EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr W Iqbal	**AND**	The Commissioners for HM Revenue & Customs

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON AN OPEN PRELIMINARY HEARING

HELD AT Birmingham **ON** 5 December 2019
(& 12 December 2019 Judge alone)

EMPLOYMENT JUDGE Dimbylow

Representation
For the claimant: In person
For the respondent: Ms E Hodgetts, Counsel

JUDGMENT

1. The claimant's application made on 5 December 2019 to amend his claim form to include further claims for disability discrimination in relation to: (1) direct discrimination, (2) discrimination arising out of disability, and (3) the respondent's failure to make reasonable adjustments is refused and dismissed.

2. The claimant's claim for unfair dismissal was presented out of time. It was reasonably practicable to have presented it in time. I do not extend the time. Therefore, the tribunal has no jurisdiction hear this claim and it is dismissed.

3. The claimant's claims for disability discrimination in relation to: (1) direct discrimination, (2) discrimination arising out of disability, and (3) the respondent's failure to make reasonable adjustments were presented out of time. They did not form part of a continuing act or a continuing act of omission such as to render them in time. It was not just and equitable to extend the time. Therefore, the tribunal has no jurisdiction to hear these claims and they are dismissed.

REASONS

1. The claim. This is a claim by Mr Wasim Iqbal (the claimant) against his former employer The Commissioners for HM Revenue & Customs (the respondent). By a claim form presented on 23 July 2019, following a period of early conciliation from 8 July 2019 to 23 July 2019, the claimant brought complaints of: (1) unfair dismissal, and (2) disability discrimination. Essentially, the claim is about the claimant's dismissal and his assertion that it was tainted by discriminatory treatment. In summary, the respondent's defence (as set out in a response form lodged with the tribunal office on 6 September 2019) is that the claimant was fairly dismissed by reason of capability arising out of his long-term sickness absence, which was untainted by any form of discriminatory treatment.

2. Upon receipt of the claim form the tribunal adopted its usual practice and gave notice dated 9 August 2019 of hearing for a Closed Preliminary Hearing (CPH) to take place at 2pm on 5 December 2019 with a time estimate of 90 minutes. In addition to the notice of hearing, the parties were sent orders made by Employment Judge Findlay at the same time. These required that the claimant served on the respondent by 20 September 2019: (a) copies of any medical notes etc on which he relied for the purpose of the disability issue, and (b) an impact statement dealing with the effect of the alleged disability on the ability of the claimant to carry out normal day-to-day activities at the relevant time. Thereafter, the respondent was directed to inform the tribunal and the claimant by 4 October 2019 whether the disability question was conceded, and if not why not.

3. When the respondent lodged the response form with the tribunal it made an application under Rules 30 and 37 of the Employment Tribunal Rules of Procedure 2013 for the claimant's case to be struck out at the CPH, as the tribunal had no jurisdiction to hear it, because it had been brought out of time. The claimant replied to the application on 10 October 2019 giving his grounds for objection to the application to strike out; and at the same time giving his observations on the respondent's grounds of resistance. The case file was placed before Regional Employment Judge Monk who directed that there would be a preliminary hearing to determine the following issue: "To consider if [the] claim was submitted in time, if it was not whether there are any grounds on which time could be extended." Judge Monk also directed that the hearing would take place at 9:45am on 5 December 2019, with a time estimate of 3 hours. The nature of the preliminary hearing was changed from the CPH to an Open Preliminary Hearing (OPH). The claimant wrote to the tribunal on 6 November seeking an adjustment to the arrangements for the OPH and on 26 November 2019 Employment Judge Dean directed that a reasonable adjustment would be made for the claimant with a later start at 11:30am to allow for a three-hour hearing and the lunch break.

4. At the start of the OPH I enquired of the claimant whether he required any reasonable adjustments. He signified that breaks would be sufficient. We agreed a provisional timetable for the hearing; but we recognised that as the hearing progressed, we were likely to run out of time for me to make a decision

on the day. That turned out to be the case. By 4:30pm I had taken the evidence and submissions. Therefore, it was agreed that I would give a reserved judgement with reasons in writing. We also agreed that there would be a CPH by telephone with a time estimate of 2 hours commencing at **11:30am on Wednesday, 12 February 2020** before me when further directions for the just disposal of the case would be given.

5. The issues in the case as a whole. The issues in the case had not been defined before the OPH, and therefore, I needed to define them with the parties before I could deal with the time issues.

5.1 The unfair dismissal claim. The parties agreed that the claimant was employed by the respondent from 19 September 2016 until he was dismissed with 4 weeks' notice dated 8 March 2019, giving an effective date of termination of the contract of employment on 4 April 2019. Unfortunately, the claimant was involved in a road traffic accident on 11 September 2018 in which he sustained serious injuries. He never returned to work after that date. Ordinarily, the limitation period would have expired on 3 July 2019. However, we have to consider the effect of the ACAS early conciliation procedure on limitation. Given that the claimant 1st went to ACAS on 8 July 2019, the original limitation period had already expired by then. The earliest date an act could be in time would be 9 April 2019. The new limitation date created by the early conciliation procedure was 18 July 2019, assuming for a moment limitation had not expired already, and therefore the claim form was still out of time on such analysis when it was presented to the tribunal office on 23 July 2019.

5.2 The disability discrimination claim. I discussed with the parties the nature of the claimant's disability. He confirmed that he was relying upon one condition only and that was in relation to a serious femoral fracture of his right leg sustained in his road traffic accident on 11 September 2018. The claimant told me that the relevant time for his disability discrimination claim was from the date of the accident until the effective date of termination of his contract on 4 April 2019. The respondent conceded that the claimant was disabled during that period.

6. We then went on to discuss the nature of the disability discrimination claims and I took the claimant through the various potential claims under the Equality Act 2010 (EQA). The claimant confirmed that he was not bringing claims in relation to indirect discrimination, harassment or victimisation. He asserted that he was bringing a claim for **direct discrimination because of disability** in that he was subject to treatment by the respondent in that he was dismissed. He said that he would be relying upon the hypothetical comparator, although we did not go on to define such at that stage. He confirmed that he thought he was dismissed because of the protected characteristic of disability. Ms Hodgetts challenged this assertion and submitted that it was not part of the claimant's pleaded case. I disagreed with the respondent's interpretation. In the claim form the claimant said this about his receipt of the dismissal letter: "…. I felt that my absence should have been supported because of disability beyond my control. I was not getting any salary and my sick pay ended by that time. I just wanted them to keep the role open for me. It was not a specialist role and could

have been kept open but they did not want to wait before making dismissal decisions." Later, when the claimant was talking about the appeal, and what was said during it, he said this: "In this meeting, I verbally represented myself advising that the Equality Act had not been considered when dismissing me, I advised there was no clear consideration given to my disabilities……" I found that looking at the narrative as a whole, and in the round, there was enough information to comprise a claim for direct disability discrimination because of the dismissal. I noted also in paragraph 19 of the respondent's grounds of resistance (34), that the respondent had pleaded to a perceived issue of direct discrimination as follows: "In particular, it denies the claimant's dismissal amounts to prohibited conduct as alleged or at all. The claimant was dismissed for a lawful reason, his capability as pleaded above."

7. The claimant confirmed that he was bringing a claim under section 15 EQA, **discrimination arising from disability**. He explained his case in this way. The claimant's sickness absence from 12 September 2018 to 4 April 2019 arose in consequence of the claimant's disability. The respondent treated the claimant unfavourably by his dismissal. The question for the tribunal to answer would be: did the respondent dismiss the claimant because of that sickness absence? The respondent accepted that such a claim appeared on the claim form. In general terms Ms Hodgetts explained that the respondent would rely upon the premise that dismissing the claimant was a proportionate means of achieving a legitimate aim. She expressed the aim in this way: the need of the respondent to provide an effective public function. It was proportionate to dismiss the claimant because he had been absent for 6 months and there was no reasonably foreseeable date for any return to work. Furthermore, sick pay had been exhausted and therefore there was a limited disadvantage to the claimant.

8. The claimant asserted that he had a claim for **failure by the respondent to make reasonable adjustments**. Ms Hodgetts accepted that the respondent had knowledge of the claimant being disabled. We then considered whether the respondent had a provision, criterion or practice (PCP). The claimant said that the respondent's sickness absence management procedure (AMP) was such a PCP. Ms Hodgetts expressed the view that it was more likely that the relevant PCP should be defined as the requirement to attend at work regularly to avoid disciplinary sanctions, and she drew on the authority of Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216 for this proposition. The claimant said that the PCP put him at a substantial disadvantage in comparison with persons who are not disabled at the relevant time in that he was placed at greater risk of being dismissed because he was absent from work sick. The claimant identified steps that the respondent should have taken to avoid such disadvantage in that the AMP should have been suspended until after the claimant had attended necessary appointments to get a proper medical opinion. The claimant identified during the OPH dates which had been arranged to take place on 14, 19 and 27 March 2019, (the 1st two appointments were with a consultant orthopaedic surgeon and the 3rd with a consultant physiotherapist). However, in the claim form he refers to 2 appointments on 14 and 27 March 2019. The claimant said that he had a 4th appointment on 26 June 2019; but that was only arranged after his appeal had taken place on 8

May and he recognised that it was not relevant to the way in which he put his case. By the time of the appeal the 3 appointments in March 2019 had taken place and there were no other dates outstanding.

9. The OPH issues for me to determine. There were 3, as follows:

(1) Whether I should allow an amendment to the claim form (this issue was only drawn to my attention during the claimant's closing submissions).

(2) Was the claimant's complaint of unfair dismissal presented within the time limits set out in section 111 (2) (a) of the Employment Rights Act 1996 (ERA)? If not, do I consider whether it was not reasonably practicable for such a complaint to be presented within the primary time limit, and if so, do I extend the time?

(3) Were the claimant's complaints of disability discrimination presented within the time limits set out in sections 123 (1) (a) and (b) of the EQA? Dealing with this issue includes consideration of whether there was an act and/or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended on a just and equitable basis, and when the treatment complained about occurred.

10. The evidence. I received oral evidence from the claimant. The parties also made submissions to me, which I mention later; and I received several documents which I marked as exhibits as follows:

C1 Claimant's bundle of documents
C2 Claimant's skeleton argument
C3 Claimant's witness statement dated 3 December 2019 (11 pages)

R1 Respondent's bundle of documents (127 pages).
R2 Respondent's skeleton argument

11.1 The law. The respondent took time points in defending all of the claims and the application to amend. In dealing with the issue of a continuing act, I had regard to the legacy case law which pre-dated the EQA, as it is still relevant. In the case of Calder –v- James Finlay Corporation Limited [1989] IRLR 55, which was approved by the House of Lords in Barclays Plc –v- Kapur and others [1991] IRLR 136, where it was held that an act extending over a period gave rise to continuing discrimination throughout employment when the claimant then was told that she was not "eligible" for a mortgage subsidy and alternatively this was subjecting her to a detriment whilst employment continued. A continuing act should be approached as being a rule or regulatory scheme which during its currency continues to have a discriminatory affect. The fact that a claimant continued to be paid less than a comparator was a consequence of the decision not to up-grade, not a continuing act of discrimination in the case of Sougrin -v- Haringey Health Authority [1991] IRLR 447. The matter was looked at again in the case of Cast -v- Croydon College [1998] IRLR 318. The Court of Appeal held, amongst other things, that the claimant's complaint was of several decisions by the employer which indicated the existence of a

discriminatory policy in her post and its application to her and that this constituted an "act extending over a period". The Court of Appeal considered the issue in Hendricks –v- Commissioner of Police for the Metropolis [2003] IRLR 96. The question is whether the acts complained of by the claimant amounted to an "act extending over a period" as distinct to a succession of unconnected or isolated specific acts, for which time would begin to run from a date when each specific act was committed. The claimant asserted in his oral submissions that incidents (his dismissal on 4 April 2019 and his being notified of the outcome of his appeal against dismissal on 14 May 2019) were linked to one another and that they were therefore evidence of a "continuing state of affairs".

11.2 In considering the exercise of my discretion over the three-month time limit applying to the EqA, I have to consider whether it is "just and equitable" to let the case, or part of it, in after three months if the acts complained of are out of time and do not form part of an act extending over a period. The case of British Coal Corporation v Keeble [1997] IRLR 337 provides guidance on how to exercise my discretion. This was considered later in the case of Chohan v Derby Law Centre [2004] IRLR 685 EAT. I also considered the matters mentioned in s.33 of the Limitation Act 1980. Although that refers to the broad discretion for the court to extend the limitation period of three years in cases of personal injury and death, it also requires the court to consider the prejudice which each party would suffer as a result of a decision to be made. I am required to have regard to all the circumstances of the case and in particular, amongst other things, to –

(a) The length of and the reasons for the delay.

(b) The extent to which the cogency of the evidence is likely to be affected by the delay.

(c) The extent to which the respondent had co-operated with any request for information.

(d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.

(e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

11.3 In the case of Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal confirmed that the Employment Tribunal had a wide discretion in determining whether or not it was just and equitable to extend the time. The tribunal is entitled to consider anything that it takes to be relevant. Nevertheless, the case re-asserts that time limits are exercised strictly in Employment Tribunal cases. When considering the discretion over a claim that is out of time, and whether the time should be extended on just and equitable grounds, the Court of Appeal said that there was no presumption that the tribunal should do so. The tribunal cannot hear a complaint, unless the claimant

convinces it that it is just and equitable to extend the time. Thus, the exercise of the tribunal's discretion is the exception rather than the rule.

11.4 The law in relation to the amendment application. Rule 29 of the tribunal rules gives a broad discretion to the Employment Tribunal to allow amendments at any stage of the proceedings either on its own initiative or an application by a party. This discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly in Rule 2, which states:

"Overriding objective

2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

11.5 I do not set out the statutory provisions on time limits, and the escape clauses, in these reasons, as both parties have placed them in their skeleton arguments.

11.6 I know from Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT, that when making a determination of an application to amend I am required to carry out a careful balancing exercise of all relevant factors, having regard to the interests of justice and the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include: the nature of the amendment, the applicability of time limits, and the timing and manner of the application.

11.7 A significant feature in this case was that the parties recognised the application to amend was made out of time, as it was only made during this hearing. In considering the exercise of my discretion I would need, in part, to take into account the 3-month time limit applying to the EQA and the provisions for extending time as described above.

11.8 I make some general observations at this point, including some which were drawn to my attention in the submissions. I am conscious of the fact that when deciding whether or not it is just and equitable to extend time for the presentation of a discrimination complaint, or an amendment, it is unnecessary to give separate consideration to the merits of the claims; but it is part of my task in the exercise of balancing the prejudice likely to be suffered by both parties should time not be extended. It has long been established that in cases such as this there is a multi-factorial assessment involved, when no single factor is determinative. In exercising my discretion, I must ensure that no significant circumstance is left out. A key factor is whether a fair trial of the issue is still possible. Nevertheless, as described above, I must weigh other factors such as serious and avoidable delay by the claimant in bringing his claim, or in obtaining advice about the possibility of a claim. A matter that the claimant raised was his medical condition, not in relation to his physical impairment, but in relation to depression arising because of his accident and the changes this caused to his life; and the adverse effect this had on his ability to present his claim in time. This is something which I consider in the round, whether it is just and equitable to extend time in the light of the claimant's medical difficulties, even though this may not actually have prevented the claimant commencing the proceedings.

12. The facts. I make my findings of fact on the basis of the material before me taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. I have resolved such conflicts of evidence as arose on the balance of probabilities. I have taken into account my assessment of the credibility of claimant and the consistency of his evidence with the surrounding facts.

13. The relevant facts can be stated quite shortly. The claimant is 27 years of age. Whilst working for the respondent he was an Administrative Officer, working part-time hours, 3 days a week. It was a desk-based job involving telephone discussions with clients. Once the claimant sustained his injury and could not attend at work after 11 September 2018 the respondent was in regular communication with him either by telephone, email or home visit. The respondent obtained occupational health (0H) reports dated: 9 October 2018, 23 November 2018, and 5 February 2019. The claimant also produced fit notes from his GP confirming that he was unfit to return to work. The last one was dated 8 February 2019 indicating that the claimant was unfit for work until 30 April 2019 on account of his femoral fracture.

14. The visits by representatives of the respondent included those which formed part of formal attendance meetings. One took place on either 9 January (according to the claimant) or 10 January 2019 (according to the respondent). By that time the claimant's salary had been replaced by SSP. The visiting officer (JH) decided to refer the case to Ms S Carter for a decision. On 1 March 2019 Ms Carter attended at the home of the claimant. In the claim form the claimant confirmed this to her: "I explained I could not possibly speculate on a date of return." He had told Ms Carter that he had medical appointments on 14

and 27 March 2019. Sick pay had expired by this time. Ms Carter decided to dismiss the claimant with notice and this was confirmed in a letter dated 8 March 2019 sent to the claimant electronically and hard copy. Ms Carter said this: "I have decided to end your employment on the grounds of continuing sickness absence. We have reached this decision as the amount of sickness you have had in the last 12 months greatly exceeds the trigger points with no ability to give a definite return to work date. 25 days for a previous absence with 6 months for this current absence is unable to be supported any further." The claimant was advised of his right of appeal, to be submitted in 10 days, and the right to make a claim to an Employment Tribunal. Significantly, the letter (103-104 is the electronic version, and 104A and B the hard copy version) includes this: "Normally the Tribunal must receive a claim within 3 months of the date your employment ends."

15. On 18 March 2019 the claimant sent an email to the respondent's appeal officer about his appeal and asked for a short extension of time for a couple of days on account of his sickness and the effect of painkillers. The claimant received a swift response on the same day granting the extension, including: "take the time you need." The officer (Mr S Smith) chased up the claimant on 8 April 2019 reminding him that he had asked for "a couple of days extension" and he could not let it just go on. The claimant replied very quickly, referred to not having full guidance on the AMP, and mentioning the equality and diversity policies of the respondent. The claimant stated on 9 April that he was in the process of drafting his appeal and would send it to the appeal officer (Mr S Forrest) the following day. This the claimant did. The chain of emails and the appeal notice were in the bundle R1 (105-112).

16. By notice dated 12 April 2019 (122) the claimant was told the appeal would be heard on 8 May 2019 at his home, and Ms K Lynch was now the Appeal Manager to deal with the hearing. The claimant was advised that he could be accompanied by trade union representative, trade union official or work colleague. The claimant had his brother present as a companion when the meeting took place. Notes of the meeting are in the bundle R1 (123-126), and the outcome letter upholding the original decision of dismissal was dated 14 May 2019 (127). During the appeal meeting the claimant referred to the EQA. In the claim form he stated: "I explained my disability has gotten worse… I advised that I had been told by the medical professionals that after the next surgery I would be in a safe position to return to work. I advised that I was not advised of further surgery dates and also that the physiotherapy had been halted for safety reasons and therefore I was helpless at this time."

17. The claimant is currently unemployed and in receipt of benefits, in the form of Universal Credit, contribution-based Employment Support Allowance and a PIP. He has not applied for any other work after his dismissal. He told me that he qualified for benefits because of a disability assessment. He explained that this entitled him to seek work if he wanted to, but he had not been applying, and said: "I have no date in the future when I can start looking for work."

18. For a litigant in person the claimant presented his case well and knew his way about the documents in the bundles. He was confident. His knowledge of

the law was good and his approach to the hearing was structured. The claimant had over 2 years continuous service which enabled him to bring a claim for ordinary unfair dismissal. Sadly, for the claimant, the consequences of his road accident have had a substantial detrimental impact upon the quality of his life. The femoral fracture to his right leg has not properly united in spite of surgery. He uses a wheelchair to prevent further damage.

19. I could see from the bundles that the respondent had medical and 0H information before it when decisions were made. The respondent consulted with the claimant, and this included some home visits. At the time of dismissal, the respondent's decision maker concluded that there was no reasonable prospect of the claimant returning to work in the reasonably foreseeable future. That conclusion was supported by the documentary evidence and the claimant's own evidence to her. That was the same scenario when the claimant's appeal was heard on 8 May 2019. It has remained the same since. The claimant has had further medical appointments since dismissal, and he has been referred to the limb reconstruction team at the Queen Elizabeth Hospital. The claimant's injuries were life changing for him, having previously led an active life, which he is unable to return to at present.

20. The submissions. Ms Hodgetts went first and spoke to her written submissions; and there is no need for me to repeat everything she said in it here. She drew attention to paragraph 19 of her skeleton argument in reference to the case of Baynton v South West Trains Ltd [2005] ICR 1730. She submitted that following this authority, I should find the respondent's refusal at the appeal to revoke the claimant's dismissal was entirely separate from the dismissal itself and not part of a continuing act or omission. This had been an important part of the case as presented to me at the OPH. There was a very late, but nevertheless legitimate application to amend the claim to include a case for discrimination in relation to the act of rejecting the claimant's appeal. Counsel asked me to find that the claimant's evidence was questionable on reliability. The claimant had failed to establish on the balance of probabilities that it was not reasonably practicable to have issued in time. I should find that time should not be extended and therefore the tribunal had no jurisdiction to hear the unfair dismissal claim.

21. In relation to the discrimination claims Ms Hodgetts asked me to consider the merits of the claim when I considered balancing the prejudice to each party. She emphasised the unreliability of the claimant's evidence and the conflicts in it. Whilst the claimant had asserted his struggle with drafting documents, set against the shock of dismissal, nevertheless in creating his documents he had insight into the EQA and was adept at using Google to obtain relevant information. I should not believe the claimant when he said that he did not read the 2nd page of the letter from the respondent to him after dismissal when the respondent reminded him that he had the right to make a claim to an Employment Tribunal and referring to a claim being made within 3 months of the date employment ends. She underlined what the claimant said in his appeal meeting on 8 May 2019 (125 of R1): "He went on to say that if Sam had waited until after his 19th March private Drs appointment to carry out her meeting/visit and make a decision he would not have appealed her decision." Counsel

accepted that if I found the dismissal and the appeal were both part of conduct extending over a period, this would bring the discrimination claims in time. She reminded me of the claimant's case in the claim form (17) when discussing the appeal. Here, the claimant does not indicate a claim arising out of the appeal. On the same page the claimant refers to the fact that: "…it was reasonably impractical for me to have lodged the tribunal claim on time…." In the circumstances, I should find that the claimant did not intend to use the outcome of the appeal as part of his claim, as he would have done so in the claim form; and also, he would not have been describing the claim as out of time already.

22. The claimant entered the discussion at this part of the respondent's submissions and confirmed that he had not mentioned a discrimination claim arising out of the appeal in the claim form. He confirmed that he 1st mentioned it in his impact statement dated 16 September 2019 (38) at paragraphs 16 and 17. The claimant confirmed that he had not made an application to amend his claim; and I asked him if he was now making such an application. He confirmed that he was. He applied to amend the claim to include a claim that the appeal officer had discriminated against him when she rejected his appeal on 14 May 2019. This conduct amounted to: (1) direct disability discrimination, (2) a claim under section 15 in the failure to discount his sickness absences leading to the unfavourable treatment of rejecting the appeal, and (3) the continuation of the failure to make adjustments that applied at the dismissal stage. The claimant accepted that in relation to the adjustments over appointments with medical practitioners all of the dates had expired by the time of the appeal. The claimant stated that he did not put it in the claim form because he was ignorant of the requirement. Furthermore, he was rushed into completing the form quickly once he had realised the claim was out of time and this caused him to miss it. He explained that he had spoken to a solicitor over the telephone and had been given a free consultation on 23 July 2019. The solicitor told him that the claim was already out of time. The claimant explained that he mistakenly believed that once he had gone to ACAS for early conciliation this "stopped the clock" for limitation purposes. He accepted the advice of the solicitor that his belief was wrong and therefore issued proceedings the same day.

23. Ms Hodgetts resisted the application to amend and reminded me of her skeleton argument at paragraph 21. I should have regard to the balance of injustice. I should also consider the Presidential Guidance -General Case Management (2018)- on amendments. The nature of this amendment involved additional facts, an additional allegation, and it was a substantial new point. It was a new complaint and it was out of time. It was not always just to grant an amendment and I should balance the injustice to both sides. However, she underlined the fact that the merits of the case were an important factor. The dismissal case was weak, and the claim is weaker at the appeal stage. At the time when the appeal was heard the claimant's health had not improved; and he was saying at that time he would return to work in a further 12 months at best. No reasonable employer would keep the claimant on its books, and it was objectively justifiable not to do that. It was not a reasonable adjustment. Any claim arising out of the appeal had no prospect of success. This is part of my balancing exercise.

24. The claimant spoke in rebuttal on the amendment application. He emphasised that the notes of the appeal (125) were talking about him walking, rather than being fit to return to work. It says this: "Karen asked what the current timeline is. Wasim said that based on his appointment last week this will now be about 12 months."

25. We then returned to the claimant continuing with his main submissions. He emphasised that he had had no advice on the merits of his claim. He told me that he had so much going on in his life concerning his health, the health of family members and family issues relating to his marriage that he had not sought advice. He expressed the view that "a layperson cannot know everything" and going over the time limit in this case caused the respondent no detriment. The delay does not stop a fair trial. He said he only knew of the time limits when speaking to the solicitor on 23 July 2019. The situation stressed him out and he became unclear. He should be allowed to proceed with his claim for unfair dismissal. Furthermore, if the disability discrimination claim was out of time and I did not allow it to proceed then justice would not be served. The claimant reminded me that he was a litigant in person, that he was not legally qualified, and he was disabled. He asserted that the respondent could have transferred him into another department or allowed him to work from home. The respondent should have identified comparators in this case, and it had failed to do so. The was a burden of proof on the respondent to make adjustments and it had failed to do so. He accepted that part of his claim may be out of time, and he wasn't aware of the procedure for amending a claim until today when he had acted straightaway. He said that a case can be years late, but he rounded off with an apology for his lateness.

26. My conclusions and reasons. I apply the law to the facts. I deal with the claimant's amendment application first. The claimant acknowledged that he made no complaint of discrimination in connection with the appeal or its outcome in the claim form. I find and conclude therefore that it was not within the scope of the existing claim. It was 1st raised in his impact statement on 16 September 2019. The formal application to amend was made at this OPH. The claimant had professional legal advice on 23 July 2019. As he told me, he was advised that the claim was already out of time at that point. Had he mentioned the appeal as a discriminatory act to the adviser then I have no doubt that the professional adviser would have told him that the claim was in time, with limitation expiring on about 13 August 2019. This amendment is to introduce a new claim. It is substantial. It is not simply a relabelling exercise. If I refuse the application, it means that the claimant is prejudiced by not having his claim heard at the tribunal concerning the appeal. On the other hand, if I allow the amendment, it brings it in time and the respondent will have the prejudice of having to defend the claim. I have looked at the facts of the case very carefully, many of which are agreed.

27. The claimant's main argument with the respondent is that neither the dismissing officer nor the appeal officer would discount his sickness absence in carrying out the AMP or allowed further time for the medical appointments to take place. However, the claimant accepted in his evidence at the OPH that: (1) at the point of dismissal, (2) at the appeal, and (3) at this hearing, there is

still no prospect of him returning to work in the foreseeable future. At a full merits hearing dealing with any discrimination claim arising out of the appeal, I find it is more likely than not that the tribunal would find that there was sufficient consultation, appropriate medical evidence and no prospect of a return to work in the reasonably foreseeable future. It is likely that any hypothetical comparator who was not disabled would be found to be treated in the same way and dismissed. If it went that far in the section 15 claim, the justification defence would in all likelihood succeed. Also, the tribunal would find it was not a reasonable adjustment to discount sickness absence or to have adjourned the process for further medical appointments, especially as there were none in the pipeline at the time of the appeal. It would be prejudicial to the respondent to have to defend what appears to be an unmeritorious new claim.

28. Even if I took the view that there was an implicit application to amend when the claimant served his impact statement on 16 September 2019 that application was over a month out of time. The reason for the delay was in the claimant's failure to seek legal advice on the point. He obtained professional legal advice which he acted upon. He did not advance the case that the appeal was an act of discrimination in any way; he did not suggest that to the solicitor and I find the advice he received on time would have been different had he done so. He made no further enquiries. The comments made about the appeal in the impact statement appear to be background rather than another claim. The claimant knew the claim was out of time when he submitted it on 23 July. The respondent had acted in a reasonable and co-operative manner, which included alerting the claimant to the fact that he could bring a claim to the Employment Tribunal and telling him of the 3-month time limit. The claimant said that he did not read the 2nd page of the letter containing this information. I do not accept this assertion at all. The claimant has an eye for detail. He is articulate and intelligent. The claimant has known all the facts that he wanted to advance since the events occurred. He relied upon advice from friends and family. He researched on the Internet to be able to prepare his appeal and claim form. The delay in submitting the form, and then the application to amend, was entirely down to the claimant. Although the claimant advanced the argument that depression and anxiety got in the way of clear thinking, I do not find that this was the case. I find that the claimant was able to think in a clear way, for example, in dealing with correspondence with the respondent, which included negotiating an extension of time over submitting his appeal, his appeal letter and drafting his claim form. I do not accept the claimant's evidence that his claim form was done in a rush. Furthermore, the claimant was engaged in the complexities of sorting out his benefits. The claim form had been prepared carefully following detailed research and was ready to be submitted as soon as he had advice from his solicitor.

29. I find and conclude that it is just, fair and proportionate to refuse the application to amend, and I dismiss it. I then proceed to deal with the substantive time points.

30. I turn my attention to **the claim for unfair dismissal and time**. It is well established law that the claimant has the task of demonstrating that it was not reasonably practicable to present the claim in time. The standard of proof is

upon the balance of probabilities. Often, the test is one where a judge or tribunal has to ask themselves whether it was reasonably feasible to present the claim in time? As I remarked earlier, I find that the claimant had his attention drawn to his right to bring a claim to the Employment Tribunal and was told of the time limit for it by the respondent in its dismissal letter of 8 March 2019. The claimant waited until after the time limit had expired before contacting ACAS about early conciliation. He made a mistake over the effect of early conciliation on stopping the time running at the point he contacted them. He delayed seeking professional advice until 23 July 2019, again, for emphasis, after the ordinary time limit had expired. The claimant knew the facts he wanted to rely upon, and he knew the time limit. It was reasonably practicable or feasible for him to have presented his claim in time. I reject the claimant's assertion that his thinking was unclear, through depression and anxiety or any other reason advanced by him, and this prevented him from issuing the proceedings. He was engaged in correspondence with the respondent, drafting his appeal notice and his claim form; and researching on the Internet. He was processing other administrative tasks in relation to his various benefits applications. The claimant has not demonstrated that there was any physical or mental impediment preventing him from issuing in time. He cannot rely upon mistaken advice by a professional adviser as he did not seek legal advice until after the event of the expiration of the ordinary time limit. He was then given advice to issue immediately, and he did so. I find that the claimant had no enthusiasm to issue proceedings during the ordinary limitation period. However, for reasons which are not entirely clear to me, he changed his mind afterwards following conversations with friends and family.

31. I did consider the likely outcome of the case. The respondent consulted with the claimant, had medical and 0H documentation and was faced with an employee who could not return to work in the foreseeable future. At any merits hearing the tribunal was likely to have found the respondent had established a potentially fair reason on the balance of probabilities in the form of capability. A reasonable procedure appears to have been adopted, which complied with ACAS guidance. Dismissal was likely to have been found to be within the range of reasonable responses given all the circumstances of the case.

32. I conclude that the claim for unfair dismissal was presented out of time. It was reasonably practicable to have presented it in time, therefore, I do not extend the time. Thus, the tribunal has no jurisdiction to hear that claim and it is dismissed.

33. I now turn my attention to **the disability discrimination claims and time**. A different test applies here. However, with the appeal issue out of the way, all the discrimination claims were plainly presented out of time. There was no continuing act or omission which would bring them in time. Thus, I must consider whether it is just and equitable to extend the time. For reasons which I have explained earlier, the claimant was not prevented by any medical difficulties in bringing proceedings in time. However, any medical difficulties that the claimant may have had form part of the factual analysis that I have to undertake in determining whether it is just and equitable to extend the time. The claimant is unafraid to make a complaint and he told the respondent in a

meeting on 1 March 2019 that he had complained about delays in being given physiotherapy treatment (99). After the effective date of termination, he attended a hospital appointment with his specialist on 19 March 2019 (66). There is a chain of emails (105-112) between the claimant and the respondent in relation to the claimant's appeal. The claimant demonstrated the ability to be thoughtful and concise. The grounds of appeal (dated 9 April 2019) include references to the EQA, reasonable adjustments, direct discrimination, and less favourable treatment due to disability. Although time was running, the claimant was able to focus his attention on matters which were important to him, and which required some thought.

34. I considered the likely merits of the claim and any prospects of the claimant succeeding. I repeat earlier observations. It is unlikely the claimant would have established that the comparator would have been treated any differently. The hypothetical comparator would also likely have been dismissed. Similarly, the section 15 and adjustments claims were likely to fail. On the information before me the claimant would not have been able to establish such facts to reverse the burden of proof in any of his claims. His prospects of success were poor.

35. All of the claimant's claims were presented out of time. They did not form part of a continuing act or omission which would render them in time. The claimant has not demonstrated to me that it would be just and equitable to extend the time. Therefore, the tribunal has no jurisdiction to hear any of the discrimination claims and they are dismissed. The length of the delay was relatively short; but the reasons for it lay entirely at the door of the claimant, and no one else is to blame. The cogency of the evidence was unlikely to have been affected by the delay. The respondent had co-operated with the claimant; and had alerted him to his right to bring a claim, including the time limit. The claimant failed to act promptly once he knew the facts giving rise to his cause of action. The claimant took no steps to take appropriate professional advice once he knew of the possibility of taking action; but delayed until after the time limit had expired. The delay was entirely avoidable. The claimant's medical difficulties did not prevent him commencing proceedings. Whilst a fair trial of the issue was still possible had I allowed the claim in, I found that the claimant had poor prospects of success when considering the merits of the case.

36. When coming to my conclusions I had regard to how the claimant presented to me. As I said before, the claimant is articulate and intelligent. However, he was rather contradictory in his evidence and he was not a good witness in his own cause. For example, on the one hand, he said he did not know of the time limits until after they had expired; but then on the other hand, in cross examination, he confirmed that he had the knowledge of the time limit under the EQA by as early as the time of his meeting with the respondent on 1 March 2019. His assertion that he did not read the 2nd page of his dismissal letter was insincere to say the least. He had it in a digital copy as well as a hard copy. I conclude that the claimant was not open and honest with me. He believed that the decision maker at the appeal stage had not discriminated against him and that is why there was no complaint about the appeal in the claim form. Once the claimant realised the difficulty he faced over the time point, he sought to change his position to try to bring the claims for discrimination in time by linking

the appeal with the other decisions about which he had complained. The claimant was not a credible witness.

37. In view of the outcome of this OPH there are no claims to proceed and I hereby order cancellation of the CPH on 12 February 2020.

Employment Judge Dimbylow
19 December 2019