deceased employee as they are specifically excluded from the list in s 206(2) ERA;

b. In any event, s13 ERA claims accruing after death do not fall under the 1934 Act;

c. WTR claims are analogous to the s13 ERA claims.

37. The Respondent argues that this is a jurisdictional issue. It says that the Claimant's wage and holiday pay claims are not covered by the case of *Andrews/Harris* which concerned discrimination claims. Ms Snocken submits that the Tribunal does not have jurisdiction to hear the Claimant's wage claims, at least so far as they are pursued as section 13 ERA or WTR claims, because unlike claims under the Equality Act 2010, s206 ERA sets out specific provisions covering when claims under the ERA can be instituted or continued by personal representatives of the deceased employee. Section 206(3) provides that claims can be instituted or continued by the personal representative, but only for the claims to which the section applies as listed in s206(2):

s13 ERA claims do not fall within that list, because they are claims under Part II of the Act and Part II is not on the list. Ms Snocken said that *Andrews/Harris* cannot be used to assist, because it cannot be taken that such reasoning applies when there are specific provisions dealing with claims after the death of an employee and the relevant type of claim has been specifically omitted.

38. Further, the Respondent argues, in the alternative, that even if (contrary to its first argument) the s13 ERA and WTR claims can be brought because the 1934 Act does apply, that does not assist the Claimant with being able to bring such claims regarding payment dates that occurred after death, as no cause of action in this regard had arisen at the time of death. Under s13 ERA, she argues liability would only arise at the time that such deductions were made: i.e. when those sums were not paid on the next payment date *after* death. Furthermore, Ms Snocken submits although s207 ERA treats some claims which accrue after death as if they had accrued before death, this does not apply to s13 claims because s207 ERA applies to the same list of claims as s206 and s13 claims are not covered in that.

39. Ms Snocken submitted that the WTR claims are more analogous to s13 claims than discrimination claims and thus should not be regarded as falling under the 1934 Act provisions. She also argues that these claims would be claims which accrued after death and so are not covered by the *Andrews/Harris* case as if they had accrued before death.

40. **Claimant.** Mr Echendu submitted that the answer to this first point was very simple - section 1(1) of the 1934 Act is very clear in the language it uses around “all cause of actions” “vested” (except defamation) are transferred to the Estate. The effect of this statutory provision he submits, is that where any employee (or former employee) dies, all his subsisting claims or any claims that could have been brought by him had he been alive may be continued or instituted by his or her personal representative except for a defamation claim. He submitted that s 206 ERA could not in effect be used to “trump” (my language) the effect of the 1934 Act.

41. Mr Echendu said that the UK Supreme Court had in *Unger and Another (in substitution for Hasan) v Al-Hasan (deceased) and another* [2023] UKSC 22, clearly defined what causes of action as provided by the 1934 Act, means (§105):

> *“The expression “cause of action” is not defined and thus bears its ordinary legal meaning of “a factual situation the existence of which entitles one person to obtain from the court a remedy against another person” (Letang v Cooper [1965] 1 QB 232 at 242-243, per Diplock LJ). Notably, section 1(1) is not limited to claims seeking a remedy for a tort or other wrong. It applies to causes of action of any kind. That includes, for example, causes of action founded on unjust enrichment, such as a claim for restitution of money paid under a mistake or on a basis that has failed.”*

42. He therefore submitted that in so far as all causes of action of Dr Iwuchukwu are vested in his estate, the personal representative of his estate is not in any way limited as to what causes of action to bring against the deceased employer but only subject to the exception set out in the 1934 Act.

43. After the hearing, and after I had delivered my oral decision on this point, Mr Echendu drew my attention (copying in Ms Snocken and the Respondent's solicitors) to the EAT decision in *Fox v British Airways* [2012] UKEAT/0033/12/ "for my information and legal updates". He said *Fox* looked at the difference between claims under the 1934 Act and section 206 ERA. He added "this is not an application for reconsideration rather in compliance with the legal representative's duty to update the court/Tribunal with any update in law to assist the Courts and Tribunals delivering Justice". Mr Echendu said the case was appealed to the Court of Appeal and the Court of Appeal upheld the EAT's judgment ([2013] EWCA civ 972). Fox was a case where a former employee died within days of being dismissed, it was said both unfairly, and because of discrimination. There was an appeal about the way the employment judge had assessed quantum and consideration of the effect of the father of the deceased having initially issued proceedings without first obtaining appointment as a person authorised to bring them by application to the ET under s. 206(4) ERA 1996. It was accepted that unfair dismissal was a "cause of action" under the 1934 Act. However, it was argued (by reference to §22 of *Andrews/Harris*) that the right to continue a claim in respect of unfair dismissal, despite the death of the erstwhile employee, was conferred by s.206 ERA, independently of the 1934 statute, because it was said, some of the Parts of ERA to which the section applies, (for example the right to be given a pay statement) created rights which could not be said to be causes of action. The EAT held that section 206 ERA is directed to giving title to bring proceedings, and not to the scope of the damages that might be claimed therein, which is what the 1934 Act provides for as long as there is something which is recognisably a cause of action. The scope of recovery in either an unfair dismissal claim or a claim for compensation for discrimination, is limited by the restriction placed in respect of future loss in the 1934 Act. I did not think that this case took matters any further than what had already been argued and put before me.

Conclusion

44. I gave my judgment on this issue, orally, on the day, with brief reasons. This document reflects that decision. To the extent that there may appear to be inconsistencies, this document should be taken as the formal record of that decision and its reasons. In my judgment, given that there is an express provision in ERA, (which is legislation which post-dates the 1934 Act), which expressly excludes the right of a personal representative of an estate of a deceased employee to bring a claim for breach of s13 ERA 1996, there is no jurisdiction for an Employment Tribunal to hear such a claim in the circumstances here. Section 13 ERA claims are not covered by the list of claims which can be brought by personal representatives under s206 ERA which creates an express exception to the 1934 Act in regard to this sort of claim. Employment Tribunals are the creation of statute. They only have jurisdiction as conferred on them by statute: (see the Employment Tribunals Act 1996, section 2). As the Court of Appeal expressly noted [§12] in *Andrews/Harris*, the position under the [Discrimination Acts] is to be contrasted with the position under the ERA 1996, where s 206 expressly provides what proceedings under that Act may be continued.

45. Further, I also accepted the Respondent's alternative argument, that even if (contrary to the first argument) the 1934 Act did apply to the s13 ERA claims, that does not assist the Claimant here as no cause of action could be said to have arisen at the time of death in regard to any payment dates that occurred after death (see analysis below at paras 137-139).

46. I was not satisfied that the same argument under s206 ERA could be said to apply with regard to the holiday pay claim made under the Working Time Regulations, as, like the Equality Act, there is no provision which expressly excludes the right of a personal representative of an estate of a deceased employee to bring a claim for a breach. However, I did accept, in principle, Ms Snocken's second ground of challenge here, namely that if a cause of action has not arisen as at the date of the employee's death, then there is nothing to vest in the estate, which might mean that a holiday pay claim under the Working Time Regulations, if it only arose on termination, would not be so vested. However, it was not clear to me at this stage, exactly how Mr Echendu was putting the holiday pay claim, or whether it related to matters that could be said to have existed before or at the time of Dr Iwuchukwu's death. At paragraph 16 of his Skeleton Argument, he said that the Respondent "further treated Dr Iwuchukwu as a temporary worker by failing to pay him holidays [sic] entitlement despite having been in their employment for two years plus thereby unlawfully deducting his wages in form of holidays pay.". It may be, once it is clear exactly how Mr Echendu puts this claim, that this argument, *if it survives the Timing issue below*, could be revisited with regard to the holiday pay claim.

47. I therefore find that the Employment Tribunal has no jurisdiction to hear any of the claims being made under s 13 ERA 1996 (18.9, and 18.10 in so far as it is put under S13 ERA).

B. <u>Is it possible, as a matter of law, for the estate of a deceased person to claim that it has been victimised within the meaning of Equality Act 2010, s. 27 ("the Victimisation Issue")</u>

48. Section 27 of the Equality Act 2010 defines victimisation as treating someone less favourably because they have asserted their legal rights in line with the Act or helped someone else to do so**.** The Act prohibits the subjecting of an employee to a detriment because they have done, or the employer believed they have done or may do, a protected act.

49. Section 27 (1) states that "A person (A) victimises another person (B) if A subjects B to a detriment because— (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act". S 27 (2) defines a protected act to include "(a) bringing proceedings under the Equality Act"; and (d) "making an allegation (whether or not express) that A or another person has contravened the Equality Act". S 27 (4) states that s 27 "applies only where the person subjected to a detriment is an individual."

Submissions

50. **Respondent.** Ms Snocken argues there is no jurisdiction for the Claimant to bring the victimisation claims because there is no right for the estate of a deceased employee to do so because:

1. The case of *Andrews*/*Harris*/*the 1934 Act* does not apply to causes of action arising after death;

2. Victimisation claims cannot be brought by an estate given the wording of the relevant statutory provisions;

51. Ms Snocken submitted that the position on victimisation is different from that of the discrimination claims considered *in Andrews/Harris*, because the protected acts and detriments that are relied upon by the Claimant here all occurred **after** the death of Dr Iwuchukwu. Nothing relied upon here was something that could be said to be vested in the estate at the time of death.

52. Further, she says section 27(4) explicitly states that the victimisation section only applies where the person subjected *to a detriment is an individual*. Thus, she says not only does the person who is alleged to have suffered a detriment need to be a person under s27(1), but furthermore they need to be an individual. Ms Snocken submitted that the estate of a deceased person is not of itself a legal entity, which is why, she says by way of example, claims are not brought by the estate but instead by a personal representative. (Ms Snocken submitted for the avoidance of doubt that the Claimant cannot assert that he can bring the claim as Personal Representative, because while this would mean that he satisfied the requirement under s27(4) for the relevant person to be an individual, he would not have basis to bring a claim in the Employment Tribunal, because there is not the required relationship existing between Mr Echendu in that capacity and the Respondent, as he would not fall under either s39(4) (employee) nor s108 (which requires not just that there has been a past employment relationship but that that relationship existed between the relevant two people, i.e. the alleged discriminator and the person said to be discriminated against).

53. Ms Snocken submitted that the estate did not class as a person, let alone an individual - as set out at more length in her skeleton argument, Ms Snocken referred to a number of examples of the definition of a person [RBA 12 – 38], which included that they were a living person (including the definition of 'Person' in Schedule 1 of the Interpretation Act 1978, as well as definitions of individual mentioned in Stroud's Judicial Dictionary ((at pages 86-88) [RBA 27-29]. She also noted that in *Andrews/Harris [*#20], the Court of Appeal said that an argument that "any person" was wide enough to cover a personal representative, was considered untenable.

54. Ms Snocken also referred me to the judgment of the Employment Tribunal (at §17) of its written reasons in *Mr A Echendu (Administrator of the estate of the late Mr O Iwuchukwu) v 1) South Tyneside and Sunderland NHS Foundation Trust 2) Dr Ian Martin,* [RBA 39-48] which Ms Snocken says applies also to victimisation claims, which are restricted to what is explicitly set out in the statute.

55. Ms Snocken therefore submitted that since there is no statutory provision under which an estate, or a deceased's personal representative, can bring claims for victimisation occurring after death (since by their very nature they are not claims that the deceased himself could have brought), there is no basis upon which such claims can be brought in the Employment Tribunal.

56. **Claimant.** Mr Echendu submitted that the issue as to whether the personal representative can continue or institute claims under the 1934 Act which are vested in the deceased person was settled in the *Andrews/Harris* case - "all causes of action subsisting against or vested in him shall survive against, or as the case maybe, for the benefit of his estate". He referred to the words of Lord Justice Stuart-Smith (§15): "*The 1934 Act is concerned with causes of action, not actions. Causes of action was defined by Lord Ester MR in Reed v Brown 22 QED 128 at p131 as "every fact which it would*

be necessary for the plaintiff to prove if transversed, in order to support his right to the judgment of the Court".

57. He said that a claim of victimisation under the Equality Act 2010 was a cause of action available to the personal representative of the deceased employee. He said Dr Iwuchukwu would have brought claims of victimisation against the Respondent if he were alive. He said that if race discrimination is a cause of action, how can victimisation not also be one.

58. Mr Echendu also took me in this context to the Supreme Court case of *Unger* (referenced above) in terms of the width of causes of action that were covered by the 1934 Act. He submitted that in so far as all causes of action of the deceased person are vested in his estate, the personal representative of his estate is not in any way limited as to what causes of action to bring against the deceased employer but only subject to the single exception set out in the 1934 Act. Vested means transferred and that includes all right and responsibilities go to the personal representative. None of this here, he said, is any different from *Andrews/Harris*.

Conclusion

59. I gave my judgment on this issue, orally, on the day, with brief reasons. This document reflects that decision. To the extent that there may appear to be inconsistencies, this document should be taken as the formal record of that decision and its reasons. In my judgment, the victimisation claims in this case are not covered by the 1934 Act, because there was no cause of action in existence that could be said to have already vested in Dr Iwuchukwu at the time of his death. That is not to say that a victimisation claim can never come within the 1934 Act, but only if there is a pre-death cause of action, which on the facts here, there is not.

60. As EJ Jones clarified at the October CMH, the victimisation claims are being made by the estate, and are claims which arise out of matters that occurred after Dr Iwuchukwu's death. At paragraph 18 of his Skeleton Argument, the Claimant specifically talks about Dr Iwuchukwu's *estate* suffering the detriment. Further, s27(4) Equality Act explicitly states that victimisation only applies where *the person subjected* to a detriment *is an individual.* That provision only appears in s 27. There is clearly a distinction being made here, in my judgment, beyond the fact that to have suffered a detriment, there needs to have be a person (under s27(1)), where that person also needs to be an individual, which on my assessment expressly excludes the estate. While a person can, as per the Interpretation Act 1889, include a corporation or a group or body of persons, as well as a natural person [23], the addition of the words "individual" further qualifies this. As noted above**,** in *Andrews/Harris [*#20], the Court of Appeal said that the EAT had correctly rejected an argument that "any person" was wide enough to cover a personal representative.

61. I also accept Ms Snocken's submission that in any event, the Claimant cannot bring a victimisation claim as a "Personal Representative", because while this would satisfied the requirement under s27(4) Equality Act for the relevant "person" to be an individual, the Claimant does not have basis to bring a claim in the Tribunal, because he lacks the required relationship (whether under s39 (4) (employee) or s108) with the Respondent.

62. Therefore, all the victimisation claims under Section 27 of the Equality Act (18.11, 18.12, **18.13**) are to be struck out because, for the reasons set out above, the Employment Tribunal does not have jurisdiction to hear them.

63. This also means that the claims against the Second Respondent fall away, as they are entirely related to the victimisation complaints. Therefore, she should now be removed from this claim as an individual named Respondent.

C. Are the claims out of time, and, if so, should time be extended ("the Timing issue")

The law

64. For the race and disability discrimination claims, the just and equitable extension test as set out in s123(1) Equality Act 2010 applies. For the money claims (arrears of pay and holiday pay), the appropriate test is the "not reasonably practicable/reasonable period thereafter" test set out in s23(4) ERA 1996 and/or regulation 30(2) WTR 1998.

65. Section 123(1)(a) (subject to any extension of time of the applicable time limit in s123(1)(a) to facilitate ACAS Early Conciliation as provided for by s140B of the Equality Act) sets out the time limits for bringing claims under s120. It says that proceedings on a complaint within section 120 must be brought before the end of *"the period of three months, starting with the date of the act to which the complaint relates"*, or such other period as the Employment Tribunal thinks "just and equitable". Section 123(3) of the Equality Act also provides that if "conduct extending over a period" is alleged, the claim must be brought within three months of the end of that period (s123(3)).

66. Section 23(2) ERA provides that an Employment Tribunal shall *not* consider a complaint of unauthorised deductions from wages *"unless it is presented before the end of the period of three months beginning with (...) the date of payment of the wages from which the deduction was made".* If *"it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months"* the Tribunal *"may consider the complaint if it is presented within such further period as the tribunal considers reasonable"* (s23(4)).

67. Similar wording to that set out in s23(2) ERA applies to claims made under the WTR. Regulation 30(2) provides that claims must be brought (a) within three months beginning with the date on which it is alleged that the exercise of the right should have been permitted … or, as the case may be, the payment should have been made; 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 …"

Process and application of the law

68. Case law suggests that it is well-established that where a claim is presented outside of the relevant limitation period, the burden is upon a Claimant to persuade the Tribunal that it is just and equitable to extend time and/or that it was not reasonably practical to present the claim in time. The general presumption is that time will not be

extended, although that is a presumption that may be displaced by evidence (see for example, in the context of the reasonably practicable test, §21 of *Cygnet Behavioural Health Ltd v Britton* [2022] IRLR 906 ('*Cygnet*') [RBA 109-116] and §12 of *Porter v Bandridge Ltd* [1978] IRLR 271) [RBA 116-122]).

69. Case law also suggests that for both types of test, it is necessary for a Tribunal to make precise findings of fact about the cause of action and the appropriate limitation periods (see e.g. in the context of a wages act claim, *Taylorplan Services Ltd v Jackson* [1996] IRLR 184 (headnote and §§14 & 19 [49-51]), which sets out a series of questions that have to be answered when dealing with a limitation point under [what was then] the Wages Act 1986). These will include making findings as to the relevant date from which time begins to run, the date of the expiry of limitation, the relevant dates of ACAS Early Conciliation and the date on which the claim was in fact lodged.

Case law on the just and equitable test

70. The discretion for a Tribunal to extend time under the just and equitable test is a wide one, but time limits are still observed strictly. In *Robertson v Bexley Community Centre (t/a Leisure Link)* [2003] EWCA Civ 576 ('*Robertson*)', the court held: *"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases".* (see also §10 i.-ii. of *Miller & Ors v The Ministry of Justice & Ors* UKEAT/0003/15 ('*Miller*') [RBA 52-62] and *Chief Constable of Lincolnshire v Caston* [2010] EWCA Civ 1298, (referred to in *Miller* [RBA 54]), as well as *Wells Cathedral School Ltd v Stringer and other* (referred to in the Claimant's Bundle of authorities). In *Robertson*, the Court of Appeal emphasised that there is no presumption that tribunals should extend time: the claimant must persuade the tribunal that it is just and equitable to do so. In *Pathan v South London Islamic Centre* (UKEAT/0312/13), the EAT held that the test is not, however, one of exceptional circumstances, it is whether it is 'just and equitable' to extend time.*"*

71. In *Miller* [§10 iv.], the EAT said, "*The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases*". The Court in *Miller* pointed out that there were two types of prejudice which a Respondent may suffer (§12): "*the prejudice to a Respondent of losing a limitation defence [the first type of prejudice] is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice [the second type of prejudice] to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive."*

72. In considering whether to exercise its discretion and allow for a different period, the employment tribunal should consider the prejudice that each party would suffer as a result of granting or refusing an extension of time, and should have regard to all the other relevant circumstances. In *British Coal Corporation v Keeble* [1997] IRLR 336 (included in the Claimant's authorities), the court said that a comparison with the checklist in s 33 of the Limitation Act 1980 might 'illuminate' the tribunal's task:

h. the length of and reasons for the delay

i. the extent to which the cogency of the evidence is likely to be affected by the delay

j. the extent to which the party sued had co-operated with any requests for information

k. the promptness with which the claimant acted once he knew of the possibility of taking action

l. the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

73. In *London Borough of Southwark v Afolabi* [2003] IRLR 220, the Court of Appeal held that a tribunal is not required to go through the matters listed in s33(3) of the Limitation Act 1980 as a checklist in considering whether it is just and equitable to extend time, provided no significant factor has been left out of account by the tribunal in exercising its discretion. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [RBA 63-77], the Court of Appeal cautioned against tribunals rigidly adhering to the checklist of potentially relevant factors in s 33 of the Limitation Act 1980 (§37–38). The Court observed, "*The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) [of the EqA] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes [in the first of the Keeble appeals]) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking*".

74. In *Adedeji,* the Court referred to what was said in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640; [2018] ICR 1194 (a case concerning the application of s123 in the context of a reasonable adjustments and harassment claim) [RBA 78- 90]: "*That said, factors which are almost always relevant to consider when considering 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)*."

75. The Court of Appeal also stated at §32 of *Adedeji,* "*Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any less undesirable in principle. As part of the exercise of its overall discretion [as to whether to extend time], a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago. [...] (I would add, whilst acknowledging that this does not appear to have been the Judge's approach in this case, that the fact that the grant of extension will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time.)"*

76. That principle was developed further in *Secretary of State for Justice v Johnson* [2022] EAT 1 [RBA 91-103], where it was held that it is not just the length of time that the claim was presented late by that is relevant (#23). The overall delay, even

where it (or at least parts of it) is not the fault of either party, in the claim being heard is relevant and a factor that should be taken into account.

77. *Wells Cathedral School Ltd v Stringer and others* EA-2020-000801, which was referred to me by the Claimant, provides a good illustration of how a tribunal should approach the application of the test. There was a considerable delay in the claimants making their claims, while they had been pursuing grievances within the organisation to the point of their resignation. The EAT agreed with the employment tribunal that it was just and equitable to extend time. The substantive argument presented by the claimants was that if the claims were dismissed, they would lose their right to have the merits determined. The claimants did not point to any other areas of prejudice that they might have suffered in the event that the extension was not granted. The employment tribunal considered 5 factors, including the significant length of the delay between the matters arising and the claims being brought; the claimants' awareness of the factual matrix; that they had received advice and decided not to issue a claim within the time limit; some of the delay was occasioned by their grievances, which crystallised the allegations; and there was no suggestion that the cogency of the evidence had been affected. The Tribunal found that the latter two points although not decisive were in the claimants' favour - the fact of the grievances meant the employer had been fully aware of the allegations over a long period of time and their claims would come as no surprise. It held there would be no significant prejudice to the employer. The fact there had been no loss of evidence was relevant as was the existence of the ongoing grievance process, although these two factors were not decisive. On appeal, the respondents argued that the absence of any prejudice to them from the delay was not, in any event by itself, sufficient to warrant an extension of the limitation period. The EAT upheld the employment tribunal's decision - it had been correct in its approach of undertaking a balancing exercise when applying the just and equitable test.

78. The concept of 'continuing acts' of discrimination has generated much case law over the years. Section 123 (3) confirms the position adopted by the courts in respect of discrimination claims brought under the previous discrimination statues before the coming into force of Equality Act 2010, namely that a discriminatory act can be a continuing act if it extends over a period of time, such as if it takes the form of a policy, rule or practice, in accordance with which decisions are taken from time to time or where the acts complained of are linked, and are evidence of a continuing discriminatory state of affairs (see the line of authority from *Barclays Bank plc v Kapur* [1991] 2 AC 355 (relied upon by the Claimant and included in his bundle of authorities), *Owusu v London Fire and Civil Defence Authority* [1995] IRLR 574, *Hendricks v Metropolitan Police Commissioner* [2002] EWCA civ 1686 ('*Hendricks*') (relied upon by the Claimant and included in his bundle of authorities), through to *Lyfar v Brighton and Sussex University Hospital Trust* [2006] EWCA civ 1548).

79. *In Coutts & Co plc v Cure & Anor* [2005] ICR 1098, His Honour Judge McMullen QC (§28) referred to the categorisation of factual circumstances in which discrimination occurs as falling into one of the following:

> (a) A one-off act of discrimination, such as a refusal to promote, which has continuing consequences for the disappointed candidate.
>
> (b) An act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time.

(c) A series of discriminatory act, whether or not set against a background of a discriminatory policy.

80. Continuing acts are therefore distinguishable from one-off acts that have continuing consequences; time will run from the date of the one-off act complained of. In *Hendricks,* the Court held that the test for a continuing act is whether the employer is responsible for 'an ongoing situation or a continuing state of affairs'. A relevant factor in determining whether or not a series of acts is to be regarded as an act continuing over a period is whether the same person or persons is or are responsible for each of the acts (*Aziz v FDA* [2010] EWCA civ 304, see also *Okoro and anor v Taylor Woodrow Construction Ltd and Others* [2012] EWCA Civ 1590). All the circumstances surrounding the acts will have to be considered.

81. In *South Western Ambulance Service NHS Foundation Trust v King* (UKEAT/0056/19), the EAT said there could not be a series of continuing acts if only one of them is discriminatory:

> *… reliance cannot be placed on some floating or overarching discriminatory state of affairs without that state of affairs being anchored by specific acts of discrimination occurring over time. The claimant must still establish constituent acts of discrimination or instances of less favourable treatment that evidence that discriminatory state of affairs. If such constituent acts or instances cannot be established, either because they are not established on the facts or are not found to be discriminatory, then they cannot be relied upon to evidence the continuing discriminatory state of affairs.*

82. Where discrimination consists of a failure to do something, the time-limit starts to run when the person decides not to do the thing in question. The Equality Act states (s 212(2) and (3)) that a reference (however expressed) to an act includes a reference to an omission; and a reference (however expressed) to an omission includes a reference to:

(a) a deliberate omission to do something;

(b) a refusal to do it;

(c) a failure to do it.

83. In *British Transport Police v Norman* (UKEAT/0348/14), the EAT held that an employment tribunal had erred when it decided that it was just and equitable to extend the time-limit for a claim in circumstances where it had not first established the extent of and the reasons for the delay. The relevant questions were those proposed by Langstaff P in *ABM University Local Health Board v Morgan* (UKEAT/ 0305/13) (at para 52):

(a) Why was it that the primary time-limit had been missed?

(b) Why, after expiry of the primary time-limit, was the claim not brought sooner than it was?

84. In *Concentrix CVG Intelligent Contact Ltd v Obi* [2022] EAT 149, the EAT held that whilst a failure by a claimant to provide evidence as to the reason for the delay would often prove fatal in practice, there is no rule of law to that effect, so that an extension can

still be granted in the light of other factors. See too *Owen v Network Rail Infrastructure Ltd* [2023] EAT 106, where the EAT held that the employment tribunal erred in law in deciding that if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, this necessarily meant that an extension of time should be refused, as opposed to that being a relevant, but not necessarily decisive, consideration to weigh in the balance.

Case law on the reasonably practicable test

85. The tribunal's discretionary power to extend the time-limit is subject to a two-part test. First, the tribunal must be satisfied that it was not reasonably practicable for the claim to be presented in time. Secondly, the tribunal must be satisfied that the claim was presented within such further period as the tribunal considers reasonable. In *Palmer v Southend on Sea BC* [1984] ICR 372, the Court of Appeal said that 'reasonably practicable' does not mean reasonably or physically possible but rather something like 'reasonably feasible'. The determination of what is reasonably practicable is a question of fact for the tribunal (see *Miller v Community Links Trust Ltd* (UK EAT/0486/07). The burden of proof is on the claimant. In all cases the question is what is reasonable.

86. Case law has established that the "reasonably practicable" test is interpreted more strictly than the just and equitable one (see for example, the Court of Appeal decision in *London Underground Ltd v Noel* [1999] IRLR 621 (§20, 21 & 24) [RBA 104-108]) and that this stricter interpretation can result in some harsh conclusions. There has been some suggestion in previous cases (see for example *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379), that the question of what is reasonably practicable should be given a "liberal interpretation in favour of the employee". However, in *Cygnet* (above) [§27], the EAT noted: *"… this [liberal interpretation] does not reflect the way that s111(2) has been interpreted and applied by the Court of Appeal in more recent cases. The test is a strict one, and, perhaps in contrast to the 'just and equitable' extension in other statutory contexts, there is no valid basis for approaching the case on the basis that the ET should attempt to give the 'not reasonably practicable' test a liberal construction in favour of the Claimant*".

87. Even if a claimant satisfies a tribunal that it was not reasonably practicable to present a claim within the three-month time-limit, the tribunal must still go on to consider whether the claim was presented within such further period as it considers reasonable. The length of any further period will be determined by the facts in any given case. In *Nolan v Balfour Beatty Engineering Services* (UKEAT/0109/11), the EAT said that tribunals must bear in mind the surrounding context, including the primary time-limit and the general principle that litigation should be progressed efficiently and without delay. Tribunals should then go on to consider all the circumstances of a particular case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time-limits; and why it was that the further delay had occurred. The basic rule is that tribunals expect claimants who present a claim late to act to rectify the delay as soon as they become aware of it.

Submissions

Discrimination claims

88. **Respondent.** Ms Snocken argues that there is no jurisdiction to hear any claims that remain after the first two matters (Jurisdiction and Victimisation) have been determined because she says all of the Claimant's claims, except the victimisation claims, are outside of their primary time limits. She says in relation to the discrimination claims, it is not just and equitable to extend time.

89. Ms Snocken referred to the case of *Robertson*, where the court held that: *"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." (*This was followed by the Court of Appeal in *Department of Constitutional Affairs v Jones* [2008] IRLR 128 (referred to in *Miller* [RBA 55]).

90. She says there is no just and equitable basis upon which the Tribunal may exercise its judicial discretion to extend the time limit for presentation of the above complaints. Ms Snocken says that all the discrimination claims (direct race discrimination, direct disability discrimination, discrimination arising from disability and failure to make reasonable adjustments) are brought in respect of how Dr Iwuchukwu was allegedly treated prior to his death. They therefore, she says, all relate to a time prior to his death, on 24 August 2021. She says some of the claims relate to significantly before that date. She says that it is not accepted by the Respondent that there are continuing acts and/or that 24 August is the applicable date for omissions. However, she says, even taking the latest possible date of 24 August 2021, these claims are out of time as they should have been presented (or at least ACAS Early Conciliation commenced) by 23 November 2021 at the latest. Since ACAS Early Conciliation was not commenced until over a year (in fact 13 months) after that date, the Claimant cannot avail himself of any extension of time under the ACAS Early Conciliation rules. The ET1 itself was not presented until 6 January 2023. Ms Snocken referred me to the discussion in Clerk & Lindsell on Torts 24th Edition at 26-80, "The ordinary rules of limitation govern actions brought on behalf of the estate of deceased persons", with the only exception arising where it is a personal injury claim (which she says is not applicable in this case as it is not a claim to which s11 Limitation Act 1980 applies).

91. Ms Snocken said that the Respondent accepted that the Claimant was required to obtain Letters of Administration prior to commencing proceedings, but argues that this should not have taken him 12 months from Dr Iwuchukwu's death, and further says no explanation is offered for the considerable further delay once the Letters of Administration had been obtained on 16 August 2022.

92. Since the claims are therefore outside of the primary limitation period, Ms Snocken says the burden is then on the Claimant to persuade the Tribunal that the just and equitable extension should be applied. She submits that it would not be just and equitable in this case to extend time because:

> 1. There has been no explanation given by Mr Echendu for the delays, whether that be the period of delay by Dr Iwuchukwu prior to his death, the delay in obtaining Letters of Administration or the delay in the period after the Letters of Administration were obtained;

2. Even if Mr Echendu relies upon obtaining the Letters of Administration, this is not a good reason especially where in any event "the ACAS Early Conciliation was started and the claim presented still more than 3 months after the Letters of Administration were obtained on 16 August 2022";

3. It is notable that Mr Echendu, although acting as personal representative of the estate, was prior to Dr Iwuchukwu's death acting as his legal adviser. In his Pre-action letter, he demonstrated knowledge of the events now complained of at the latest by August 2021;

4. There is considerable prejudice to the Respondent:

i. Proceeding with the claims will require the Respondent and its witnesses, to defend themselves against serious allegations at least 3 plus years after they occurred assuming the final hearing will not take place until after August 2024;

ii. There may be difficulties in accessing documents after this passage of time;

iii. It is unclearly precisely what was sent or communicated prior to Dr Iwuchukwu's death, but the "letter of claim"/complaint letter was not sent until September 2022 nor ACAS Early Conciliation started until after that, so the Respondent was not aware that there may be any claim of this sort until at least over a year after the relevant events took place (and in many respects often longer than that).

93. **Claimant**. Mr Echendu in the first instance disputes that the claims were made outside their primary time limits, and argues that they are a continuing state of affairs towards Dr Iwuchukwu over a period which was continued against his estate until March 2023; and/or in any event given the particular circumstances that arise here, he says it is just and equitable to extend time. Further, Mr Echendu says that in any event reference will be made to matters which are out of time as supporting evidence for those grounds which were in time (relying on *Eke v Commissioners of Customs and Exercise* [1981] IRLR 334).

94. Mr Echendu's first submission is that the acts relied upon here are all continuing acts, such that the claims were brought in time. He says that in deciding whether or not the claims are in time, the tribunal should bear in mind s123(3) Equality Act, to the effect that an act extending over a period should be treated as done at the end of that period. As to the question of whether such matters can be evidence that later events were acts of discrimination, Mr Echendu refers to *HSBC Asia Holdings BV v Gillespie* [2011] ICR 192. He submitted that in determinating the issue of whether a number of incidents amounted to an act continuing over a period, the test is whether the claimant has made out a prima facie case for the incidents being treated collectively as act continuing over a period, (*Lyfar v Brighton and Sussex University Hospitals* [2006 EWCA Civ 1548)*)*.

95. He says that the fact that the various acts of alleged discrimination form part of an act continuing over a period had not been specifically pleaded in the claim form does not preclude the tribunal from treating them as such for the purpose of time running

for so long as the respondent had been alerted to the point (*Khetab v Aga Medical Ltd* UKEAT/0313 (21 October 2010)). He says that in *Rovenska v General Medical Council* [1998] ICR 85, the GMC took a series of decisions refusing an applicant for limited registration to practice as a medical practitioner on the basis of a policy requiring the claimant to pass a language test. The Court held that the applicant's relevant complaint had been made within three months of the refusal of her last application for exemption. Brook LJ stated at 96A: "*If the regime which the GMC had selected for its exemptions policy was inherently discriminatory, as the applicant maintained, then on every occasion that it refused to allow her limited registration without first taking PLAB test it would be committing an act of unlawful discrimination ....*".

96. Mr Echendu submitted that the Claimant's discriminatory claims (and victimisation detriments) come within categories (b) and (c) as listed by McMullen J in *Coutts v Cure,* namely

> (b) An act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time.
>
> (c) A series of discriminatory acts, whether or not set against a background of a discriminatory policy.

97. He submitted that the various acts of discrimination/victimisation were a seamless whole of the respondents' practice towards their deceased employee that led to his death and they continued these against his estate until March 2023. Mr Echendu also referred to *Littlewoods Organisation Plc v Traynor* [1993] IRLR and to the *Lyfar case,* in terms of determination of the issue of whether a number of incidents amounted to an act continuing over a period, the test is whether the claimant has made out a prima facie case for the incidents being treated collectively as acts continuing over a period.

98. In effect he says that all the acts should be treated as all done at the end of the period over which they extended. In other words, he says the Claimant's claims in respect of all of them have been presented in time.

99. Alternatively, Mr Echendu submits that in the event the tribunal believes that some or any of the claims were out of time, he relies upon the tribunal to exercise its just and equitable discretion to allow the claim as late claims. He reminded me that in deciding whether to extend time on a just and equitable basis, the tribunal has a wide discretion: it can, he says, apply multifactorial *Keeble* factors and other relevant factors to find that it is just and equitable to extend time.

100. Mr Echendu said that the initial delay in bringing claims was because "Dr Iwuchukwu was in a precarious employment which he believed he would be stopped from work should he bring any claim against the respondents' consultants' staff who kept him on the job as he was not given any written contract of employment. This fear and his multiple disabilities made him to continued to [sic] work without any claim." He says Dr Iwuchukwu died intestate, so that there was no one authorised to bring claims. The estate was vested in the President of the Probate Division of the High Court, where it remained until the letter of administration was issued to the Claimant in August 2022. Mr Echendu says, immediately after the Letter of Administration was issued to him, a dispute was raised by a maternal cousin and an interlocutory injunction was awarded in September 2022 in the Central County Court London (claim no J02CL902). Mr Echendu

say the injunction claim was “dismissed/or refused” in December 2022 by HHJ Raeside, whereupon he went to ACAS for early conciliation, and subsequently issued the claim on January 6 2023.

101. Mr Echendu submitted that there were extraordinary circumstances in this case, given the allegations of excessive workloads and long hours of work, which he maintains caused Dr Iwuchukwu’s early death, which should be considered when considering prejudice. He reminded me of the “the principle of law that a person cannot benefit from his wrongs” and said that the daughter of the deceased had the expectation and the right to benefit from any damages arising from the torts of the Respondent. He also says that because he went through a long process of securing the relevant letter of administration from the High Court any claim “deemed to be made outside time should [be] accepted as they are in the interest of equity and just to be accepted as made in time.”

Discussion and conclusion on the discrimination claims

102. Section 123(1)(a) says that proceedings on a complaint within s120 must be brought before the end of *“the period of three months, starting with the date of the act to which the complaint relates”*, or such other period as the Employment Tribunal thinks “just and equitable”. Section 123(3) provides that if "*conduct extending over a period*" is alleged, the claim must be brought within three months of the end of that period. Sections 212(2) and (3) provide that a reference (however expressed) to an act includes a reference to an omission; and a reference (however expressed) to an omission includes a reference to (a) a deliberate omission to do something: (b) a refusal to do it; (c) a failure to do it.

103. As per the helpful summary in *Robertson*, the discretion to extend time is a wide one but time limits are to be observed strictly in employment tribunals. There is no presumption that time will be extended unless it cannot be justified, “quite the reverse”. The exercise of that discretion is the exception rather than the rule. [54].

104. The first thing I needed to do was to ascertain whether the discrimination claims which are under challenge were brought in time or not. If not, then I have a discretion to allow them to be brought within such other period as I think is “just and equitable”.

105. In terms of discrimination claims which are under challenge, by reference to the list produced by EJ Jones in the October CMH, there are 7 such claims in total, some of which are **new** and some of which are existing:

> 18.1 A **new** claim that Dr Iwuchukwu was the victim of an act of direct race discrimination. The less favourable treatment relied upon is subjecting him to an excessive workload. This claim effectively dates back to late 2019, some 4 years ago, when Dr Iwuchukwu commenced his employment with the Respondent.
>
> 18.2 A **new** direct discrimination claim that by failing to carry out a risk assessment in February 2020, after Dr Iwuchukwu had suffered a seizure or epileptic fit, the First Respondent treated him less favourably than it would have treated a hypothetical comparator because of either Dr Iwuchukwu’s race or his

disability. This claim effectively dates back to February 2020, and so is some 3 and ½ years old.

18.3 A **new** direct discrimination claim that by requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own, he was treated less favourably than a hypothetical comparator would have been because of his race. This claim effectively dates back to late 2019, some 4 years ago, when Dr Iwuchukwu commenced his employment with the Respondent.

18.4 A **new** claim that the practice of requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own gave rise to a failure to make a reasonable adjustment. The PCP relied upon is the practice described immediately above. It is alleged that the PCP put him at a substantial disadvantage when compared with persons who are not disabled. The adjustment contended for is that the practice should not have been required of Dr Iwuchukwu.

18.5 A **claim** that the practice of imposing upon Dr Iwuchukwu an "excessive workload" amounted to a PCP which put him at a substantial disadvantage when compared with persons who are not disabled, and that the First Respondent, in failing to reduce the workload, failed to make a reasonable adjustment. This claim effectively dates back to late 2019, some 4 years ago, when Dr Iwuchukwu commenced his employment with the Respondent.

18.6 An existing direct discrimination claim that by failing to appoint him to a permanent position in February 2021 the First Respondent treated Dr Iwuchukwu less favourably than it would have treated a hypothetical comparator and did so either because of his race or because of his disability. This claim effectively dates back to February 2021, and so is some 2 and ½ years old.

18.7 An existing direct discrimination claim that by deciding in or about May 2021 to terminate his bank contract him the First Respondent treated Dr Iwuchukwu less favourably than it would have treated a hypothetical comparator and did so because of either because of his race or because of his disability. This claim effectively dates back to May 2021, and so is some 2 and ½ years old.

106. No determinations have yet been made as to whether any of the matters relied upon by the Claimant are in fact discriminatory acts. However, that is what is alleged and for the purposes of this determination, I have taken the Claimant's case at its highest and have approached the matter on the basis that these are all potentially discriminatory acts within the scope of the Equality Act.

107. Bearing in mind the wording of ss123(1)(a), 123(3) and 212(2) and (3) of the Equality Act, and the cases I have cited above, I believe it would be helpful if I first endeavour to categorise these allegedly discriminatory acts, by reference to the categorisation that the Claimant pointed out, by McMullen J in the *Coutts v Cure* case, namely that the factual circumstances in which discrimination occurs have been illustrated in the authorities as falling into one of the following categories:

(a) A one-off act of discrimination, such as a refusal to promote, which has continuing consequences for the disappointed candidate.

(b) An act extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time.

(c) A series of discriminatory acts, whether or not set against a background of a discriminatory policy.

As McMullen J goes on to observe, category (a) requires a complaint to be made within three months of the act; category (b) requires a complaint to be made within 3 months from when the policy was repealed or cancelled and in the case of its application to a specific employee, time will run from the date it is applied to an employee; and in regard to category (c) time runs from the last in the series of acts.

108. Mr Echendu submitted that all the discrimination claims all fell within (b) and (c). With respect, I do not wholly agree with him on this. Applying these categorisations to these claims, it seemed to me that these claims could well be separated into all of McMullen J's categories, so including (a) as well as (b) and (c).

109. The claims which I assess fall within category (a) are those at 18.2 (a failure to carry out a risk assessment in February 2020, after Dr Iwuchukwu had suffered a seizure or epileptic fit); 18.6 (a failure to appoint Dr Iwuchukwu to a permanent position in February 2021); and 18.7 (a decision in or about May 2021 to terminate Dr Iwuchukwu's bank contract with effect from 31 August 2021). These to my mind were all one-off acts of discrimination, albeit ones that had continuing consequences. There were clearly not acts extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time. Further, in my assessment, these matters were not collectively such as to amount to a series of discriminatory acts such as to fall with McMullen J's category (c). As Mr Echendu pointed out, the test is whether the claimant has made out a prima facie case for the incidents being treated collectively as act continuing over a period. No evidence was presented to suggest there was any link between these acts or that the same people were involved in them.

110. Moreover, the claims at 18.2 and 18.6 are both built around failures to do things, and case law has established that in these cases, time runs from the date of the decision not to do the something.

111. The other claims listed above [18.1, 18.3, 18.4 and 18.5] were in my assessment based on a continuing pattern of work which it is alleged existed throughout or for a considerable period of Dr Iwuchukwu's employment with the Respondent. Mr Echendu categorised that workload as "excessive" and said there was also a requirement that Dr Iwuchukwu care for the patients allocated to his supervisors as well as his own. These claims seemed to me to amount to acts extending over a period of time, constituting a rule or policy, by reference to which decisions are made from time to time, and / or a series of discriminatory acts, whether or not set against a background of a discriminatory policy.

112. With regard to those above, which I have found to be in category (a), these are all specific incidents, which if Dr Iwuchukwu had made complaint about at the time, would have therefore needed to be brought within 3 months of their occurrence. On any basis, the first two of these claims [18.2 – which dates from February 2020; and 18.6 which dates from February 2021] were both already seriously out of time by the date of Dr Iwuchukwu's death, no complaints having been made.

113. As far as 18.7 was concerned, I noted that in his submissions, Mr Echendu said that the date of the letter informing Dr Iwuchukwu that his bank contract would be terminated on the 31st of August 2021, was 25 May 2021. It could be argued of this claim, that while this was a one-off act, the date of the act – when it would have crystallised – was 31 August 2021 rather than 25 May 2021. So, with regard to this act, in my assessment, as at the date of Dr Iwuchukwu's death, it could be argued it was still in time.

114. As far as the other claims, [18.1, 18.3, 18.4 and 18.5] I do not regard these as being out of time at the time of Dr Iwuchukwu's death.

115. I do not accept Mr Echendu's submission that it can be said that these were all claims that effectively continued after Dr Iwuchukwu's death without any limitation. Ms Snocken referred me to the passage in Clerk & Lindsell on Torts 24th Edition at 26-80, namely: "The ordinary rules of limitation govern actions brought on behalf of the estate of deceased persons". That being the case, the 3-month limitation period applied at the latest from the death of Dr Iwuchukwu's death. This meant that these claims all needed to have been brought (or at least ACAS Early Conciliation commenced) by the 23 November 2021.

116. On my assessment therefore all the discrimination claims were commenced out of time, as they should have been presented (or Early Conciliation commenced) by 23 November 2021 at the latest. In fact, as far as the existing claims [18.5. 18.6 and 18.7] are concerned, ACAS Early Conciliation was not commenced until some 13 months after that date and the ET1 was not presented until 6 January 2023. So, these are still very significantly out of time. And as far as the new discrimination claims [18.1 – 18.4] are concerned, these are even further out of time, having been raised for the first time on or around 18 October 2023, when Mr Echendu submitted his response to the Respondent's request for further particulars.

117. On the basis that I have found that all the discrimination claims, both existing and new, are out of time, what I have to do now is apply the just and equitable test when considering whether I should extend time. As stated above, case law suggests that it is well-established that where a claim is presented outside of the relevant limitation period, the burden is upon the claimant to persuade the Tribunal that it is just and equitable to extend time. Case law also suggests that it is necessary for a Tribunal to make findings of fact about the cause of action and the appropriate limitation periods, which is what I have endeavoured to do at §104 - 115.

118. In considering whether to exercise my discretion and allow for a different period for the claims to have been submitted, I need to consider the prejudice that each party would suffer as a result of granting or refusing an extension of time, and should also have regard to all the other relevant circumstances. In *Keeble*, it was suggested that a comparison with the checklist in s33(3) Limitation Act 1980 might 'illuminate' this task. Subsequent case law (such as *Afolabi* and *Adedeji)*, makes clear that I am not required to go through the matters listed in s33(3) Limitation Act 1980 as a checklist, provided that I leave no significant factors out of account. I bear in mind here that the Court in *Adedeji* observed that "*The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) [of the EqA] 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".*

119. Starting therefore with *prejudice*, both parties have argued that prejudice would be caused to them if an extension were granted/refused. Ms Snocken said there would be considerable prejudice to the Respondent, which was a public authority, if the claims were allowed to go ahead, including that the Respondent was not aware that there might be any claim until over a year after the relevant events took place, that the Respondent and its witnesses would have to defend themselves against serious allegations at least 3 years after they occurred and that there may be difficulties in accessing documents after this passage of time. Mr Echendu submitted that there were extraordinary circumstances in this case which should be considered when considering prejudice, not least the allegations of excessive workloads and long hours of work, which he maintains caused Dr Iwuchukwu's early death. He also referred to "the principle of law that a person cannot benefit from his wrongs" and said that the daughter of the deceased had the expectation and the right to benefit from any damages arising from the torts of the Respondent.

120. Having considered both side's arguments, in my assessment, there was potential for prejudice on either side here. However, overall, I judged that the Respondent would suffer more prejudice here both in terms of the very considerable extension of the limitation period that would be occasioned if time was extended, which is in effect a defence available to the Respondent, as well as a result of the "forensic" effect of the various delays, given the passage of time that had passed before they had any inkling that there might be a complaint (7 September 2022), and the further time that passed before the claim was proceeded with.

121. Turning then to look at other factors which I consider relevant, I felt on the facts here that most of the suggested factors listed in *Keeble,* were relevant.

122. <u>The length of and reasons for the delay.</u> As already indicated above, there have been some very serious delays here.

123. There is firstly, the delay in Dr Iwuchukwu bringing any claims himself. As I noted earlier, most of the discrimination claims could on their face have been brought by Dr Iwuchukwu before he died. Mr Echendu acknowledged there was an "initial delay" in Dr Iwuchukwu bringing claims but said this was because "Dr Iwuchukwu was in a precarious employment which he believed he would be stopped from work should he bring any claim against the respondents' consultants' staff who kept him on the job as he was not given any written contract of employment. This fear and his multiple disabilities made him to continued [sic] to work without any claim." There was some contemporary documentation to support Dr Iwuchukwu being under stress and having a history of various medical conditions [see e.g. page 2 Supplemental bundle and the additional documents at 146-147] to suggest Dr Iwuchukwu felt his employment was in a precarious position.

124. Secondly, there was a delay after Dr Iwuchukwu's death of almost a year before the Letters of Administration were obtained in August 2022. Mr Echendu pointed to the "long process that had to be gone through with regard to securing the relevant letter of administration from the High Court". In *Secretary of State for Justice v Johnson* it was held that it is not just the length of time that the claim was presented late by that is relevant, but the overall delay, even where it (or at least parts of it) is not the fault of either party, is a relevant factor that should be taken into account. Here, even if there was no fault involved as letters needed to be obtained, Mr Echendu gave no direct

evidence about the process of getting the Letters and provided no timeline as to when he had got involved, or when he had first made the application for the Letters.

125. Thirdly, there is a further period of delay after the Letters of Administration were obtained. On 7 September, Mr Echendu sent a pre-action letter to the Head of Legal Services at the Queen Elizabeth Hospital [125-133]. This was almost three weeks after the Letters of Administration had been obtained. It is to be inferred, in the absence of anything to the contrary, that by that point in time, he felt he was in a position to make his claims. Mr Echendu in his submissions said that there was a subsequent dispute with the family, which resulted in an interlocutory injunction being issued in September in relation to the Letters, which was not discharged until December 2022, and which meant he was not cleared to proceed to act on behalf of the estate until then. However, he gave no direct evidence about this process and provided no timeline as to when the injunction was first obtained, nor as to when exactly it was discharged. It is apparent from the additional documents Mr Echendu supplied that, on 8 December 2022 [148], he sent an email to the Respondent about the need for payroll information about Dr Iwuchukwu's pension. In this letter, he said "I am the Estate Administrator of Dr Iwuchukwu". On 12 December 2022, [148] the Second Respondent, Ms Leeks replied to say that she had contacted Dr Iwuchukwu's "next of kin" "from our files" "to request permission from them in order to liaise with you. Unfortunately, I have been told by them that you are not officially authorised to represent Dr Iwuchukwu's family and/or estate"; she suggested that Mr Echendu contact the family directly to resolve any issues of representation. Mr Echendu replied on the same day, 12 December, [152] to say that Ms Leeks had been "misinformed', that he had been appointed by the "Probate Division of the High Court" and "was responsible for any claim to his estate". He attached a further copy of the Letters of Administration". It is to be inferred from this exchange, that the injunction must have been discharged by the time Mr Echendu wrote these emails. However, the Early Conciliation notification to Acas was not sent until a further 10 days had passed on, 23 December.

126. There was then a further, fourth period between the EC notification and the filing of the ET1 on 6 January 2023. Even allowing that this period covered Christmas and New Year, it still amounts to a further delay.

127. Finally, there was a fifth period of delay between the filing of the ET1 on 6 January 2023 and the provision of further particulars containing details of new claims, filed on 18 October. In regard to this, Mr Echendu says that "It was in satisfying the Respondents' request that what were thought to be original claims have now been identified as new claims." He says the new claims arise out of the facts with the other claims which the respondents have responded to. I note here that the Respondent's criticism of the original pleading was set out in their ET3/Grounds of Response in March 2023.

128. <u>The extent to which the cogency of the evidence is likely to be affected by the delay.</u> Ms Snocken pointed out that the Respondent was not aware that there might be any claim until they received Mr Echendu's letter of 7 September 2022, over a year after Dr Iwuchukwu's death and said that that there "may be difficulties" in accessing documents after this passage of time. She said, by way of example, that although the Respondent has located an email with the Claimant's contract of employment attached, it had not been possible to open the attachment. Further, she said there would self-evidently be problems in a case where the employee was deceased and a third party

was making their case for them – there would have to be considerable reliance on documents as opposed to live witnesses. As the courts have said, On the other hand, his letter, although not mentioning every claim, did at that point in time, give the Respondent some level of information about what it might be facing: it was informed about "pay arrears of holiday pay entitlement of Dr Obiukwu Iwuchukwu and other arrears of wages not paid before his death." The Respondent was asked to "provide me with your proposal or arrangement your organisation had or intend to make regarding his (a) outstanding wages, his holiday pays (sic), his funeral cost and an offer of compensation for causing his untimely death". The letter accused the Respondent of exploiting Dr Iwuchukwu and subjecting him to work overload. While there were no direct references to race discrimination, there were a number of references to pre-existing medical conditions and disabilities and of a failure to make any "reasonable assessment as to the likely harm he would suffer" because of those "medical conditions. Mr Echendu stated that he intended to pursue "tortious and employment claims in the respective courts and/or Tribunals". He ended that "if after 14 days I do not hear from your organisation I will proceed to initiate legal and other actions without any further recourse to you". It seemed to me that from this point, the Respondent was effectively on notice of a possible claim, and any prejudice to the Respondent in terms of evidence gathering etc effectively ceases around this time. The Respondent's attention had been drawn to a number of potential claims being made against it.

129. The extent to which the party sued had co-operated with any requests for information. In the additional documents supplied by Mr Echendu, it is apparent that he was not provided with some documents relating to pension and payroll that he requested. However, this does not appear to have impacted on Mr Echendu's decision and/or ability to bring the claim. He raised no such arguments before me. It is also apparent from his letter of 7 September 2022, that he was very well acquainted with the background to and history of Dr Iwuchukwu's relationship with the Respondent, having acted as his legal advisor and was aware of the events and matters now complained about. There was some resistance from the Respondent here but this doesn't seem to have prejudiced the Claimant or caused any particular delay.

130. The promptness with which the Claimant acted once he knew of the possibility of taking action. Ms Snocken said it would not be just and equitable in this case to extend time because no explanation has been given by Mr Echendu for the delays, whether that be the period of delay by Dr Iwuchukwu prior to his death, the delay in obtaining Letters of Administration or the delay in the period after the Letters of Administration were obtained. She said even allowing for the time it took to get the Letters of Administration, there was still a considerable delay even after the Letters were obtained.

131. In terms of the delays and the reasons for them, and considering the "pertinent questions" posed in *ABM University Local Health Board v Morgan*:

(a) Why was it that the primary time-limit had been missed?

(b) Why, after expiry of the primary time-limit, was the claim not brought sooner than it was?

I am not in a position to answer either with any degree of confidence. In terms of the first question, (a) the reasons advanced as to why primary time-limits had been missed, any

evidence has been given by way of submissions only: “Dr Iwuchukwu was in a precarious employment which he believed he would be stopped from work should he bring any claim against the respondents’ consultants’ staff who kept him on the job as he was not given any written contract of employment. This fear and his multiple disabilities made him to continued [sic] to work without any claim”; and Dr Iwuchukwu died intestate and Letters of Administration had to be obtained, which were contested. Even allowing for the need to obtain the letters of Administration, the answer to the second question is to my mind, even less clear.

132. I therefore have some sympathy with Ms Snocken’s point on delay and the lack of explanation. Case law make clear that the burden of proof where a claim is presented outside of the relevant limitation period, is on a Claimant to persuade the Tribunal that it is just and equitable to extend time. As stated in the *Concentrix v Obi* case (above), whilst a failure by a claimant to provide evidence as to the reason for the delay can often prove fatal in practice, there is no rule of law to that effect, so that an extension can still be granted in the light of other factors. If no explanation or reason for the late submission of the tribunal claim can be found in the evidence, that is a relevant, but not necessarily decisive, consideration to weigh in the balance.

133. Mr Echendu was given permission to serve a witness statement at the October PH, but did not do so. He did not volunteer any explanation for not doing so, even when this point was raised against him at the hearing. As a result, there is a considerable lack of specificity as to what happened when. As stated above there were a number of delays here, and in regard to the second, third, fourth and fifth, little detail has been provided as to reasons for these delays, beyond the reference to the bare fact of obtaining Letters of Administration and the later injunction. The overriding impression created is of a lack of urgency on the part of Mr Echendu in bringing these matters before the Tribunal as quickly as possible. He is a legally qualified professional, who offers advice in the field of employment law. He was an adviser to Dr Iwuchukwu in 2015 when he acted for him in an employment tribunal claim (2500964/2015) against City Hospitals Sunderland NHS Foundation Trust. In that claim Mr Iwuchukwu made claims including race discrimination, victimisation and unfair dismissal. As I understand it, after an appeal, one of the complaints of victimisation succeeded as did the claim of ordinary unfair dismissal. He acted for the estate in a claim against South Tyneside and Sunderland NHS Foundation Trust, where the ET1 was issued on 4 January 2023, and in which he made claims of “race/disability discrimination and victimisation-malicious/fraudulent acts causing the death of Mr Iwuchukwu including common law negligence”. Against this background, Mr Echendu must be assumed to have a good working knowledge of employment and discrimination law and an awareness of the strict time limits that apply in bring claims to a Tribunal and the need to proceed in a timely manner especially where time issues exist.

134. Having determined that all the claims here are out of time, the question I now have to answer, is what other period do I think is just and equitable to allow those claims to be brought within. I have listed 5 factors above that I consider to be relevant to that question, none of which is determinative in its own right, namely prejudice, delay and the reason for it, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued had co-operated with any requests for information, and the promptness with which the Claimant acted once he knew of the possibility of taking action. In my assessment, while I think that two of these (the extent

to which the cogency of the evidence is likely to be affected by the delay and the extent to which the party sued had co-operated with any requests for information) are fairly evenly balanced, the remaining factors come down in favour of the Respondent.

135. As far as prejudice in concerned, on balance, considering the various pros and cons set out [at paras 118-119] above, this factor, in my assessment weighs more in the Respondent's favour than it does in the Claimant's. There have been some significant delays after the primary limitation period expired have been identified above. While some delay was inevitable because of the need to obtain the Letters of Administration, and the subsequent challenge thereto, but scant details have been provided on the process leading to this, and no reasons have been advanced beyond this on the reason for the further delays. Further, there is nothing to suggest to me that the Claimant acted with any degree of promptness to remedy or rectify the delays, once he knew of the possibility of taking action. In my assessment these three factors come down very firmly in favour of the Respondent.

136. On any analysis, the claims at 18.2 and 18.6 were well out of time even before Dr Iwuchukwu died. With regard to the remaining claims, where it might be argued the impact of the delay caused by obtaining the Letters of Administration and the subsequent challenge, have more bearing, nonetheless, these were all claims that needed to be attended to with a degree of urgency. On the limited facts that have been presented to me and taking account of all the matters set out above, I find that it would have been just and equitable for Mr Echendu to at the earliest have started claims for all the discrimination claims as soon as – or within a day or two – of receiving the Letters of Administration, or at the very very latest, as soon as the injunction proceedings were dismissed. There is no evidence that this happened. Overall, taking all the above into consideration and on balance for the reasons given above, I think justice and equity lies with the Respondent here and none of these claims should be allowed to proceed. As such I did not consider it to be just and equitable to allow any of the discrimination claims to be brought so long out of time. As such I conclude that find that the Employment Tribunal does not have jurisdiction to hear any of the Claimant's race and/or disability discrimination claims.

Money claims

137. **Respondent**. Ms Snocken's primary arguments with regard to both the money claims, were that they did not fall within the 1934 Act because of s206 ERA 1996 and/or because any cause of action only arose after death and so was not vested in the Claimant at his death. These arguments and my findings in regard to them have been set out at para 45 above, none the less for the sake of completeness, and because I did not make a finding that these arguments delivered a "knock out" blow to the WTR claim, I should also deal with the Respondent's arguments that they are both out of time. Ms Snocken argues in relation to the money claims, that it was reasonably practicable for the Claimant to make his claim within the normal time limits and that the Claimant has not shown it was not reasonably practicable to bring those claims in time and therefore those claims are out of time.

138. Ms Snocken says that the Claimant's money claims have never been entirely clear from the pleadings. There is no evidence as any complaint being made about wages or holiday pay in the months before Dr Iwuchukwu's death. She says that the Respondent understands that they relate to alleged failures to pay arrears of wages and

holiday pay both upon termination and prior to that. She understands that the Claimant argues that any of these arrears and/or outstanding payments should have been paid, at the latest, on the first payment date following Dr Iwuchukwu's death (since they are claims for payment that arise on that date if they survive the death).

139. Ms Snocken says that Bank workers at the Respondent are paid weekly in arrears on the following Thursday after the week they had worked (the week covering Monday to Sunday). There are 3 payslips in the Bundle [114-116] that evidence this: page 114 covers the period for the week that ended on Sunday 15 August 21, when the payday was Thursday 19 August [114]. The slip at 115, covers the next week, ending on Sunday 22 August, with a pay date of Thursday 26 August. [Dr Iwuchukwu died on 24 August]. The final slip, at 116 is for the week ending on 29 August and the payday was Thursday 2 September.

140. Therefore, Ms Snocken says, on any basis, the last relevant pay date here, fell on 2 September 2021. Whereas s23 ERA (for the s13 claims) allows for time limits to run from the last payment where they form a "series", reg 30 WTR (for the WTR claims) does not provide for this. Therefore, she says for any holiday pay claims under the WTR going back before death, each one is further and further out of time because they will not be linked together like the ERA claims may be. In any event, even taking the last possible date for time running, either prior to or the last relevant payment date after death, she says the primary limitation period would expire at the latest on 1 December 2021.

141. Accepting that the Claimant did not get the Letters of Administration until 16 August 2022, but ACAS Early Conciliation was not commenced until 23 December 2022, Ms Snocken says this was still at least a year late and the Claimant cannot avail himself of any extension in that regard. Further, the ET1 was not presented until 6 January 2023.

142. She says these claims are therefore outside the primary time limit. The Claimant has failed to discharge the burden on him to show that it was not reasonably practicable to present the claims within the relevant limitation periods. She says it is also significant that the Claimant is a Legal Adviser and says he was advising and/or representing Dr Iwuchukwu prior to Dr Iwuchukwu's death.

143. Furthermore, Ms Snocken says there is a more than 3-month gap between the time that the letter of administration was obtained and when the ACAS Early Conciliation was started and subsequently the ET1 was presented. Ms Snocken submits that Mr Echendu has failed to discharge the relevant burden of proof in relation to either of the money claims and that is therefore she says an end to the matter as the Tribunal does not have jurisdiction to hear those claims.

144. If, contrary to the above, it is found that it was not reasonably practicable for the Claimant to bring the money claims in time, Ms Snocken submitted that Mr Echendu has not shown that the claim was presented within a reasonable time thereafter.

145. **Claimant.** Mr Echendu said that Supreme Court in *Agnew* had effectively done away with the 3-month limit. He said Dr Iwuchukwu had never been paid holiday pay since he started – he said there is no mention of this in the payslips, which should be itemised. He said Dr Iwuchukwu can bring a claim here for a series of deductions, especially as he has never been paid any holiday pay. Mr Echendu referred to the case

of *DPP v Marshall* [1998] ICR 518, where he said that the Claimant was unaware of her right to bring a claim for 5 years but was still allowed to bring it. He said that on 3 March 2023, the Respondent had closed access to the Claimant's employment records. He said it was reasonably practicable to give him until December 2022 to be within time as it was still a valid and subsisting claim. He said it was not possible to bring the claim before as he had no rights until he got the Letters of Administration. In relation to the money claims, it was therefore not reasonably practicable to bring those claims in time and he brought them within a reasonable time thereafter.

Discussion

146. I asked the parties whether the recent supreme Court decision in *Chief Constable of the Police Service of Northern Ireland v Agnew,* which concerned historic claims o*f* underpayments to holiday pay, made any difference to any of their submissions, as neither had mentioned it. As above, Mr Echendu argued that the case had in effect removed the 3 month limitation for bringing claims. Ms Snocken said it had no impact on any of the issues to be decided here as it was essentially looking at what was a series of deductions, and how far back such claims could go (the two-year backstop that limits unlawful deduction from wages claims in the UK contained in the Deduction from Wages (Limitation) Regulations 2014 (SI 2014/3322) was not in issue, as it does not apply in Northern Ireland) and it was not decided on the basis of the WTR.

147. Mr Echendu also referred me to the case of *Marshall*, which was a discrimination case. It held, as I understand it, that an employment tribunal may determine that it is just and equitable to hear a complaint of sex discrimination out of time where the complainant was reasonably unaware of her right to bring proceedings until shortly before filing her complaint. Ms Marshall did not bring a claim for sex discrimination until the European Court of Justice gave its ruling in the case of *P v S and Cornwall County Council* [1996] IRLR 347 and held that the EC Equal Treatment Directive precludes discrimination against a transsexual for a reason related to a gender reassignment. Ms Marshall's complaint was three years out of time and the Crown Prosecution Service (CPS) claimed that the tribunal did not have jurisdiction to hear her complaint. The employment tribunal found, and the EAT upheld, that it was reasonable of Ms Marshall not to have brought her claim within the three-month time limit. She could not have been aware that she had a right to bring a claim for sex discrimination until the law was clarified in *P v S*. As the evidence in the case was well documented the tribunal held that the CPS would not be prejudiced by the hearing and as such it was just and equitable to allow her to bring her claim out of time.

148. Where a complaint is made relating to a deduction of wages by an employer, time runs from the date of payment of the wages from which the deduction was made, or if it is in regard to a series of deductions, time runs from date of the last deduction or payment in the series. I accept Ms Snocken's analysis that the last possible date for time starting to run, either prior to or the last relevant payment date after death, in regard to either claims would be 2 September 2021, such that the primary limitation period here would expire at the latest on 1 December 2021. Mr Echendu says of the holiday pay claim, that no holiday pay had ever been paid. Applying the *Taylorplan* guidance on the questions to ask on timeliness in a wages act context, and putting Mr Echendu's case at its highest, assuming these complaints related to a series of deductions, and taking the date of the last possible deduction as being the 2 September 2021 pay date, then the relevant date for the presentation of the complaint, was within the period of three

months thereafter, so 1 December 2021. On that basis, clearly these complaints were not made in time.

149. Therefore, I now have to ask myself two questions – (1) was it was reasonably practicable for the Claimant to have made these claim within the normal time limits; if I find it was then therefore I must find that the claims were are out of time; (2) if I find it was not reasonably practicable to bring those claims in time, then there is a discretion to consider the complaint if it is presented within such further period as the tribunal considers reasonable.

Was it reasonably practicable for the Claimant to have made these claims within the normal time limits?

150. I have found that the money claims should have been presented on or before 1 December 2021. Ms Snocken argues that Mr Echendu has failed to discharge the burden of proof in relation to either of the money claims as to whether or not it was reasonably practicable to bring those claims in time.

151. The wording of the relevant statutes require me to be "satisfied" that it was not reasonably practicable for complaints in regard to the money claims to be presented before the end of the relevant period of three months. The burden of proof in this regard lies with the Claimant. Dr Iwuchukwu died intestate and I acknowledge that with any death, but particularly ones that are unexpected, as appears to be the case here, there is a period of time when there is confusion and uncertainty, but Mr Echendu did not advance any argument or evidence to me on this basis. Nor did he provided any detail around what happened after Dr Iwuchukwu died, nor around the timing of the application for the Letters of Administration and the obtaining thereof. None of this is satisfactory. The legal test requires not just that I am satisfied but that I am satisfied that it was not "reasonably" practicable for the to be presented before the end of the relevant period. "Reasonably" adds something to practicable. In *Palmer,* the court said this did not simply mean reasonable, and that it meant more than merely what is reasonably capable physically of being done, such that they formulated the question as "was it reasonably feasible to present the complaint to the industrial tribunal within the relevant three months?" Thus, it appears to me this is not simply a test of practicability, such that it could simply be said that it was impossible for Mr Echendu to have commenced these claims until valid Letters of Administration were in place. It involves an element of reasonableness, which reflects and focusses on the conduct of the Claimant and what he was doing during that primary limitation period – in this case until 2 December 2021. I have no information about this period. I do not know why the Letters of Administration took over a year to obtain. I do not know if the Claimant pursed them with vigour or whether he met with obstacles. Tempting though it is to give him the benefit of the doubt here with regard to the fact that Letters of Administration were required, I cannot be satisfied on the basis of what I have been presented with, that it was not reasonably practicable for complaints in regard to the money claims to be presented before the end of the relevant period of three months. That being my finding, it is therefore an end to the matter, as the Tribunal does not have jurisdiction to hear those claims.

What further period do I considers reasonable for the presentation of the claim?

152. In the event that I have fallen into error in my analysis of the first question, I have also gone on to ask myself what further period I consider would have been

reasonable for these complaints to have been presented within. Any such additional analysis must it seems to me, be based around the date on which the Letters of Administration were obtained, namely 16 August 2022. On the basis of Mr Echendu's submissions, sometime in September 2022, there was a challenge to those Letters and an interim injunction was obtained. Nonetheless, it appears from the pre-action letter written on 7 September 2022, that Mr Echendu was at that date well aware of the possible existence of the money claims. Furthermore, if he was able to write and send that letter at the time, then I have to assume (in the absence of any evidence to the contrary) that at that time there was no extant challenge to the Letters, which he had by then been in possession of for almost three weeks. I have seen no evidence as to why it was not reasonable for the steps necessary to commence a claim to have been taken at this time. On this basis, in my judgment it would have been reasonable for Mr Echendu to have made the appropriate reference to ACAS for early conciliation on or around 7 September 2022, and that appears to me to the appropriate reasonable further period for the bringing of the claim. On that basis, the claims are out of time.

Overall conclusions and outcome in the light of the determinations above.

153. None of the Claimant's claims, where existing or new, can proceed. On that basis, the ET1 claim is struck out in its entirely as there are no valid claims that can be brought. Using the numbering set out by EJ Jones at paragraph 18 of the October CMH, the result of the determinations I have made above is as follows:

> 18.1 the direct race discrimination claim that Dr Iwuchukwu was subjected to an excessive workload on the grounds of his colour. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**
>
> 18.2 the direct race and/or disability discrimination claim, that by failing to carry out a risk assessment in February 2020, the Respondent treated Dr Iwuchukwu less favourably than it would have treated a hypothetical comparator. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**
>
> 18.3 the direct race discrimination claim, that by requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own, he was treated less favourably than a hypothetical comparator would have been. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**
>
> 18.4 the disability discrimination claim, that there was a practice of requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own giving rise to a failure to make a reasonable adjustment. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**
>
> 18.5 the disability discrimination claim, that there was a practice of imposing upon Dr Iwuchukwu an "excessive workload" which put him at a substantial disadvantage giving rise to a failure to make a reasonable adjustment. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**

18.6 the direct race and/or disability discrimination claims, that by failing to appoint him to a permanent position in February 2021, Dr Iwuchukwu was treated less favourably than a hypothetical comparator. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**

18.7 the direct race and/or disability discrimination claims, that by deciding in or about May 2021 to terminate his bank contract Dr Iwuchukwu was treated less favourably than a hypothetical comparator. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**

18.8 the disability discrimination claim, that the decision to terminate Dr Iwuchukwu's bank contract was unfavourable treatment which was because of him having had a seizure in early 2021. **This has been struck out of the basis that it was out of time and was not made within such further period as I considered to be just and equitable.**

18.9 the claim for unlawful deduction from wages consisting of underpayments of salary and/or overtime. **This has been struck out of the basis that it was (1) outside of the employment tribunals' jurisdiction based on s206 ERA; and /or was not vested in Dr Iwuchukwu at the time of his death such as to come within the 1934 Act; and/or (2) it was out of time, it was reasonably practicable for the Claimant to have made the claim within the normal time limit; and/or he did not do so within such further period as I considered to be reasonable.**

18.10 the claim for unlawful deduction from wages and/or breach of the Working Time Regulations 1998 consisting of failure to pay holiday pay. **This has been struck out of the basis that (1) in so far as the claim was made under s 13 ERA it fell outside of the employment tribunals' jurisdiction based on s 206 ERA; and/or (2) it was out of time, and that (1) it was reasonably practicable for the Claimant to have made the claim within the normal time limit; and/or he did not do so within such further period as I considered to be reasonable.**

18.11 A claim that Dr Iwuchukwu's estate was victimised, relying on the Claimant's letter of 7 September 2022 as a protected act. **This has been struck out of the basis that this claim, as a victimisation claim (1) is not covered by the 1934 Act, because there was no cause of action in existence that could be said to have already vested in Dr Iwuchukwu at the time of his death, but rather this was a claim being made by the estate, arising out of matters that occurred after Dr Iwuchukwu's death; and/or because (2) the Claimant cannot bring a victimisation claim as a "Personal Representative", as he lacks the required relationship (whether under s39 (4) (employee) or s108) with the Respondent.**

18.12 A claim that Dr Iwuchukwu's estate was victimised by the Second Respondent, relying upon the Claimant's letter of 7 September 2022. **This has been struck out of the basis that this claim, as a victimisation claim (1) is not covered by the 1934 Act, because there was no cause of action in**

existence that could be said to have already vested in Dr Iwuchukwu at the time of his death, but rather this was a claim being made by the estate, arising out of matters that occurred after Dr Iwuchukwu's death; and/or because (2) the Claimant cannot bring a victimisation claim as a "Personal Representative", as he lacks the required relationship (whether under s39 (4) (employee) or s108) with the Respondent.

18.13 A claim that Dr Iwuchukwu's estate was victimised by the Second Respondent, relying on the Claimant's letter of 7 September 2022. [**December 2022??] This has been struck out of the basis that this claim, as a victimisation claim, (1) is not covered by the 1934 Act, because there was no cause of action in existence that could be said to have already vested in Dr Iwuchukwu at the time of his death, but rather this was a claim being made by the estate, arising out of matters that occurred after Dr Iwuchukwu's death; and/or because (2) the Claimant cannot bring a victimisation claim as a "Personal Representative", as he lacks the required relationship (whether under s39 (4) (employee) or s108) with the Respondent.**

The Claimant's application to amend his claim.

154. Given these findings, as I have found that none of the claims, whether existing or new, survives, the need to deal with the Claimant's application to amend has become otiose. Further, any need for the further PH that was put in place as a precautionary measure at the hearing on 17 November, also falls away.

General matters

155. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

_____
Employment Judge Phillips
Date: 11 December 2023

Appendix – the October CMH para 18 claims

18.1 A **new** claim that Dr Iwuchukwu was the victim of an act of direct race discrimination. The less favourable treatment relied upon is subjecting him to an excessive workload. The specific protected characteristic relied upon is that Dr Iwuchukwu was black. The Claimant relies on a hypothetical comparator. A parallel allegation of direct disability discrimination is no longer pursued.

18.2 A **new** direct discrimination claim that by failing to carry out a risk assessment in February 2020, after Dr Iwuchukwu had suffered a seizure or epileptic fit, the First Respondent treated him less favourably than it would have treated a hypothetical comparator because of either Dr Iwuchukwu's race or his disability.

18.3 A **new** direct discrimination claim that by requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own, he was treated less favourably than a hypothetical comparator would have been because of his race.

18.4 A **new** claim that the practice of requiring Dr Iwuchukwu to care for the patients allocated to his supervisors and not just his own gave rise to a failure to make a reasonable adjustment. The PCP relied upon is the practice described immediately above. It is alleged that the PCP put him at a substantial disadvantage when compared with persons who are not disabled. The adjustment contended for is that the practice should not have been required of Dr Iwuchukwu.

18.5 A **claim** that the practice of imposing upon Dr Iwuchukwu an "excessive workload" amounted to a PCP which put him at a substantial disadvantage when compared with persons who are not disabled, and that the First Respondent, in failing to reduce the workload, failed to make a reasonable adjustment.

18.6 An existing direct discrimination claim that by failing to appoint him to a permanent position in February 2021 the First Respondent treated Dr Iwuchukwu less favourably than it would have treated a hypothetical comparator and did so either because of his race or because of his disability.

18.7 An existing direct discrimination claim that by deciding in or about May 2021 to terminate his bank contract him the First Respondent treated Dr Iwuchukwu less favourably than it would have treated a hypothetical comparator and did so because of either because of his race or because of his disability.

18.8 A **new** claim that the decision to terminate Dr Iwuchukwu's bank contract was unfavourable treatment which was because of something arising from his disability. The relevant "something arising" relied upon is Dr Iwuchukwu's having had a seizure in early 2021.

18.9 An existing claim for unlawful deduction from wages consisting of underpayments of salary and/or overtime.

18.10 An existing claim for unlawful deduction from wages and/or breach of the Working Time Regulations 1998 consisting of failure to pay holiday pay.

18.11 An existing claim that Dr Iwuchukwu's estate was victimised. The protected act relied upon is the Claimant's letter of 7 September 2022 which it is alleged raised allegations of discrimination. The detriment is not reply to his correspondence

18.12 An existing claim that Dr Iwuchukwu's estate was victimised by the Second Respondent. The protected act relied upon is the Claimant's letter of 7 September 2022. The detriment is the Second Respondent's failing to provide payroll information to the NHS Pension team when requested to do so.

18.13 A **new** claim that Dr Iwuchukwu's estate was victimised by the Second Respondent. The protected act relied upon is the Claimant's letter of 7 September 2022. The detriment is the Second Respondent refusing to deal with the Claimant's correspondence.