EMPLOYMENT TRIBUNALS

Claimant: Mr M Bearman

Respondent: NG Bailey Limited

Heard at: Bristol **On:** 10 and 11 September 2024

Before: Employment Judge Barton

Representation
Claimant: Mr N Bidnell–Edwards of counsel
Respondent: Mr T Welch of counsel

JUDGMENT

1. ***The Claimant was not a disabled person by reason of dyslexia at the times material to this claim. The Claimant's claim in relation to this disability is dismissed.***

2. ***The Claimant's detriment claims (set out below) and the reasonable adjustment claims are dismissed as being out of time.***

JUDGMENT having been provided to the parties on 11 September 2024 (oral reasons given) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

[Numbers in brackets **[00]** refer to the first page of a document in the preliminary hearing bundle]

1. On 28 March 2024 Judge Roper ordered ("the Second Order") **[148]** that the two matters set out above, and a further two matters were to be determined at a preliminary hearing with the parties appearing in person on 10 and 11 September 2024.

2. These matters were all determined, and oral reasons were given at the time of the hearing. The two further matters are set out in a separate order which has been sent to the parties. The List of Issues was reduced accordingly.

3. Following enquiry and discussion the parties agreed that there were no further matters that required case management. The Respondent was satisfied with the response provided by the Claimant in relation to specific disclosure of documents relating to the Claimant's alternative employment.

4. Following discussion with the parties about availability and agreement regarding timing the full main hearing was listed for five days starting on **Monday 8 September 2025**.

The Background and Preliminary Issues

5. By a claim form presented on 20 January 2023 the Claimant brought the following complaints:

   (a) Unfair dismissal (automatically unfair);
   (b) Detriment on the grounds of public interest disclosure / health and safety;
   (c) Breach of contract (relating to notice);
   (d) Unlawful deductions from wages,

6. By email dated 15 May 2023 the Claimant confirmed, in response to an enquiry by the Tribunal, that he would like to bring a claim of disability discrimination.

7. The Claimant was employed by the Respondent between 23 August 2021 and 28 September 2022 as an Electrical Technician. The claimant asserts his effective date of termination was the 14 October 2022 when he received confirmation of dismissal.

8. The Respondent says it is a leading provider of construction and engineering services across the United Kingdom.

9. This matter had already been the subject of a previous telephone case management preliminary hearing, on 8 November 2023, and the background and issues have been set out in detail by Judge Gray in that order ("the First Order") **[55]**. At the hearing on 8 November 2023 the Respondent accepted that the Claimant was a disabled person by reason of industrial deafness at the material times to this claim. The Respondent disputed dyslexia as a claimed disability asserting the Claimant had not evidenced the impairment or a substantial disadvantage by the impact statement and disclosure provided to date.

10. The matter was then listed before Judge Roper on 28 March 2024 to hear the Respondent's application for strike out and/or deposit orders. It remained the case that the Respondent did not concede that the Claimant was a disabled person by reason of dyslexia. Judge Roper declined to allow the matter to proceed to its full main hearing without that first having been determined at a preliminary hearing. It became clear that the Respondent

wished to make an application that some of the Claimant's claims should be dismissed as having been presented out of time. There was also an application for specific disclosure of documents relating to the Claimant's alternative employment. At the 28 March 2024 hearing it was agreed that if the matter proceeded to hearing as envisaged, it could take at least 10 days to resolve when the result of a preliminary hearing might mean that certain aspects of the claim might fall away. Judge Roper expressed his view that the allegations as presented on 28 March 2024 were wholly disproportionate to the issues to be determined. The list of legal obligations which the Claimant asserted he had in mind as being breached when making his disclosures were, in the Judge's view, bewildering **[155]**.

11. The Preliminary Issues to be determined at the preliminary hearing were set out by Judge Roper in the Second Order **[149]** as follows:

    (1) Whether the Claimant was a disabled person by reason of dyslexia at the times material to this claim; and

    (2) The Claimant's application to amend the wording of alleged Detriments 4, 5 and 7; and

    (3) Unless the Employment Judge decides that this is better dealt with at a full main hearing, or in the context of the Respondent's application for strike out and/or deposit order, to determine whether the first 10 detriment claims and the reasonable adjustment claims should be dismissed because they were presented out of time; and

    (4) The Respondent's application for strike out and/or deposit order under Rules 37 and 39; and

    (5) Whether the agreed List of Issues is then reduced accordingly; and

    (6) To list the full main hearing (to which end the parties must have to hand their witness and representatives' availability for hearing from December 2024 to August 2025 inclusive).

The Hearing

12. I was assisted by the provision of the preliminary hearing bundle of 255 pages. Counsel had also submitted written arguments which they referred to and developed in their oral submissions. The Claimant was the only witness, and he gave his evidence on oath. The identified issues were dealt with in the order set out above. Oral reasons were given for each determination before moving onto the next issue.

13. The Claimant forgot to bring his hearing aids on both days of the hearing. Reasonable adjustments were made. These took the form of the Claimant and other participants moving seats to make sure that the Claimant could hear what was being said and participate fully. Over the course of both days'

I made enquiries with the Claimant to make sure that he could hear the proceedings and participate.

14. At the start of day two (11 September 2024) the lighting in the courtroom failed and could not be fixed. There was one window in the courtroom allowing natural light to enter. As there were no other court rooms available enquiries were made with the parties to determine if the hearing could continue. The parties confirmed that they could proceed.

15. I will deal with each issue in turn setting out the evidence, the law and the application of the law to the facts as I found them to be.

Disability – dyslexia
The evidence and submissions

16. The first preliminary issue to be determined is, whether the Claimant was a disabled person by reason of dyslexia at the times material to this claim. The Claimant has provided a disability impact statement **[234]**. This was undated and unsigned. The Claimant adopted this as his evidence and signed a copy during the hearing. A significant proportion of this 3 page document is focused on the accepted disability of industrial deafness. 10 of the 22 paragraphs of the witness statement relate to dyslexia. In relation to dyslexia there is no medical evidence or other evidence beyond the Claimant's own evidence given today in his statement and cross examination.

17. The Claimant's evidence was that he had lived with dyslexia all his life. It was undiagnosed until 1993/1994, while the Claimant was in higher education. At that time, he was provided with a "Dyslexia Statement" but no longer has that document. In cross examination the Claimant gave evidence that he had to give up Higher Education due to the use of software packages in teaching his course. His dyslexia made using these pieces of software too difficult to continue. The Claimant accepted that he had not raised his dyslexia with his GP. The Claimant gave evidence of how over a successful 25 year career he had become accustomed to dealing with large written documents such as the specifications or standards for a particular job. The Claimant also gave evidence that because of the nature of his work he is required to pass regular exams to be current in matters of health and safety. The Claimant's dedication and great personal pride in his work was clear to see. The Claimant clarified that he was used to reading large written specifications as there was usually some familiar text or standard elements that changed little from job to job. His evidence was that his main difficulty was to do with the increasing use of computers in the workplace and the impact that using screens and software had in relation to his dyslexia.

18. The Respondent submitted that the Claimant's evidence was that he could do his job on a daily basis and there was no evidence of a substantial impact day to day on the basis of the Claimant's own evidence. The Respondent pointed to a lack of medical evidence or other professional assessment of the extent and effect of the Claimant's dyslexia. The Respondent also relied upon the absence of detail relating to the Claimant's use of computers and software.

19. On behalf of the Claimant, it was submitted that the focus should be on what the Claimant cannot do. This submission was developed by highlighting that the Claimant is already disabled by way of deafness. This hearing loss reduces the amount of information the Claimant can receive. Therefore, his need to read and write is more acute. I was also addressed on the basis that Paralympians may be able to do exceptional things, but that this is due to training and preparation and does not mean that they are not disabled, Mr P Aderemi v London and South Eastern Railway Ltd: UKEAT/0316/12/KN.

Disability the law

20. A person (P) has a disability if they meet the criteria set out in section 6 Equality Act 2010:

"(1) P has a disability if:

(a) P has a physical or mental impairment, and
(b) The impairment has a substantial and long-term adverse effect on P's ability to do normal day to day activities".

21. The Claimant bears the burden of showing me that he meets this definition, on the balance of probabilities Morgan v Staffordshire University [2002] IRLR 190. When determining the question of disability, I must also take account of such guidance as I think necessary (paragraph 12, Schedule 1 Equality Act 2010). I consider it is necessary to take into account the government guidance "Guidance on matters to be taken into Account in Determining Questions Relating to the Definition of Disability" (the guidance). I have directed myself that the guidance is guidance only and should not be taken too literally or used to adopt a checklist approach Leonard v Southern Derbyshire Chamber of Commerce [2001] IRLR 19.

22. In Goodwin v Patent Office [1999] ICR 302, it was held that there are four limbs to the definition of disability, and this is reflected in the legislation.

(i) Does the person have a physical or mental impairment?
(ii) Does that impairment have an adverse effect on their ability to carry out normal everyday activities?
(iii) Is that effect substantial?
(iv) Is that effect long term?

23. The term 'substantial' is defined under section 212 Equality Act 2010 as being "more than minor or trivial". Normal day to day activities are things people do on a regular basis such as shopping, reading, writing, conversing, getting washed and dressed, preparing food, eating, carrying out household tasks, walking and travelling, socialising, and working (the guidance, D2 to D9). Normal day to day activities must be interpreted as including activities relevant to professional life Paterson v Commissioner of Police of the Metropolis [2007] IRLR 763.

24. Paragraph 2 Schedule 1 Equality Act 2010 states that:

    (1) The effect of an impairment is long term if -

        (a) It has lasted for at least 12 months,
        (b) It is likely to last for at least 12 months, or
        (c) It is likely to last for the rest of the life of the person affected.

    (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal everyday activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

25. The issue of how long an impairment is likely to last is determined at the date of the alleged discriminatory act and not the date of the tribunal hearing McDougall v Richmond Adult Community College [2008] ICR 431, CA. Subsequent events should not be taken into account.

Findings – applying the law to the evidence

26. I find that the Claimant has been living with dyslexia all his life. This is an impairment. The effect is long term. On the basis of the available evidence I find that the Claimant's dyslexia has an adverse effect on his ability to carry out normal everyday activities, including activities related to his employment.

27. Examining the Claimant's disability impact statement **[234],** I find that the evidence of effect being substantial is minimal. The Claimant addresses the effect of his dyslexia at paragraphs 17 – 21 of his statement. Although there is evidence that the Claimant's dyslexia does have an effect on his ability to carry out normal everyday activities there is insufficient evidence that addresses how substantial that effect is.

28. One such example is found at paragraph 18 where the Claimant states that it takes him longer to read information, and to digest and understand it. In the same paragraph he states that it takes him longer to process verbal instructions. There is no further explanation of how these adverse effects are substantial.

29. I have reminded myself that substantial means "more than minor or trivial". I have taken this into account when assessing the evidence. The Claimant bears the burden of proving that the effect is substantial. The evidence provided at the preliminary hearing does not discharge that burden. I do not find that the effect is substantial.

30. The absence of any medical evidence does not assist the Claimant in establishing that the effect of his dyslexia is substantial. At paragraph 21 of his statement **[236]** the Claimant states that his dyslexia causes him anxiety and depression. His evidence in cross examination is that he does not speak to his GP about his dyslexia. It is, of course, a matter for the Claimant as to what he discusses with his GP. If anxiety and depression

were a substantial effect of his dyslexia, I find it incongruous that the Claimant has not spoken to his GP to seek assistance. The Claimant did say that he did not discuss it because he did not think the GP would have done much about it. He also said that even if he had mentioned it he had no idea if the GP would have kept a note of it. At pages 28 and 29 of the preliminary hearing bundle it is said on behalf of the Claimant that he experienced insomnia and migraine headaches in December 2021. On 17 December 2022 he was signed off work due to work related stress. Although it is not recorded, it is clear that a medical professional must have signed that fit note. It is clear that the Claimant was in contact with his GP or another medical professional. There was no evidence to explain how the Claimant's disability of dyslexia could have a substantial effect on his day to day activities but did not warrant him discussing the substantial effect with his GP.

31. There was no evidence from the Claimant about what adjustments had been made, or not made, by his previous employers over the course of his career prior to the period of time relevant to the claims. Given that dyslexia is a lifelong condition it would be expected that if the dyslexia had a substantial effect this would be reflected in the effect during previous periods of employment. I understand that the Claimant had a particular difficulty with working in an office environment during his employment with the Respondent. However, if his dyslexia has a substantial effect on the Claimant's everyday activities I would have expected more detailed evidence on this point. It is a matter for the Claimant and those that represent him as to how his case is presented. I do note that over half of the disability impact statement relied upon at the preliminary hearing is devoted to dealing with the industrial deafness disability. This condition was accepted as a disability by the Respondent. It seems to me that the space used to provide evidence about an agreed disability may have been better used to provide any further evidence in relation to the substantial effect of the Claimant's dyslexia. Although the Claimant submitted that I should focus on what he cannot do, due to his dyslexia, the lack of detail about what the Claimant cannot do is the reason why I find that the impairment does not have a substantial adverse effect on his ability to carry out normal everyday activities. There is insufficient evidence to establish that the Claimant has discharged the burden upon him to establish that he meets the definition of disability set out above.

Jurisdiction – time limits

32. The claim form was presented on 20 January 2023. The Claimant commenced the Early Conciliation process with ACAS on 9 November 2022 (Day A). The Early Conciliation Certificate was issued on 21 December 2022 (Day B). Accordingly, any act or omission which took place before 10 August 2022 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

33. In the second order **[148]**, Judge Roper listed the 13 Detriment claims **[162]**, set out below (the words underlined in Detriments 4, 5 and 7 being

subject to the Claimant's application to amend, which the Respondent opposes);

34. Detriments 9,12 and 13 are within time (starred in the table below) and there is no issue of jurisdiction to be determined. I have picked out the names of Rob Gill, Jamie leech and Mark Webber in bold text. This is due to the argument advanced by the Claimant that there is a continuing act in relation to time limits. I have added the name Jamie Leech in brackets to the wording of Detriment 7, as this flows from detriment 6.

	Site	Detriment
1	MENSA	Apply the disciplinary policy from 9 February 2022; and
2	(Claimant transferred to Plymouth site)	on 9 March 2022 sanction the Claimant with a final written warning; and
3	MENSA	on approximately 30 August 2021 during an inspection with Rob Jenner, **Rob Gill** became agitated volatile and abrupt with the Claimant; and
4	MENSA	from approximately 29 September 2021 Martin Everett ostracised the Claimant by blanking him, not engaging in conversations and at times not even acknowledging his presence; and
5	MENSA	from 24 September 2021 **Rob Gill**, Cameron White and Dave Wilson ignored the Claimant by not even acknowledging him when he was in the office. The Claimant would ask them to clarify things and as they were never forthcoming with a verbal answer the Claimant resorted to emailing them; and
6	MENSA	between 6 January and 9 February 2022 **Jamie Leech** ignored the Claimant at the morning briefings when he raised concerns, and ignored safety aspects the Claimant raised on risk assessments; and
7	MENSA	from 18 October 2021 (**Jamie Leech**) blanked and ignored the Claimant when he returned to the office; and
8	MENSA	between 6 January 2022 and 9 February 2022 **Jamie Leech** was aggressive in his mannerisms towards the Claimant; gave abrupt instructions; badgered the Claimant about work progress; made derogatory comments as to work progress; gave unreasonable instructions regarding work hours and work areas; gave the claimant

		"dirty" awkward and unsafe jobs to complete; and
9*	Plymouth	approximately between 19 May and 12 August 2022 **Mark Webber** and Kieran McGarry ordered the Claimant to work in extreme heat; and
10	Plymouth	on 6 August 2022 branding the Claimant as "public enemy number 1"; and
11	Plymouth	between 3 and 8 August 2022 **Mark Webber** proposed or planned to transfer the Claimant to another project; and
12*	Plymouth	on 12 August 2022 suspending the Claimant; and
13*	Plymouth	applying the disciplinary policy on or after 12 August 2022.

35. The reasonable adjustments (PCPs) were also identified by Judge Roper and are set out in the table below;

Reasonable Adjustment PCPs	
A (Dyslexia)	Employees in roles such as QC/QA are to use and operate the Respondent's computer systems and software on a daily basis to record and produce reports.
B (Dyslexia)	Employees in roles such as QC/QA are expected to read and understand the Respondent's written Risk Assessments and SOPs.
C (Hearing)	Employees in roles such as QC/QA are expected to work in areas of danger, high risk, and/or alone.
D (Hearing)	Employees in roles such as QC/QA are expected to hear all management communications and instructions.

36. Judge Roper ordered that the Claimant prepare a witness statement relating to the jurisdiction issue. The statement was to address why the Claimant asserts that it was not reasonably practicable for the claim in respect of these 10 detriments to have been brought within the time limit, and if it was not reasonably practicable, why the Claimant suggests that it was made within a reasonable period thereafter. With regard to the claim for reasonable adjustments, in respect of each of the PCPs A, B, C and D, when the Claimant suggests that they gave rise to the substantial disadvantage relied upon, and, if different, when the Claimant suggests that the statutory duty to make adjustments was engaged, with an explanation as to why that date is different. In addition, the Claimant was to state in each case why the claims were not brought in time and why the Claimant suggests that it would be just and equitable to extend time.

Jurisdiction – Time Limits
Evidence and submissions

37. The Claimant made an application to postpone the consideration of time limits to be dealt with at the full main hearing. I refused that application.

38. The Claimant provided an unsigned and undated statement in respect of time limits **[238]**. The Claimant adopted this statement as his evidence and signed a copy during the hearing. This witness statement, of three pages, did not fully address all the points set out by Judge Roper (above). The Claimant's evidence with regard to matters that were out of time is summarised below;

    37.1 He was involved in a lengthy internal appeal process until 7 November 2022.

    37.2 He was focused on this process and his dyslexia coupled with this process effectively stopped him from otherwise pursuing his claims.

    37.3 He did try to get support from his Union in October 2022, but they were consistently unhelpful and did not get back to him.

    37.4 He did not know that the appropriate claim for him to make was an Employment Tribunal claim. After his internal appeal was unsuccessful he contacted ACAS on 9 November 2022.

    37.5 He believes that his dyslexia has made it very difficult to understand how to put his case. At the end of December 2022 he contacted a firm of solicitors to submit his ET1. On 10 September 2023, counsel, instructed at that time, produced an amended draft of his claims.

    37.6 He was unfamiliar with the law on whistleblowing and disability.

    37.7 He believed that he could not have brought his claims any earlier and that all his whistleblowing claims formed a continuing series of events.

    37.8 He explains that he has accidentally narrowed his claim in relation to reasonable adjustments by referring only to the roles of QC/QA (Quality Control / Quality Assurance).

39. In cross examination the Claimant was asked about his knowledge of Employment Tribunals. The Claimant was shown the Judgment at page 146 of the bundle. He accepted that he was number 8 on the schedule of claims struck out **[147]** on 21 November 2022.This judgment related to a group action brought by UNITE regarding unfair selection for redundancy. The Claimants evidence was that he was a party but that the union had dealt with the day to day management of the claim. The Claimant told me that he did not think that he had seen the ET1.

40. The Respondent submitted that the Claimant had not given any evidence that gives rise to an argument to extend time. Further the Respondent submitted that the ignorance of the Claimant in relation to not knowing where to make a claim was not reasonable. The Respondent also submitted that on the basis of the evidence there were no grounds for a just and equitable extension of time.

41. The Claimant submitted that with regard to the ten detriment claims it was not reasonably practicable for the claims to have been brought in time, and that in any event they amount to a continuous series of acts. On behalf of the Claimant, it is submitted that because there was no cross examination on whistleblowing it must be the case that the Respondent accepted everything that is said about that. The Claimant's evidence is that there is a series of events that are connected. He alleges that the named people are connected and says that the detriments flow from his disclosures. The Claimant's case is that it is open to this Tribunal to find that there has been a series of acts, and the Claimant's case should be taken at its highest. The overlap in personnel is the common causation.

Jurisdiction – Time Limits
The Law

42. Employment Tribunal proceedings must be brought within strict (and comparatively short) time frames. Section 48(3)(a) ERA sets out the time limit for making a complaint to the Tribunal for Public Interest Disclosure and Health and Safety claims. This is three months, or 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 (ERA s.48 (3) (b)).

43. Reasonably practicable means reasonably feasible Palmer v Southend-on-Sea Borough Council [1984] IRLR 119. I was also directed, by the Respondent, to the case of Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470 and I direct myself that the test should be given a liberal interpretation.

44. The Claimant bears the burden of proof to show precisely why it was that he did not present his complaint in time – Porter v Bandridge Ltd [1978] IRLR 271.

45. I was also directed by the Respondent to the case of Wall's Meat Co Ltd v Khan [1978] IRLR 499 in respect of the situation where the reason for being out of time is ignorance. In this situation the test is whether the ignorance itself is reasonable. The Respondent also referred me to the cases of Avon County Council v Haywood-Hicks [1978] IRLR 118 and Porter v Bandridge. In relation to whether the Claimant should have known of the particular employment right or the applicable time limit, the test is an objective one.

46. For reasonable adjustment time limits, the 'just and equitable' extension of time applies. This is the case in respect of a number of statutory claims,

including but not limited to unlawful discrimination because of sex, race and disability, under s123 (1)(b) of the Equality Act 2010. The wording of the test in s123 of the Equality Act 2010 is:

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a)the period of 3 months starting with the date of the act to which the complaint relates, or

(b)such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

(b)such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a)when P does an act inconsistent with doing it, or

(b)if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

47. The discretion for the Tribunal is very wide, as stated by Leggatt LJ ; ' Parliament has chosen to give the employment tribunal the widest possible discretion.' Accordingly, because of that wide discretion, an appeal should only be successful where the conclusion of the tribunal is perverse Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA. A decision is likely to be considered to be perverse where the Tribunal fails to have regard to relevant factors or fails to give adequate reasons - Madhavan v Great Western Hospitals NHS Foundation Trust EAT 0200/16.

48. The following further points may be drawn from the caselaw;

47.1 - The discretion to extend time is a wide one.

47.2 - Time limits are to be observed strictly in employment tribunals.

47.3 - There is no presumption that time will be extended unless it cannot be justified. The reverse is true: the exercise of discretion is the exception rather than the rule – Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR. In Jones v Secretary of State for Health and Social Care 2024 EAT 2 Judge Taylor highlighted that the authority in Robertson is authority that the Tribunal has a wide discretion, and not that the discretion should be used sparingly.

47.4 - What factors are relevant to the exercise of the discretion, and how they should be balanced, are a matter for the tribunal. The prejudice that a Respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases.

47.5 - The Tribunal may find the checklist of factors in s.33 of the Limitation Act 1980 helpful but this is not a requirement and a tribunal will only err in law if it omits something significant.The Limitation Act 1980 s33(3) sets out the following points:

(a) the length of, and the reasons for, the delay on the part of the plaintiff;
(b) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed…
(c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
(d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
(e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
(f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

49. Whilst that list need only be used as a guide, the Court of Appeal gave guidance in Southwark London Borough Council v Afolabi 2003 ICR 800, CA that two of these factors are almost aways relevant:

a. the length of, and reasons for delay and
b. whether the delay has prejudiced the Respondent.

Also relevant is a decision of the Court of Appeal in Department of Constitutional Affairs v Jones [2008] IRLR 128. The Court emphasised that the guidelines are a valuable reminder of factors which may be taken into account, but their relevance depends on the facts of the particular case.

50. The potential merits of a complaint that is out of time may be one relevant factor amongst others to be taken into account when deciding is it is just and equitable to extend time; Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT 132.

Continuing Acts
The Law

51. The Equality Act s.123(3)(a);

> (a)conduct extending over a period is to be treated as done at the end of the period;

52. The Claimant must show that events are linked to establish an 'act extending over a period', or a pattern across time. The Claimant must bring their claim within 3 months of the final incident in the series, this would then bring the claim within the time limits.The alternative, if a pattern is not established, is each incident will be treated as an isolated act carrying its own three-month time limit.

53. A continuing act has been defined as follows:

> 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'. Aziz v FDA 2010 EWCA Civ 304, CA.

The distinction is made in Barclays Bank plc v Kapur and ors 1991 ICR 208, HL, between a continuing act, and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, that is an act extending over a period. Where there is no regime, rule practice or principle in operation, that will not be treated as continuing, even though the ramifications extend over a period of time. As set out in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA, the correct test is whether there is a continuing act by the employer rather than the existence of a policy or regime. This provides a fairly wide ambit then for the Tribunal to consider whether something is a continuing act, dependent on the facts of the case before it. In Aziz v FDA 2010 EWCA Civ 304, CA a relevant but not conclusive factor given for considering whether various incidents constituted a continuing act or not, was whether the same or different individuals were involved in those incidents. However, that is not conclusive. In Worcestershire Health and Care NHS Trust v Allen 2024 EAT 40 the EAT confirmed that there is no requirement that the conduct over the period of time concerns the same protected characteristic and or that the prohibited conduct must be the same.

Findings – applying the law to the evidence
Public Interest Disclosure and Health & Safety Detriments

54. The Claimant relies upon thirteen detriments for his Public Interest Disclosure (PIDA) and Health & Safety claims. Ten of these are out of time. The Claimant raised in his witness statement that the detriments at the MENSA site in Reading are part of a "series of similar acts" (ERA s.48(3)(a)) and are also linked to the detriments at the Plymouth site.

55. The Claimant's statement **[239]** in respect of time limits is a three page document of ten paragraphs. It does not address all the points highlighted by Judge Roper in the second order. The statement is remarkably short on detail. I will address the matters raised by the Claimant in his statement as set out above.

56. Paragraph two **[238]**; following an incident on 12 August 2022 the Claimant was dismissed for a second time by the Respondent on 12 September 2022. He was then involved in an appeal process that concluded on 7 November 2022. He relies upon his involvement in the appeal process coupled with the difficulties presented by his dyslexia as a reason for not bringing his claims in time. The way this was put in evidence was more of a statement than an explanation of how this prevented the Claimant pursuing his claims. There was a lack of detail. The earlier finding in this hearing was that the Claimant did not meet the definition of disability in relation to his dyslexia. Taken at its highest the Claimant's involvement in the appeal process was between 13 September 2022 and 7 November 2022 a period of almost eight weeks. While I can see that focusing on his appeal and doing so while contending with dyslexia would be a struggle, I am not persuaded on the evidence presented that the combination of these two factors effectively stopped the Claimant from pursuing his claims in the Employment Tribunal. I am also mindful that by the 7 November four of his alleged detriments were over a year old.

57. Again, in paragraph two at page 238 of the bundle the Claimant explains that he unsuccessfully sought help from his union (UNITE) in October 2022. The Claimant's evidence is that UNITE were consistently unhelpful and did not get back to him. This was in relation to the appeal process, not bringing his claims to the Tribunal. I found this evidence difficult to reconcile with the evidence of the transcript of the appeal hearing **[223]** on 7 November 2022. Present at that meeting was Mark Richards of UNITE – he was vocal on behalf of the Claimant at that appeal meeting putting an active case to the Respondent. On the evidence before me I cannot reconcile how UNITE were advocating for the Claimant on 7 November 2022 but were also consistently unhelpful to use the Claimant's words **[238]**. I am not persuaded that a lack of support from UNITE is a reason why the Claimant could not bring his claims in time.

58. The Claimant argues that he did not know that the appropriate claim for him to make was a claim to the Employment Tribunal. I am not persuaded by this argument. I accept the Claimant's evidence about the earlier claim being brought by the Regional UNITE office and that practically he had little to do with that claim. The earlier claim was in relation to a group claim about unfair selection for redundancy (ET reference: 3212974/2020). For a claim of that nature to have been properly brought before the Tribunal the regional office of UNITE would, at the very least, have had to take instructions from the Claimant to fill in an ET1. UNITE, acting properly, would have also kept the Claimant up to date about the progress of the case. If the Tribunal was writing to the Claimant as an individual, then he would have received emails or correspondence from the Tribunal. In either scenario I find that the Claimant did know of the existence of the Employment Tribunal and that this was the appropriate venue in which to

bring complaints against an employer. Similarly, the Claimant has given evidence that he was unfamiliar with the law on disability and whistleblowing. Again, this was more of a statement than an explanation of how this lack of knowledge prevented his claims being made in time. There was no evidence to substantiate how this lack of knowledge prevented the claims being made in time. I find that a lack of knowledge (ignorance) is not a reason why the Claimant could not bring his claims in time.

59. I also note that there is some internal inconsistency in the Claimant's arguments. On the one hand he states that he could not bring his claims in time because he was struggling to deal with the appeal and his dyslexia. Then he argues that he could not bring his claim in time because he did not know that the Tribunal was the appropriate venue. It seems to me that these arguments are largely inconsistent. My reading of the arguments is that the Claimant knew in September – November 2022 that he could bring a claim, but he could not do so due to being overwhelmed. This is inconsistent with then arguing that he did not know that the Employment Tribunal was the place to bring his claim.

60. The Claimant started his employment with the Respondent on Monday 23 August 2021. The first Detriment claimed is Detriment 3 on Monday 30 August 2021. The limitation period for this case is 10 August 2022. The limitation period had already expired by the time of the incident on 12 August 2022. By the time the Claimant was dismissed for the second time (13 September 2022) over a year had passed from the time alleged in Detriment 3. By the time that the appeal process had concluded on 7 November 2022 over a year had passed from the dates of Detriments 4, 5 and 7. The first Detriment (in time) is Detriment 3 on 30 August 2021. It is difficult to understand the Claimant's case for this detriment as the first protected disclosure took place in September 2021.

61. The Claimant's evidence was that he contacted ACAS on 9 November 2022 and after that he looked for information online to help him submit his claim to the Tribunal. The Claimant contacted a firm of solicitors in December 2022, and they submitted the ET1 on 20 January 2023. Instructed counsel provided an amended claim on 10 September 2023. I note that the Claimant's earlier evidence was that he struggled with using computers and software packages. There was no evidence that the Claimant had sought advice face to face, instead seeming to adopt online methods, until at least December 2022. This struck me as being at odds with the Claimant's earlier evidence regarding dyslexia and computers/software. I took notice of the fact that online research would quickly throw up the concept of time limits in relation to claims. The ACAS website highlights the issue of time limits prominently. I took note that the Claimant started to seek formal advice from 9 November onward and has had some form of legal advice since at least January 2023.

62. I find that the Claimant has not discharged the burden of proof required to establish that it was not reasonably practicable for his complaints to be presented before the end of the period of three months.

Series of similar acts

63. The Claimant raised in his witness statement that the out of time detriments (Reading – Mensa) are a part of a "series of similar acts". This argument is based on the connection between the persons involved. I have highlighted the persons named in the detriment claims in the table above at paragraph 34. In order for the Claimant to establish that the detriments that took place at the MENSA site in Reading are part of a series of similar acts with the detriments that took place at the Plymouth site there would have to be a link between the two sites. The Claimant says that this link is in the form of the persons involved. In his witness statement at page 239 of the bundle the Claimant states;

> "I allege that Graham Wilson, and Russell Walters were employed both on the MENSA project, and at Plymouth. it was only Graham Wilson and Russell Walters who were both employed on the Mensa Project. There was also a connection between Russell Walters and Kieran McGarry and Mark Webber because they had all worked together previously."

There was no further elaboration of this statement in the Claimant's evidence. Graham Wilson and Russell Walters are not named in the pleaded detriments. A person called Dave Wilson is referred to in detriment 5. The thrust of the Claimant's argument appears to be that there was an agreement between the individuals he has identified. The agreement was to send the Claimant to "Coventry", ignore him, give him dirty jobs, send him dirty looks and otherwise make his life miserable at both the Reading and Plymouth sites. I was told that the Claimant had access to 6000 pages of disclosure and found nothing that supported his claim. The Claimant has not alleged "acts similar to one another" in the pleadings or his witness statement. On the available evidence I find that the Claimant has not established that there is series of acts that link the two sites and would consequently bring all the claims within time.

Findings – applying the law to the evidence
Reasonable adjustments

64. The applicable time limit is three months or such other period as the Tribunal thinks just and equitable. The Claimant bears the burden of persuading the Tribunal to exercise its wide discretion in his favour.

65. Considering the length of the delay I find that it is considerable. The PCPs all relate to the Claimants role in quality control/quality assessment. This role came to an end on 4 January 2022. The Claimant presented his claim on 20 January 2023. The Claimant has provided no good reason for the delay in bringing the reasonable adjustment claims, beyond the reasons already set out above in relation to the detriments. I do not find those reasons persuasive when considered in the context of reasonable adjustment claims. The absence of a good reason to extend time weighs heavily in the balance against the Claimant. The delay has caused prejudice to the Respondent by preventing it from investigating the claim while matters were fresh in the recollection of those alleged to be involved. Recollections fade with the passage of time. I also note that there were no

documents useful to the Claimant in the 6000 pages of disclosure. In my view this strongly suggests that any claim would revolve around the recollection by individuals of events that took place almost three years prior to the hearing. This inevitably will render the evidence less cogent.

66. The Respondent has conducted itself appropriately in resisting the claim and made substantial disclosure to the Claimant. Although the Claimant has dyslexia I have already found that the effect of his dyslexia was not substantial. The Claimant acted with reasonable speed following his contact with ACAS in November 2022. He has also amended his claim since lodging the ET1 and seeks to do so again as part of this hearing. The Claimant does not appear to have sought any medical or expert advice. He has been in receipt of legal advice since at least January 2023.

67. I have considered the merits of the reasonable adjustment claims. The PCPs relied upon relate to the Claimant's QC/CA role which ended on 4 January 2022. The substantial disadvantage that the Claimant claims to have suffered relates to his ability to perform that role. There are no allegations that go beyond 4 January 2022. PCP A lacks merit; although the Claimant may have had difficulties with this PCP, I have already found that his evidence on the substantial effect of his dyslexia was not persuasive and that the evidence meant that his dyslexia did not meet the definition of a disability. PCP B is also focused on dyslexia and again I find that the related claim lacks merit. In relation to PCPs C and D which relate to the hearing disability which is accepted by the Respondent I find that these claims lack merit. The Claimant's evidence was that much of the communication out on the work site was done by shouting due to background noise levels. Everyone shouted or spoke in a raised voice which was what he was used to. While C and D are not totally without merit they do lack merit.

68. I find that, having taken into account the relevant factors, I am not persuaded by the Claimant that it would be just and equitable to extend time in relation to the reasonable adjustment claims. Those claims are dismissed, being out of time.

69. The remaining matters will proceed to a full hearing.

Employment Judge

27 October 2024
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

11 November 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE