EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000498/2024

Preliminary Hearing held remotely in Glasgow on 8 October 2024

Employment Judge A Kemp

Mr AB	**Claimant** **In person**
Department for Work and Pensions	**Respondent** **Represented by:** **Ms E Campbell,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The claimant's claims as to detriments alleged to have been suffered prior to 5 November 2023 are outwith the jurisdiction of the Tribunal and those claims are dismissed.**

2. **The claimant's remaining claims are struck out as vexatious under Rule 37.**

REASONS

Introduction

1. This was a Preliminary Hearing into three issues by which the respondent sought a strike out of the claims. They had been raised at an earlier Preliminary Hearing on Date, after which a Note was issued which set out the three matters to be addressed at this hearing.

2. The claimant responded to that Note on 4 September 2024 referring to his Claim Form. There was correspondence from the Tribunal to him thereafter on 9 September 2024 but which he did not directly respond to.

3. The background is that the claimant pursued an earlier claim against the respondent under case number ("the first claim") which was dismissed by Judgment dated ("the Judgment"). The claims made in the first claim were pursued under sections 13, 26 and 27 of the Equality Act 2010.

The claims

4. The claimant confirmed at the start of the hearing before me that he made claims in the present claim of direct discrimination under section 13 of the Equality Act 2010 on the basis of his protected characteristics of race, being a British Asian, and religion being Muslim, section 27 of that Act on the basis of protected acts referred to below, and detriment for having made a protected disclosure under section 47B of the Employment Rights Act 1996. The protected acts he relies on are –

   (i) An email sent to Mr HA on 29 September 2021

   (ii) Complaints made about the attempted restriction on his ability to promote the requirements of the 2010 Act

   (iii) Complaints about colleagues harassing him, and

   (iv) The first claim to the Tribunal.

5. During the course of the hearing before me the claimant referred to a grievance he had raised, but that was not referred to in any of the pleadings, the Note of the Preliminary Hearing, or the later correspondence as being a protected act, nor was the grievance within the documentation prepared for the hearing before me. I did not consider that it was a matter that was properly before me as one of the alleged protected acts.

6. The protected disclosure is said to be the said email on 29 September 2021.

7. The detriments he alleges are –

(i) Allegations to the effect that he was involved in terrorism made from late 2021 to the present date (he was asked to be more specific as to the most recent date, and said that it was in March or April 2024 by those investigating his grievance).

(ii) Dismissal from his role as Diversity and Inclusion National Team Lead in March 2022.

(iii) Harassment by colleagues.

8. It was not entirely clear about what facts the claimant relied on in his claim, from the Claim Form and later correspondence, as some details were somewhat vaguely expressed either in the Claim Form or as noted within the Preliminary Hearing Note, which the claimant did not fully respond to with specification as he might have done, and before evidence was heard I raised these issues with the claimant to seek to find out what claims he sought to pursue and why, following the guidance in ***Cox v Adecco and Others [2021] ICR 130.*** The claimant was not fully able to do so, despite an adjournment to allow him further time to consider that.

The issues

9. I explained that I had identified the following issues:

(i) Has any claim made by the claimant in this Claim been decided by the Tribunal in the first claim and so should be struck out?

(ii) Is any claim outwith the jurisdiction of the Tribunal under either section 123 of the 2010 Act or section 48 of the 1996 Act?

(iii) Is any claim covered by the principle of immunity for judicial proceedings such that it should be struck out?

10. The parties were content with those issues. Ms Campbell had raised the argument of the claims having no reasonable prospects of success in her skeleton argument, and others, but accepted that they were encompassed in the issues which derived from the Note of the first Preliminary Hearing.

11. The claimant lives in England and works remotely. It was not disputed that the Tribunal had jurisdiction. His “chain of command” as he put it was based in Glasgow. He himself worked for the department remotely, doing

so from his home, and his work included for the benefit of the Department across the United Kingdom. I raised with the claimant and Ms Campbell the issue of which law applied to the issues before the Tribunal, and both agreed that it should be taken to be Scots Law. In the absence of any issue being raised as to that I considered that Scots Law did apply to the claims and their determination and in any event even if another law might apply (obviously that of England and Wales) the presumption is that it is the same as that of Scotland unless skilled evidence is tendered to prove what it is, and no such evidence was put forward.

12. The claimant also applied for a Rule 50 Order, which is dealt with separately.

The evidence

13. The claimant gave evidence, and spoke to documents that had been produced in a Bundle of Documents, in accordance with the case management orders issued in the Note of the First Preliminary Hearing. I asked him questions to elicit facts under Rule 41, to the extent I considered in accordance with the overriding objective. He was cross examined. He gave some further evidence in re-examination. The respondent did not lead evidence.

The facts

14. I found the following facts, material to the issues before me, to have been established**:**

15. The claimant is Mr AB.

16. The respondent is the Department for Work and Pensions. It employs the claimant.

17. The claimant sent an email to his line manager on 29 September 2021. It stated as follows:

> "I have just been in the 95-minute D&I team planning meeting for this Friday's National Inclusion Week presentation. No one made any mention of the text and photo slide previously added by Jason regarding LGBT+ rights issues in Afghanistan. Near the end of the

meeting, I asked the team about including this slide in the newly-made Powerpoint presentation – which you've titled 'The Untold Story' – and Ranjit told me LGBT+ rights cannot be included in any way because 'it is too controversial'.

This important matter of equality and human rights has quite rightly been included in our D&I Powerpoint presentation from the very start; and you've never mentioned anything about this being a problem or that it would not be included. I have also clearly been excluded from your discussions with other D&I team members about this subject; and you haven't provided a list of slides you didn't want to include in the presentation - as promised you would do in the previous D&I meeting.

I have a very serious commitment to protecting the rights of all people – which includes all protected characteristics covered by the Equality Act 2010. So I think I am left with no choice other than to respectfully withdraw my involvement in this Friday's National Inclusion Week presentation to our staff.

Thanks for your help."

18. The claimant raised a claim against the respondent at the Employment Tribunal under case number ("the first claim"). After two Preliminary Hearings were heard it proceeded to a Final Hearing commencing on date and continuing on date and date. There was a day in chambers on date and the claim was dismissed by Judgment dated ("the Judgment").

19. The claimant has had legal advice for a period of about one month for around August 2023, around the time of the second Preliminary Hearing of the first claim, has had two appointments by telephone with Strathclyde University Law Clinic on dates not given in evidence, and has had support from his union representative in general terms. He has no legal qualifications or experience.

20. In the course of the preparations for that Final Hearing and in accordance with case management orders the claimant was sent, on or around 31 October 2023, documents to be relied upon by the respondent. The documents included emails dated 16 March 2022.

21. Witness statements were exchanged as had also been the subject of case management orders. Witness statements referred to the said emails dated 16 March 2022. They were spoken to in evidence at the Final Hearing of the first claim.

22. On or around 7 November 2023, a witness statement for a witness, who was identified as “JB” to be called by the respondent was sent to the claimant. He read it on or around the first day of the hearing, being on Date.

23. That statement included the following

> “[HA the claimant’s line manager] later told me that when that presentation was prepared, the Claimant wanted content with a beheading of a gay person shown on video. Everyone else said that this was not appropriate to include in the presentation, given it was likely to upset someone and be graphic especially since a refugee from Afghanistan was attending the presentation to share their experience. The Claimant took umbrage locally and felt this should be added…..”

24. During the period leading up to the Final Hearing the claimant was under stress. He suffers from fibromyalgia, which was exacerbated by the stress. He had raised a grievance against the respondent which the respondent agreed to investigate. He sought an adjournment of the Final Hearing to allow that investigation to proceed, initially doing so with the respondent. He sent several reminders about it, but eventually the respondent confirmed that it did not agree to the adjournment or a sist of the case. The claimant then applied to the Tribunal for an adjournment and sist, but that application was refused.

25. At the Final Hearing the claimant raised that remark he was said to have made to his line manager, which he disputed as having occurred. He made an application to amend his claim to refer to this allegation, which the Tribunal refused. He made an application to call the person named, which was also refused. At the time of those decisions being intimated the claimant was informed that he could, if he wished, seek to raise the matter in a new Claim Form. The respondent had agreed during discussions on

the issues raised by the claimant not to rely on those parts of the said witness statement (as the Judgment issued after the hearing records).

26. The claimant conducted the Final Hearing, gave evidence at it, and attended work during the period of it. He did not consult his General Practitioner in the period of about October 2023 to April 2024.

27. The claimant commenced Early Conciliation in respect of the present claim on 4 February 2024. The Certificate was issued on 17 March 2024.

28. The Claim Form in this claim was presented on 17 April 2024.

Submissions

29. Ms Campbell had prepared a skeleton submission in accordance with the case management orders issued at the first Preliminary Hearing, which she spoke to and expanded where appropriate. I raised with her that some of the authorities she sought to rely upon were of English law, and that the law in Scotland may be different. No further authorities were relied upon. She sought a strike out for each of the three issues raised above essentially for the reasons set out in the written submission.

30. The claimant made a submission orally. He did not make specific reference to authority but did refer to an article as addressed below. The following is a brief summary of it. He argued that the allegation made in the witness statement against him was a very serious one, which he only became aware of when it was sent to him. At the Final Hearing into the first claim most of his evidence was not heard, and he had found the hearing extremely difficult. His health had been impacted. He had not had legal advice save for a period of about a month, short consultations with the Law Clinic, and had never been represented by the Clinic. He himself had limited legal insight.

31. He argued that the respondent should not have immunity from the terms of the witness statement, as the evidence had been used against him. It was untrue. He claimed that other witnesses had had information passed to them, as they referred to an article he had raised with others, which he considered wrong. He was not aware of the detailed terms of the Practice Direction and Presidential Guidance on the use of written witness

statements in Scotland. He was concerned that the person named in the witness statement by JB had not been called as a witness despite him understanding that that person would be, and no witness statement was tendered for that person. His understanding was that possession of such a video as the statement describes is a criminal offence, and that that meant that he was described as a criminal and terrorist from the comment. The respondent had not followed government protocols with regard to such material. He referred to an article in the Law Gazette about immunity.

The law

(i) Res judicata

32. The principle of res judicata roughly translated means that the issue has been judicially determined. For that principle to apply normally the claim made in the second action must be the same as that in the first. Whilst the respondent referred to Supreme Court authority in its skeleton submission that was on the basis of English law, and that in Scotland is different, as the EAT explained in ***Kit Yi-Lucas v Lloyds Banking Group plc UKEAT/0009/20.***

33. In a case appealed to the Inner House of the Court of Session the principle of *res judicata* was explained in ***British Airways plc v Boyce [2000] IRLR 157***, in which the court held that

> "the proper approach is encapsulated by the question, 'What was litigated and what was decided?' …….We would, however, go further and say that in the tribunal system the *media concludendi* [roughly translated as the grounds of the claim made] should in general be taken as covering everything in the legislation, both in its legal and its factual aspects, which is pertinent to the act or acts of the employer made the subject of complaint – here the act of the employer in refusing the respondent's job application on allegedly racial grounds. And, as for the matter of what was decided, we are of the opinion that it should in general be presumed that an industrial tribunal, by its decision, has reached a 'proper judicial determination of the subject in question' – that, as we understand it, being the underlying requirement for a decree of absolvitor vide

McLaren, *Court of Session Practice* p.396. What we have said does, however, admit of exceptions for special circumstances of a wholly unforeseen nature or for a situation (quite unlike the present) in which the tribunal has made it clear that no final decision was intended."

34. There is accordingly firstly a question of whether the point raised in the second claim has been properly judicially determined, secondly if not the principle may apply if the matter ought to have raised, but thirdly there are exceptions for special circumstances, such that it is not always an absolute bar to the pursuit of a claim, or that it would be vexatious for the claimant to do so.

(ii) Jurisdiction

(a) Discrimination claims

35. Section 123 of the Equality Act 2010 provides

"**123 Time limits**

(1) Subject to section 140A and 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…….

(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."

36. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). Provisions as to the

effect Early Conciliation has on timebar are found in Schedule 2 to the Enterprise and Regulatory Reform Act 2013, which creates section 140B of the 2010 Act. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 give further detail as to early conciliation. The statutory provisions provide in basic summary that within the period of three months from the act complained of, or the end of the period referred to in section 123 if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place. If EC is not timeously commenced that extension of time is inapplicable, but there remains the possibility of a just and equitable extension where it has taken place albeit late.

37. Whether there is conduct extending over a period was considered to include where an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant - ***Barclays Bank plc v Kapur [1989] IRLR 387*****.** The Court of Appeal has cautioned tribunals against applying the concepts of 'policy, rule, practice, scheme or regime' too literally, particularly in the context of an alleged continuing act consisting of numerous incidents occurring over a lengthy period (***Hendricks v Metropolitan Police Commissioner*****,** ***[2003] IRLR 96****)*.

38. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant (***Robertson v Bexley Community Centre [2003] IRLR 434***). All of the circumstances may be considered, but three issues that may normally be relevant in this context are firstly the length of and reasons for the delay, secondly prejudice to either party (particularly whether a fair hearing of the case is possible) and thirdly the prospective merits of the claim.

39. There is a divergence of authority in relation to the first aspect. There is one line to the effect that even if the tribunal disbelieves the reason put forward by the claimant as to delay it should still go on to consider any other potentially relevant factors, which can include the prospective merits of the claim: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016]***

IRLR 278, following ***Pathan v South London Islamic Centre UKEAT/0312/13*** and ***Szmidt v AC Produce Imports Ltd UKEAT/0291/14.***

40. A different division of the EAT decided in ***Habinteg Housing Association Ltd v Holleran UKEAT/0274/14*** that where there was no explanation for the delay tendered that was fatal to the application of the extension, which was followed in ***Edomobi v La Retraite RC Girls School UKEAT/0180/16***.

41. In ***Rathakrishnan*** there had been a review of authority on the issue of the just and equitable extension, as it is often called, including the Court of Appeal decision in ***Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194*** in which the Court held:

> "First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion."

42. That was followed in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23*****,** which also discouraged use of what has become known as the ***Keeble*** factors, in relation to the Limitation Act 1980 an English statute having no effect in Scotland as form of template for the exercise of discretion.

43. More recent cases have followed the ***Rathakrishnan*** line, such as ***Owen v Network Rail Infrastructure Ltd [2023] EAT 106*** and ***Concentrix CVG Intelligent Contact Ltd v Obi [2023] IRLR 35***.

44. The Court of Appeal in ***Morgan*** commented on the issue of prejudice and whether the delay prevented or inhibited the employer from investigating the claims while matters were still fresh. In ***Adedeji*** the court stated that there would be prejudice if the evidence was less cogent, but also had the effect of requiring investigation of matters that took place a long time previously. In each case it stated that those were factors to be taken into account, but did not suggest that they were determinative issues.

45. The Inner House of the Court of Session held in the case of ***Malcolm v Dundee City Council [2012] SLT 457*** that the issue of whether a fair trial was possible was "one of the most significant factors" in the exercise of this discretion, in its review of authority. It referred *inter alia* to the cases of ***Chief Constable of Lincolnshire v Caston [2010] IRLR 327*** and ***Afolabi v Southwark London Borough Council [2003] ICR 800.*** In ***Malcolm*** the delay had been of the order of a month, but it is notable that whether a fair trial was possible or not was not considered to be a determinative issue.

46. Where there is said to be some ignorance of the relevant law (in this case as to the time limit) the reasonableness of that lack of knowledge is a factor to take into account - ***Bowden v Ministry of Justice UKEAT/0018/17, Averns v Stagecoach in Warwickshire UKEAT/0065/08*** and ***Adedeji*****.**

(b) Protected disclosure

47. Section 48 of the Employment Rights Act 1996 provides, in short summary, that the claim as to detriment must be commenced within three months of the act or failure to act founded on, or where there is a series of such acts or failures the last of them, but where it was not reasonably practicable to have presented the claim in time there is jurisdiction if it was presented within a reasonable period.

48. It is subject to early conciliation under section 207B of the Act, in terms equivalent to those set out above.

49. The first question is whether or not there has been a series of similar acts or failures. That has been addressed in authority which has held that the degree of linkage required for the series should not be set too high: ***Arthur v London Eastern Railway Ltd [2007] IRLR 58,*** *and* ***Lyfar v Brighton & Sussex University Hospitals Trusts [2006] All ER (D) 182.***

50. Essentially the same test arises in section 111 of the Employment Rights Act 1996 in relation to unfair dismissal claims, and the case law is generally found in relation to those claims of unfair dismissal. It is applied to all the relevant statutory provisions – ***GMB v Hamm EAT 0246/00***.

51. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271.***

52. The question of what is reasonably practicable is explained in a number of authorities. In ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119,*** a decision of the Court of Appeal, the court suggested that it is appropriate: "to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months'?" That, it explained, is a question of fact for the Tribunal taking account of all the circumstances. It gave guidance on how to do so.

(iii) Judicial proceedings immunity

53. The basic principle is that comments made in litigation, either in writing or orally when giving evidence and including in a precognition (witness statement taken to prepare for an evidential hearing) are protected from subsequent action – ***Fraser v McEwan 1905 5F (HL) 109***. That was in the context of an action against the witness, but it appears to me that it must also apply to an action against the party calling the witness, in this case JB's employer.

54. In ***Parmar v East Leicester Medical Practice [2011] IRLR 641*** the EAT in England considered this issue in the context of Employment Tribunal proceedings. It held that a claim of victimisation based on written witness statements in previous proceedings between the same parties had been correctly dismissed by the Tribunal on the basis of the principle of judicial proceedings immunity.

55. The point was addressed further by the EAT in ***Aston v The Martlet Group Limited UKEAT/0274/18,*** which in turn addressed issues arising from a Supreme Court decision ***P v Commissioner of Police of the Metropolis [2005] ICR 329*** which had overturned a decision that the EAT in ***Parmar*** had relied upon***.*** The issues in that Supreme Court case were distinguished, for the reasons there given, and the argument in ***Aston*** in this regard is I consider binding on me in the circumstances of this case. Even though the facts in the present case and that are very different the

same general argument applies, in my view. The decision of the EAT was that judicial proceedings immunity applied, the EAT supported the conclusion of ***Parmar***, and both are binding on me as it appears to me that there is no different principle that applies in Scotland.

56. In an earlier Court of Appeal decision ***Singh v Governing Body of Moorlands Primary School and Reading Borough Council [2011] IRLR 820***, it was held that the principle did not apply to prevent a claimant in a discrimination claim from relying on what were allegedly untrue comments in a witness statement made in those proceedings as the last straw to claim constructive unfair dismissal in a second claim. The allegation was not however that the witness said something untrue, but as the Court of Appeal stated "The breach complained of is that the [respondent] placed undue pressure on [the witness] to produce a witness statement containing false or otherwise inaccurate evidence. No complaint is made about [the witness's] evidence itself." That is not a decision binding on me. I do not consider that it is capable of being reconciled with the comments in ***Fraser,*** and whilst it is a higher authority than the two EAT decisions is in a different context – being in relation to what was said to be a last straw because of the actions of the respondent rather than the terms of the statements itself, and is I consider a case confined to that particular context, very different to that before me.

(iv) Strike out

57. Strike out is provided for in Rule 37, which is subject to the terms of Rule 2 and the overriding objective. Rule 37 provides as follows:

> "**37 Striking out**
>
> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success…..

58. The EAT held that the striking out process requires a two-stage test in ***HM Prison Service v Dolby [2003] IRLR 694***, and in ***Hassan v Tesco Stores Ltd UKEAT/0098/16***. The first stage involves a finding that one of the

specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim.

59. Issues of *res judicata* and immunity raise separate considerations but each also falls to be considered against that second test. Questions of timebar raise the issues within the statutory provisions and raise separate considerations.

Discussion

60. These are complex issues, and the circumstances are unusual. Despite my attempts to elicit facts from the claimant in evidence I found it difficult to do so as frequently detail was not provided and supporting documents which might have been provided had not been (one example is the grievance he said had been made, which he said had been referred to in his Claim Form but which I could not see reference to, and he did not point me to it when given the opportunity). I deal with each issue in turn:

(i) Has any claim made by the claimant in this Claim been decided by the Tribunal in the first claim and so should be struck out?

61. There is no single answer to this question, and I shall deal firstly with those aspects where I consider that the answer is yes. The claimant seeks to found on his being dismissed from an internal role (as he argues although the respondent argues that he was asked to step down from it) in March 2022. That issue was considered in the Final Hearing and addressed in the Judgment in so far as the claim is made under the 2010 Act. It appears to me that the claims in relation to the emails of 16 March 2022 on which he also seeks to found were judicially determined. They were addressed in witness statements and evidence, and in the Judgment. These are matters that are covered by the principle of *res judicata*, and in my opinion it is vexatious to seek to raise them in a second claim, as is now done.

62. That also extends to the points he seeks to make in relation to six witness statements tendered for the Final Hearing, which I also address further below. These statements were before that hearing, evidence was given in

relation to them, and a decision taken in relation to the 2010 Act. In my view these matters do fall within the principle of *res judicata*.

63. I then considered each of these matters against the test in Rule 2, and concluded that it was just and fair to strike out those aspects of the claims made on the basis that they were vexatious. I did so having regard to the factors above, the terms of the Judgment in the first claim, and the circumstances overall.

64. So far as the claim of having made a protected disclosure is concerned, the position is more complex. The claimant relies on the email of 29 September 2021 for the protected disclosure. But he did not make any claim of detriment under section 47B of the 1996 Act in his first claim in relation to that email. His claim was only one of discrimination under the 2010 Act. He now seeks to pursue a different claim to those in the first claim for what he argues is a detriment, some relied on in the first claim and one discovered around 10 November 2023, but that is based on the same underlying founding fact that the first claim included, namely the said email.

65. In so far as the matters referred to in paragraphs 65 and 66 are concerned it appears to me that the claimant could, and had he wished to rely on the matters should, have raised those under section 47B in the first claim, such that they fall under the principle as explained in ***Boyce.*** It appears to me that it is in accordance with the overriding objective to strike them out under Rule 37 for that claim also.

66. It appeared to me initially that whilst the detriment from that alleged disclosure is different, in effect a new one more recently discovered, the claimant not having pled a section 47B claim in the first claim led me to consider whether the detriment of which he knew only in November 2023 was covered by the extension to the operation of the *res judicata* principle explained in ***Boyce.*** I have concluded that it is not, as although he might have raised such a claim in general terms in the first claim he could not have done so for that particular detriment before being aware of the terms of the witness statement containing what he claims is a detriment. He did not seek to raise that as an amendment which included a claim under

section 47B but it is I consider obvious from the Judgment that even had he done so that would have been refused.

67. My conclusion on this aspect is that the claim made under section 47B in so far as based on the detriment said to arise from the witness statement referred to is not to be struck out under Rule 37 as it is not *res judicata.* It is not by any means certain that the said email does amount to a protected disclosure but I have assumed for this purpose that the claimant will establish this in evidence if the case otherwise proceeds.

68. In relation to the claims of discrimination under sections 13 and 27 the position is different, in that they were within the first claim, and what is now sought to be raised is a new detriment on the same overall basis for what is a new matter. He did not know of the detriment until the issue was revealed to him from the witness statement, and it is the kind of exceptional issue that I consider is outwith the principle of *res judicata*. The claim under sections 13 and 27 on the basis of that detriment are therefore not struck out under Rule 37.

(ii) Is any claim outwith the jurisdiction of the Tribunal under either section 123 of the 2010 Act or section 48 of the 1996 Act?

69. Whilst the claimant argued that all of the claim he makes before me was in time as the detriments he alleges occurred prior to 5 November 2023 continued with the way his grievance was being addressed which he alleged continued to March or April 2024, I did not consider that that was in general correct. There was an absence of evidence with regard to the grievance, it had not been pled, and the grievance itself, or correspondence in relation to it, was not in the Bundle of Documents before me. The claimant's evidence on earlier matters was not at all clear. He referred to being dismissed from a role in March 2022 but on what basis that had any link to later matters he founds on was not explained in his evidence. It did not appear to me either that there had been conduct extending over a period for the 2010 Act or a series of acts for the purposes of the 1996 Act. The claimant had not in my view discharged the onus on him to prove that there was conduct extending over a period or such a series of acts.

70. In any event, I considered that Ms Campbell was right to argue that a claimant cannot secure a claim in time solely by raising a grievance and saying that the way that is dealt with means that there is conduct extending over a period. There requires in my view to be more than that. There requires to be some form of connection to the conduct relied on – as explained in the authorities set out above - or to the earlier acts. The claimant in my view did not give evidence on that issue which I considered reliable. His evidence was simply a form of assertion, and there was no material behind that assertion that I could decern from what he said or from the limited documentation in this regard relied upon.

71. What I did consider to be within the time for a claim under sections 13 and 27 of the 2010 Act and under section 47B of the 1996 Act was the allegations made in relation to the claimant in JB's witness statement, which he received on or after 7 November 2023. He alleges that the comments referred to are a detriment, and were caused, at least to a significant extent, by his race or religion as a matter under section 13, for having made a protected act under section 27 or from the protected disclosure he founds on under section 47B. Whether these allegations are true or not has not been judicially determined, but until the statement was provided to him he was unaware of such a matter being raised, and the detriment arose from the date of his reading or, or at the earlier date of the receipt of the statement. The claim was in my opinion raised in time given the timings as to the start of early conciliation, grant of the certificate and presentation of the Claim Form referred to above. The "cut-off" date for a claim in time in this regard, subject to issues of conduct extending over a period or what is just and equitable, was 5 November 2023. The detriment was on either view after that date, on 7 or 10 November 2023. The claims in this regard were, in my view, in time on such a basis.

72. The next issue for the remaining matters which he alleges occurred prior to that "cut off" date which I have held are not part of conduct extending over a period is whether it is just and equitable to allow the otherwise late claims under the 2010 Act to proceed. The respondent pointed to the passage of time and evidential prejudice from that. I consider that that is likely to be correct. The passage of time is material, there has already

been a Final Hearing with witness evidence, and there is a material possibility of evidential prejudice.

73. It appears to me that the claimant's arguments that witnesses were provided with detail for their witness statements which they should not have been is of limited relevance. Witnesses can give hearsay evidence. Paragraph 17(2) and (3) of the Practice Direction on the use of written witness statements in Scotland, issued on 22 August 2022, refers to what the statement should state if the witness did not have the document at the material time, but I am not aware of the terms of the witness statements as they were not before me. I am not aware of what if anything the claimant argued about them at the time of the Final Hearing at which the evidence on them was heard.

74. If there was an issue with regard to the witness evidence that was a matter that he could have raised before the Tribunal at the Final Hearing in the first claim. No evidence about his doing so was before me. It did appear to me that he was seeking to have a second opportunity to raise an issue that was properly to be raised at that Final Hearing, which he had not done from the evidence I heard.

75. In any event his complaint in one particular respect in the claim before me appears to be that he sent an email with reference to an article, and that was then commented upon by those who did not directly receive it from him, but the relevance of that in the present context is not at all clear and was not explained in his evidence before me. That he sent the article does not appear to be disputed.

76. The other matters on which he founds he alleges were caused to at least a significant extent by the protected characteristics or protected act, but it is far from obvious that that might be so. Again it was not explained in his evidence. I took account of the terms of the Judgment with regard to the matters before the Tribunal in the first claim, and the evidence as given before me. It appeared to me that the claimant's allegations in the claim addressed at this hearing, where otherwise outwith jurisdiction, did not have other than very low prospects of success in light particularly of the terms of that Judgment, but also having regard to the manner of the evidence he gave to me.

77. In my view taking account of all the circumstances the claim for matters arising prior to 5 November 2023 are not ones that favours the extension on the just and equitable principle to those aspects otherwise outwith the jurisdiction of the Tribunal.

78. I then considered the issue of matters prior to 5 November 2023 from the perspective of the 1996 Act. It appeared to me that it had been reasonably practicable for the claimant to have raised these matters within time and under that Act. I did not consider that his evidence on this, which was limited, unsupported by any medical evidence independently of his own assertions, should be accepted. Even if it had not been reasonably practicable to have raised matters at the time, he had been informed of the possibility of raising a new claim at the Final Hearing in November 2023 and it was not until February 2024 that he commenced early conciliation. That was a very lengthy delay for matters prior to the said "cut off" date. I did not consider that he had proved that the claim had been commenced within a reasonable period of time.

79. In light of that the claims for matters that occurred prior to 5 November 2023 are outwith the jurisdiction of the Tribunal and dismissed on that basis. The claims arising from JB's witness statement however under both the said Acts are, subject to what follows, not dismissed on that basis.

(iii) Is any claim covered by the principle of immunity for judicial proceedings such that it should be struck out?

80. What remains is the claim as to the comments in JB's witness statement. That claim is in not subject to the principle of *res judicata*, and it is within the jurisdiction of the Tribunal, for the reasons given above. Whilst the respondent agreed not to rely on it at the Final Hearing, the words were used, and the claimant alleges that they are simply untrue. Taking his case at its highest that may amount to a detriment, in my opinion. Whilst his own characterisation of it as that he was guilty of terrorism is, on one view at least, an exaggeration the comment allegedly made does refer to an horrific matter, and the allegation (assuming it to be untrue) is a serious one.

81. But it arises from the witness statement. I have concluded that I am bound by the decisions of the EAT in ***Aston*** and ***Parmar***, which are consistent in their consideration of the extent of immunity in this regard, and the basic principle applies in Scotland as the House of Lords confirmed in ***Fraser***. It did not appear to me that the article in the Law Gazette to which the claimant referred contradicted that. It referred to the position in the civil courts in England and Wales, set out the views of an academic, and did not address the authorities referred to above. It was not I considered of assistance in the issue before me. It referred to the cases of ***Darker v Chief Constable [2001] I AC 435*** and ***Autofocus Ltd v Accident Exchange Ltd [2010] EWCA Civ 788***. They were however very different facts in very different circumstances and matters of English civil procedure. I am in my opinion bound by the decisions of the EAT and that of the House of Lords in a Scottish appeal, to which I have referred.

82. The claimant also sought to raise before me matters relating to other witness statements given in the first claim, and for the same reasons those matters would be subject to the same immunity if they were not *res judicata*.

83. As the principle of judicial proceedings immunity applies, I then considered whether or not it was within Rule 2 to strike out that claims made on the basis of such witness statements. I concluded that it was. The principle is I consider clear, and it is just and fair to apply it. In light of that conclusion the remaining claim must be struck out as vexatious, as that word is understood in this context in Rule 37.

84. I do so having some sympathy for the claimant, who is a party litigant seeking to raise issues in circumstances where he received a witness statement in the first claim reporting a remark he is said to have made, made to the witness it is said by a former colleague not called to give evidence at that earlier hearing, which he denies making, which he has not been able to challenge and to have the accuracy or otherwise of that reported remark judicially determined. But as the case law indicates there are strong policy considerations underlying the concept of immunity in this regard, which prevail. In any event, for the reasons given, I consider that I am bound by authority.

Conclusion

85. For the reasons given above, part of the claim is not within the jurisdiction of the Tribunal, and that part is dismissed on that basis. The remaining aspects are struck out under Rule 37 for the reasons given above.

86. In this Judgment I have referred to a number of authorities neither party raised in argument (which for the avoidance of doubt is not a criticism of the claimant). I considered it appropriate under the terms of Rule 2 to issue the Judgment without causing further delay by asking parties for submissions on the authorities I have referred to before issuing it. That is so particularly given the outcome, that the claimant is a party litigant, and that there would be delay and potentially extra expense by such a course, but if either party (particularly the claimant) considers that there has been prejudice by that and wishes to make representations specifically on the case law above it can do so by an application for reconsideration of this Judgment under Rule 72.

Employment Judge: **A Kemp**
Date Signed: 17 October 2024
Date Copied to Parties: 21 October 2024