EMPLOYMENT TRIBUNALS

Claimant: Mrs Patricia Jones

Respondent: Emcor Group (UK) Limited

RECORD OF A PRELIMINARY HEARING

Heard at: Manchester (in private; by CVP) On: 7 September 2022

Before: Employment Judge Shotter (sitting alone)

Representatives
For the claimant: In person and supported by Mr A Jones, husband
For the respondent: Mr M McLean, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was not disabled in accordance with section 6 of the Equality Act 2010 with an impairment of *post-traumatic stress disorder* in the relevant period 21 May 2020 to 1 June 2021.

2. The Tribunal does not have the jurisdiction to consider the complaints of disability discrimination, which are dismissed.

REASONS

Preamble

1. This has been an in-person hearing. The documents that the Tribunal was referred to are in a bundle of 261 pages, the contents of which I have recorded where relevant below, in addition to the claimant's unsigned and dated impact statement.

The preliminary hearing

2. Today's preliminary hearing is primarily to consider whether the claimant was disabled for the purpose of section 6 on the Equality Act 2010 ("the EqA") in the relevant period 17 November to 24 November 2020, followed by a strike out/deposit application.

3. The claimant is a litigant in person who states she suffers from PTSD. Without pre-empting any decision on disability status and with the Equal Treatment Bench Book in mind, the claimant was told she could take her time today, would not be put under pressure and take breaks whenever she feels they are needed, which she did. We also adjourned for 20 minutes at the outset to give the claimant time to check through the hard copy bundle as it had not been delivered to her in good time and she had difficulties reading the bundle emailed to her on the 1 September 2022, 6 days ago. I have read the bundle and I am content the claimant has seen the index; the documents will not take her by surprise as they are common to both parties and a number were provided by the claimant. The bundle has been updated to include the GP report dated 31 August 2022 provided by the claimant on which she relies as evidence of disability status.

Claimant's non-compliance

4. The claimant has not complied with case management orders and her evidence that she did not understand them is not credible and undermines the less than transparent information she gave in connection with her disability status. In oral evidence under cross-examination the claimant explained she had not understood she was required to provide the information set out in paragraphs 4(i) to (iii) in the Case Management Summary and orders sent to the parties on the 4 May 2022 following a preliminary hearing attended by the claimant on the 5 April 2022. I took the view that the claimant's evidence was disingenuous, and as an after-thought when giving oral evidence she stated that the fact she did not understand the case management orders was evidence of her mental impairment with post-traumatic stress disorder ("PTSD").

5. I have set out below a chronology dealing with this matter including the three case management hearings which took place, party-to-party correspondence and strike out applications.

6. I heard oral evidence under oath from the claimant concerning her disability status and means, followed by oral submissions made on behalf of the respondent by Mr Mclean and the claimant which have been taken into account and subsumed within the reasons below. Any findings of fact I have arrived at are provisional and do not bind any judge dealing with this case in the future. I have set out as best as possible what facts appear not to be in dispute that are relevant to the issues.

7. The claimant is aware that in order for the complaints of disability discrimination to succeed, the claimant will need to establish that she had a disability within the meaning of section 6 of EqA, and this is the first issue before me today on the basis that if I find the claimant was not disabled her complaints of disability discrimination cannot continue to a final hearing and there is no requirement for me to consider any of the other strike out issues. The claimant's case is that she was disabled by PTSD, and this had been the position since 2012.

Issues

8. We discussed and agreed the issues to be decided at this preliminary hearing. Mr McClean produced a draft list of issues further amended by me in relation to the disability status as follows:

Compliance with orders

9. Has the Claimant complied with order 4(iii) of the CMO dated 12 April 2022 in providing the Respondent with a separate statement detailing:

    a. Why she believes claim two should proceed;

    b. Why it took so long for her to issue the proceedings in October 2021 when she was dismissed on 1 June 2021; and

    c. Set out clearly what her financial circumstances are

10. Has the Claimant complied with the Tribunal's Order of 21 July 2022 ordering the Claimant to provide full medical evidence and two statements, setting out why she believes that her mental impairment has a substantial long-term effect on her ability to carry out day to day activities and what those day-to-day activities are. Secondly, to give details as to why she waited to issue her proceedings until October 2021?

11. If the Claimant has not complied with one/both of the above, should her claim be struck out under rule 37(1)(c) for non-compliance with the Tribunal's orders?

Disability

12. Did the Claimant suffer from post-traumatic stress disorder during the relevant period of her employment with the Respondent?

13. Did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about 21 May 2020 (the date of the alleged discrimination) to 1 June 2021, the effective date of termination. The Tribunal will decide:

    i. Did she have a mental impairment: of PTSD?

    ii. Did it have a substantial adverse effect on her ability to carry out day-to-day activities?

    iii. If not, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment?

    iv. If so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures?

    v. Were the effects of the impairment long-term? The Tribunal will decide:

        1. did they last at least 12 months, or were they likely to last at least 12 months?

        2. if not, were they likely to recur?

15 If not, should the claims be struck out under rule 37(1)(a) on the basis they have no reasonable prospect of success?

Prospects of success

16 Has the Claimant demonstrated an arguable case in her ET1s and/or accompanying documents in respect of her discrimination and harassment claims? If not, should the either/both of the direction discrimination or harassment claims be struck out under rule 37(1)(a) on the basis they have no reasonable prospect of success?

Time limit/jurisdiction

17 Did the Claimant bring her claims in time?

18 If not, would it be just and equitable to extend time?

Deposit order

19 If the Claimant's claims proceed, should the Tribunal order that the Claimant pays a deposit order?

20 The key issue in this case is did the claimant's impartment have a substantial adverse effect on her ability to carry out normal day-to-day activities as agreed between the parties.

The procedural history and written communications sent by the parties to each other and the Tribunal to the parties (party-to-party correspondence

The first claim: 2400263/2020

14. The claimant issued proceedings on the 12 November 2020 following ACAS early conciliation that took place on the 16 September to 16 October 2020. The Grounds of Complaint at Para 8.2 recorded how the claimant had started her employment as a cleaner on 10 May 2020 and on 21 May 2020 two employees discriminated against her on the grounds that she had PTSD in receipt of a free travel pass and a PIP payment. The claimant continued to be employed by respondent and her claim was limited to disability discrimination.

15. A preliminary hearing took place on the 17 February 2021 by telephone following a clear notice of hearing being sent to the parties on the 2 December 2020 that informed the claimant of telephone details "to take part you should telephone…" The respondent attended through its solicitors, the claimant did not despite being sent further emails from the Tribunal explaining how documents were to be forwarded ready for the hearing.

16. Nothing was heard from the claimant until after a strike out warning was issued and the claimant explained by return she had PTSD mental health issues and did not understand she was to make a phone call. This was accepted by the Tribunal.

Claimant's bankruptcy

17. On the 14 July 2021 the claimant was made bankrupt and did not inform the Tribunal.

18. A second preliminary hearing took place on the 11 October 2021 by telephone which the claimant attended, and a third preliminary hearing was listed. The claimant confirmed she was bringing a claim of harassment and direct discrimination relying on her PTSD disability. The cause of action arose on the 21 May 2020. There is no actual comparator referenced.

21 The Case Management Summary sent to the parties on 15 October 2021 records the claimant stating her employment had terminated due to incapacity on the 1 June 2021 and having contacted ACAS on the 1 July 2021 a second claim had been presented. The claimant confirmed she had made a claim under section 15 of the EqA relying on the dismissal as unfavourable treatment because of her long-term absence resulting from her condition of PTSD. The claimant also referenced unfair dismissal, notice pay and holiday pay.

22 The claimant at para.1 under "Amendment" was ordered to present a further claim form seven days from the date the case management order was sent to the

parties being 21 December 2021 which would be treated as an application to amend the claimant's claim to include disability related discrimination under section 15 of the EqA, wrongful dismissal (notice pay) and 2 days holiday pay.

14 At today's preliminary hearing the claimant confirmed she brought the disability related discrimination claim under section 15 claim in order to recover notice pay and holiday pay she believed she was legally owed, and had the respondent paid these sums of money she would not have claimed disability discrimination arising from her dismissal on the grounds of attendance/capability. The respondent indicated at that hearing there were time limit issues in respect of both claims.

Second claim under claim number 2414111/2021

15 The second claim under claim number 2414111/2021 was presented on the 16 October 2021 outside the statutory time limit when the claimant had no legal standing as a bankrupt and she had not obtained the necessary consents. The effective date of termination was the 1 June 2021.

16 At the preliminary hearing held on 11 October 2021 it is recorded at paragraph 11 that the claimant believed she had misunderstood the process and when she contacted ACAS on the 1 July 2021 thought she had presented a second claim when the early conciliation certificate was issued on the 1 July 2021. The claimant was bankrupt and made no mention of this fact to the Tribunal.

17 At today's preliminary hearing the claimant blamed the advice given to her by ACAS, USDAW and the Employment Tribunal clerks for her out of time claim, and as a backstop the PTSD, which I found not to be credible. I concluded from the claimant's oral submissions and answers given to questions when she was invited by me to explain and set out her claims that (a) the claimant was aware of her right to bring a complaint and time limits when she was dismissed on the 1 June 2021, (b) she had access to advice from USDAW and was aware of the 3-month time limit, (c) she knew how to file a claim having done so in case number 2417995/2020, (d) the reason she did not bring a claim of disability discrimination within the statutory time was because she was arguing with the respondent about the non-payment of notice pay and holiday pay having been told her statutory sick pay was exhausted, (e) the section 15 EqA complaint was a lever to get paid notice pay and holiday pay, and (f) the claimant was not prevented from bringing a claim due to the effect of PTSD; she was well-enough to deal with the respondent and Tribunal; writing complaining letters and dealing with her first case communicating with both the respondent and Tribunal.

18 At today's preliminary hearing the claimant confirmed her disability complaint related not to her dismissal but to the non-payment of notice pay and holiday pay. The claim involved a number of the respondent's employees including HR who dealt with her during the relevant period when she was arguing for the payment in the anticipation that she would be paid and spend the money before she went bankrupt. In oral submissions the claimant alleged her feelings were injured because the respondent had been "toying" with her, promising payment and then not paying so she "tagged" the discrimination allegation onto the existing claim on the basis that the respondent had not paid her what she was due because of her mental health. The respondent in

not paying her notice or accrued holiday was "toying around and bullying" when all the claimant wanted was payment by 30 June 2020 before she went into bankruptcy 14-days later on the 14 July 2021, after this date the payment would be too late as the monies would then be offset against her bankruptcy order. In short, had she been paid in time the claimant would not have issued the second sort of proceedings for disability discrimination and spent the money before she went bankrupt.

19 It is notable that at the 11 October 2021 preliminary hearing the claimant made no mention of her bankruptcy and there was no reference to her claiming disability discrimination arising out of the respondent's alleged failure to pay notice pay and holiday pay and the treatment of her leading to this.

20 In a letter dated 13 January 2022 the Insolvency Service confirmed the claimant's "hybrid claim" would invest in the Official Receiver and if she were to limit her claim to injury to feelings this would not vest. The bankruptcy order was made on 14 July 2021.

21 The claimant when pressed by the Tribunal confirmed in an email sent on 30 January 2022 she agreed to limit remedy in respect of both claims to injury to feelings only and in relation to the second case (number 241411/2021) the claimant referred to pursuing compensation for discrimination in respect of how she had been treated by HR and the payroll department.

22 The Tribunal directed a preliminary hearing to be listed to discuss the claims and a possible strike out.

23 The unfair dismissal claim was struck out as the claimant did not have 2 years' service, and the claimant confirmed she was claiming direct discrimination and harassment in respect of all claims under section 13 and 26 of the EqA. There is no reference to the section 15 complaint in respect of the claimant's dismissal, which is unsurprising given the claimant's assertion today that the section 15 claim was brought essentially as a lever to get her notice pay and holiday pay claims paid. The claimant agreed that her claims were limited to injury to feelings. The claimant indicated she was relying on a continuing act ending in an incident that was in time. This was not an argument put forward before me at today's preliminary hearing, and nor was there any information upon which such an argument could be explored given the amount of time that had elapsed since the 21 May 2020 allegation, the claimant's sickness absence when nothing happened through to termination of employment on the 1 June 2020 and the claimant attempting to recover notice pay and holiday pay.

24 A 4-day final hearing was listed starting on the 2 January 2024, and Case Management Summary records at para 4 that it was "essential" for the claimant to "release" her medical records and case management orders were made including the following;

> "By no later than **14 April 2022** the respondent shall send, both by email and by post, a consent form in order to allow the respondent to obtain the Occupational Health report from Maitland Medical.

On receipt of that form the claimant must sign it and return it to the respondent by no later than **22 April 2022**.

By no later than **17 June 2022** the claimant shall send to the respondent the following documents:

a. Copies of all her GP reports relating to PTSD commencing (if necessary) in 2012. That GP evidence should include details of the diagnosis of PTSD and details of medication the claimant is taking for that condition. The claimant should also send any other medical evidence in her possession or control that support her claim that she is disabled within the meaning of section 6 of the Equality Act 2010 in relation to PTSD.

b. A section 6 impact statement setting out details as to how the mental impairment has had a substantial and long-term adverse effect on the claimant's ability to carry out normal day-to-day activities. I have explained to the claimant what that means and what she is required to do, and I believe she understands what she needs to set out in the impact statement.

c. A statement, typed, paragraphed, and paginated, with each paragraph numbered, setting out why she believes claim two should proceed and why it took so long for her to issue the proceedings in October 2021 when she was dismissed on 1 June 2021. The statement must also set out clearly what her financial circumstances are. I explained to the claimant that the Judge on 7 September 2022 could order her to pay a deposit in order for her to proceed with her claims if that Judge believes that her claims (or some of them) have little reasonable prospect of success.

25 It is apparent from the Case Management Summary the claimant (who has and continued to be assisted by her husband) was informed she needed to comply with the orders to progress the case to the hearing on 7 September 2022. The claimant was aware that her claims could be struck out and/or a deposit order made at that hearing.

26 The claimant provided an incomplete impact statement and made no reference to relevant dates. At today's hearing the claimant alleged she suffered and continues to suffer from all of the effects recorded in the impact statement, including struggling to leave her home. Some limited medical evidence covering 2015 and 2016 was provided but so heavily redacted it could not meaningfully assist the respondent or Tribunal.

27 The claimant did not comply with the remaining case management orders and she has never compliance with them, laying the blame on the advice received from Tribunal staff which was not credible as clerks/staff do not provide advice and would always point parties to the orders made by the judge for compliance. The claimant's correspondence to the respondent was not constructive and the Tribunal became

involved on the 19 July 2022 ordering the claimant to serve on the respondent "full medical evidence" by 4pm 5 August 2022 together with two statements "one setting out in clear terms why she believes her mental impairment had a substantial effect on day-to-day activities, the other giving details as to why she waited to issue proceedings until October 2021.

28 The claimant did not comply with the orders. She sent some unredacted copies of her medical records to the Tribunal and not the respondent, and when a copy was forwarded to the respondent, complained on the basis that personal information private to her was divulged.

29 The claimant indicated the redactions were to preserve her confidentiality and did not affect the issue of her disability status. At today's preliminary hearing it was clear the redactions were not solely to protect the claimant's confidentiality, personal and family life as she explained when giving oral evidence dealing with non-compliance of orders. It is apparent for example, in the redacted records set out within the hearing bundle, the claimant had taken it upon herself to redact sentences that were relevant to her disability status which she did not want to be before the respondent or Tribunal, for example, in the report prepared by an advanced mental health practitioner on the 12 July 2016 there is a reference to the claimant failing to keep appointments and a decision to discharge the claimant made by the access team. I have dealt with this further below on the question of the claimant's credibility and her attempt to mislead the respondent and Tribunal as to the precise nature of the adverse effect on her ability to carry out day to day activities and the medical treatment she was receiving.

30 I do not intend to rehearse the correspondence sent to the claimant, suffice to say the claimant did not provide all the information she was ordered to including the consent form for the release of the occupational health report which the respondent had never received during the period when it was managing her absence. The respondent applied for an unless order on the 18 August 2022 and outlined its grounds including the documents the claimant had not provided, repeating the case management orders made for the claimant's benefit.

31 At today's hearing the claimant gave evidence that she did not understand the case management orders and this was why she had not complied with them. The claimant's explanation was not credible. She is perfectly capable of dealing with this litigation, and on a number of occasions wrote to the respondent and Tribunal arguing her position and demanding information from the respondent with arbitrary time limits, such as names of witnesses, that was not relevant to the preliminary hearing. At no stage did the claimant ask the Tribunal, particularly the judge who had made the case management orders **with her consent**, for further clarification.

32 After hearing the claimant and taking into account the way she gave her evidence on cross-examination, on one occasion asking counsel where his questions were leading, I took the view the claimant understood what was being asked of her and decided not to comply because it did not suit her purpose. The claimant did not want to provide a written statement explaining the time limitation issues or provide a statement dealing with her means. The claimant was given an opportunity to provide

a hand-written breakdown of her means and copies of supporting documents (which were available on phones) with the assistance of her husband, and yet she omitted to include a key payment or any supporting documents. I have dealt with this further under the heading “Claimant’s Means.”

33 Despite being told by the Tribunal on the 21 July 2022 that there was no requirement for the respondent to name its witnesses at this stage, the claimant continued to insist on the information being provided in correspondent accusing the respondent’s solicitors of “bullying through the legal system” in attempt to deflect the fact that it was the claimant who had failed to provide all of the information ordered. As a result of the claimant’s behaviour it was ordered by a judge that at the 7 September 2022 hearing “the judge will now also deal with whether claimant has complied with the orders of the Tribunal or whether she is in breach, and if she is, whether all or parts of her claims should be struck out.”

34 In response the claimant provided a letter from the GP dated 31 August 2022 inserted into the bundle by the respondent and provided no further information. The claimant remained in default and at no stage did she explain to the judge who made the order that she did not understand them and could not comply. The claimant did not say her non-compliance was attributable to the condition of PTSD, and for the avoidance of doubt there is no medical evidence before me supporting such a proposition.

The claimant’s failure to comply with Tribunal orders.

35 The claimant has complied with the case management orders in part only; she provided a signed authority for the release of the occupational health report, an impact statement and a very limited number of medical records, heavily redacted, that did not cover the relevant period with the exception of the GP report dated 31 August 2022. The claimant ignored case management orders when she failed to provide all of her medical records, a written statement dealing with means and why she was late in filing the claims.

36 I take the view that whilst the claimant can be criticised for the way she has conducted her case, it is not fatal to a fair hearing taking place as the claimant has been given an opportunity to orally give an explanation for missing the time limits and time has been given to her during this preliminary hearing in order that she can produce a breakdown of her means which she complied with in part only, ignoring the instruction to provide a full breakdown including all of the income and expenditure which covered her husband’s input supported with documents they both help on their mobile phones.

The evidence on means

37 The claimant did not provide a breakdown of all income and expenditure, and I took the view she intentionally failed to mention all of the family income and expenditure concentrating on her income and expenditure only. The claimant did not produce any supporting evidence despite being instructed to do so. When questioned under oath the claimant stated she had the information on her phone. The claimant’s

husband, who earns more and contributes towards household expenditure assisted the claimant producing this information and I took the view both intentionally failed to produce the supporting evidence with the result that the claimant's evidence could not be relied upon.

38 I questioned the claimant about the Personal Independence Payment she referred to receiving which gave rise to the first claim of disability discrimination and at that stage, for the first time, the claimant confirmed she was still in receipt of it and she received a payment of £240 per month. When asked to explain why she did failed to mention it in either her written breakdown or evidence confirming the breakdown the claimant stated because it was not means tested. The claimant's explanation was not credible and I took the view she understood full well all income needed to be provided (including savings and so on) and chose not to disclose this payment because she did not want to be ordered to pay a substantial deposit.

39 The claimant, who has access to bank statements of her phone and was told to email evidence to the Tribunal clerk failed to do so, and I took the view the claimant was not being transparent in relation to her means much in the same way she has attempted to engineer the redactions in the medical evidence so that it was more favourable to her. The claimant's lack of credibility has substantially undermined the evidence given on her on disability status exaggerating the adverse effect of PTSD on day-to-day activities.

<u>The claimant's disability status and medical evidence limited to the period 2015 to 2016</u>

40 The claimant has produced medical evidence relating to her referral to Clinical Pathways that has been heavily redacted. The assessment took place on the 12 April 2016 and refers to the claimant seeing a colleague in Clinical Pathways in 2015, that she had followed "her plan; she now wants medication and help/support for post-traumatic stress disorder…She reported she continues to struggle when she leaves the house, she described feeling 'panicky' She reports not liking going out in her local area due to her ex-partners family living locally. She described hyperventilating, feeling clammy and restless…she often sits picking at her skin…" The concerns set out largely involve the claimant avoiding her abusive x-partner and his family with no suggestion for example, that the claimant cannot leave the house to go out in areas where the ex-partners family do not live. The report confirmed the claimant had stopped working with RASA. Under the heading "past psychiatric history" reference was made to "the impression was PTSD."

41 The claimant confirmed in evidence today the reference in the GP records to "capable of work-on-work capability assessment criteria" dated 27 March 2015 was applicable throughout the relevant period as she worked for agencies companies as a cleaner in different locations for different businesses, travelling and attending interviews. There was no suggestion the claimant's day-to-day activities in respect of her work, travelling and dealing with other people had been adversely affected, and there was no medical evidence to this effect.

42 In a Mersey Care NHS letter dated 29 April 2016 the claimant's anti-depressant medication was confirmed.

43 In a letter dated 12 July 2016 an advanced practitioner from the Liverpool Mental Health Team confirmed the claimant was assessed on 29 April 2016 and "the initial impression was PTSD with related moderate depressive episode; Patricia presentation today…describes chronic anxiety, flashbacks, nightmares and intrusive thoughts that all relate to the years of abuse she suffered at the hands of her ex-partner…**prescribed a low dose of Citalopram in the past however only took this for several weeks**…wants to try an anti-depressant medication…we agreed Sertraline was an appropriate choice in relation to the diagnosis of PTSD…next NMP medication review arranged 20/5/2016. Patricia…cancelled or did not attend…and the decision was taken to discharge Patricia back to the care of her GP" [my emphasis]. The claimant had heavily redacted this part of the report so that it became unreadable. She also redacted the sentence "Patricia has declined referral for psychological intervention at this time."

44 The GP record provided was initially heavily redacted and the claimant had voluntarily handwritten "updated PTSD prescribed medication." without any medical basis. The unredacted record revealed the claimant was taking numerous drugs for numerous redacted conditions. I am not a medical expert and there is no information before me as to whether the drugs continued to be taken until and during the relevant period, and what they were for because the claimant has chosen not to rely on her more recent GP records. The second page of the record lists a number of "active problems" ranging from hip pain, drug dependence NOS, comments about alcohol intake and against the date 9 April 2015 "[x]Post-traumatic stress disorder". The claimant was unable to explain what the "[x]" referred to.

<u>GP report 31 August 2022</u>

45 Finally, the claimant relies on a report dated 31 August 2022 from her GP which confirmed she had been diagnosed with post-traumatic stress disorder in September 2015 and "suffers from ongoing distressing symptoms, intrusive thoughts and experiences flashbacks from her previous traumatic experience in relation to her ex-partner". Reference was made to assessments in 2016 and 2017 and counselling which the claimant confirmed today took place years before she commenced her employment with the respondent. The GP confirmed "over the years she has been on various types of medication to help manage her symptoms. At present she is on Duloxetine which she has been taking since December 2018. Prior to that she was taking Sertraline and prior to that she was taking Citalopram."

46 Mr McLean in oral submissions invited me to treat the GP report carefully arguing it was the equivalent of a MED3 and to give it less weight. I did not agree. The 31 August 2022 medical report is the only document that throws light on the PTSD condition in the period 21 May 2020 to 1 June 2021 some 5 years after the initial prognosis of PTSD.

47 The problem with the GP report is the lack of detail and the fact that according to the medical evidence provided by the claimant there was a period of time when she

was not taking medication and had been discharged from the Mental Health Services. Due to the claimant's intransigence over disclosing her medical records and the fact that there are no records beyond 2016 with the exception of the GP report, the only up-to-date document, it is difficult to get a clear picture of the period 21 May 2020 to 1 June 2021, the extent and strength of the medication prescribed to the claimant for PTSD and the effect of her mental health condition with or without medication on her ability to carry out normal day-to-day activities taking into account the unreliability of the claimant's evidence.

The claimant's impact statement and what day to day activities have been adversely affected by PTDS

48 The claimant was taken through her impact statement and I did not find her evidence that she was unable to leave the house, struggled to eat, and take care of her own personal hygiene persuasive. In oral evidence the claimant when discussing how she did contribute/pay for food when the breakdown of means was provided, gave an explanation that as a result of an operation she was unable to eat much food and that was the reason she did not pay for it. The claimant did not say she found it difficult to eat due to post traumatic stress disorder. The claimant accepted that she did go out the house, and had worked in "lots of different places and with lots of different people" for 3 years plus before she was successfully interviewed by the respondent.

49 With reference to the medication the claimant confirmed it controlled the feelings of flashback stating it was not anti-depressant medication and it was difficult for me to reach any conclusion as to whether in 2020/2021 lack of medication would have an adverse effect on the claimant's ability to take part in day-to-day activities, an assessment I was not qualified to take without the benefit of medical advice especially bearing in mind the scant medical evidence provided and the claimant's credibility issues. Taking into account the claimant's credibility I found it difficult to accept the claimant's evidence that on a daily basis she suffered "every single day" with some of the details set out in the impact statement, without corroboration from medical evidence and apart from the description in the 12 April 2016 report there was none. It is notable in that report the claimant is described as follows; "continues to struggle when she leaves the house, she described feeling 'panicky' She reports not liking going out in her local area due to her ex-partners family living locally." There is no reference to the claimant not eating, not watching TV and "avoid watching brutal…fact or fiction regarding domestic violence to women as it makes me feel very anxious and emotional." There is no reference to the claimant being unable to sleep, avoiding socialising and "anxious and fearful but embarrassed to inform people [of the PTSD] in fear of being stereotyped or bulled…" as the claimant now alleges.

50 With reference to being fearful of discussing her PTSD with other people in fear of being bullied and stereotyped, this is undermined by the claimant's claim that she did not disclose the PTSD to the respondent because of the embarrassment and stigma, yet on the 21 May 2020 a few days after her employment started with the respondent on the 11 May 2020 she discussed her PTSD with two other cleaners who were unknown to the claimant before she worked for the respondent. This suggests the claimant, on her account, had no issue with discussing her condition otherwise she would not have volunteered the information.

51 It is notable in oral evidence under cross-examination the claimant confirmed she had redacted personal matters only when this was clearly not the case. The claimant explained she “just had to go to work and get on with it” as it was “best for me to get out of the house” undermining the claimant’s credibility in relation to her struggling to leave her home.

52 We discussed the effects of the medication, and the claimant confirmed the medication helped her when she was experiencing flashbacks which never happened outside the home, always inside and when this happened she was scared to go out of the door and did not want to get dressed. I accepted the claimant’s evidence that she had in the past experienced this given the 12 April 2016 assessment which referred to the claimant’s concern about coming across her ex-partner and his family, however, I was not satisfied the claimant had given me the full picture particularly whether the flashback experience she described was relevant in 2020 and 2021 when the claimant on her own account had no difficulties going out of the house, travelling, undertaking interviews and carrying out agency work.

Law and conclusion: Disability status

53 S.6(1) of the Equality Act 2010 (“EqA”) provides that a person, 'P', has a 'disability' if he or she 'has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.'

54 Schedule 1 of the EqA 2010 sets out factors to be considered in determining whether a person has a disability. S.6(5) of the EqA 2010 provides for the issuing of guidance about matters to be taken into account in deciding any question for the purposes of determining who has a disability. When considering whether a person is disabled for the purposes of the EqA regard should be had to Schedule 1 ('Disability: supplementary provisions') and to the Equality Act (Disability) Regulations 2010, and the 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' under 6(5) of the Equality Act 2010 should be taken into account.

55 The relevant time to consider whether a person was disabled is the date of the alleged discrimination; see the well-known case of McDougall v Richmond Adult Community College *[2008] IRLR 227,* [2008] ICR 431. In the case of Mrs Jones it is 21 May 2020 and the date of her dismissal on 1 June 2021.

56 Paragraph 5(1) of Schedule 1 to the EqA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, *likely* means ‘could well happen’ — the well-known case of Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) [2009] ICR 1056, HL In assessing whether there is a substantial adverse effect on the person’s ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. The problem in Ms Jones’ case is the reliability

of her evidence and the absence of any medical evidence confirming the dates when the medication was taken and what might happen if she were to come off the medication when considering the deduced effects given it appears the claimant had no serious problems since 2015/2016 and there were no up-to-date medical evidence to show otherwise. Mr McLean submitted that all that was before the Tribunal was vague information dealing with medication, there was no references to doses, pauses or re-starts or what the medication was for. The claimant has been obstructive and intentionally so in terms of the medical records, and I was invited to weigh in the balance the number of times the claimant was asked to clarify her medical condition and the lack of clarity given in her responses, which I did.

57 For any claim to succeed, the burden is on the claimant to show, on the balance of probabilities, something an 'impairment' whether it is a mental or physical condition. In the case of Millar v ICR [2005] SLT 1074, [2006] IRLR 112, the Court of Session held that a physical impairment can be established without establishing causation and, in particular, without being shown to have its origins in any particular illness. The focus should be on what the claimant cannot do, and this test is particularly relevant to Mrs Jones who gave less than satisfactory evidence on this issue, for example, her difficulties in leaving the house which did not appear to be an issue in 2020/2021.

58 It is not appropriate to have an examination for the purposes of discovering the causes of an alleged disability, since, whatever the cause, a disability which produces the effects specified in legislation will suffice. In considering what amounts to an 'impairment', **its effect, not cause is what is of importance**. This approach is set out in the Guidance issued under the EqA 2010, and it is stated that 'it is not necessary to consider how an impairment is caused, even if the cause is a consequence of a condition which is excluded. This is also relevant to Mrs Jones who has PTSD which on the face of the diagnosis could result in a serious effect on her ability to carry out normal day-to-day activities depending on the extent of it; however as a result of the claimant's unreliable evidence the effect she claims it had was not readily apparent during the relevant period.

59 The EAT in Goodwin v Patent Office [1999] ICR 302, EAT, said that of the four component parts to the definition of a disability and judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows: 'What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. **In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts**. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes", yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities,

whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be “no”. Those might be regarded as day-to-day activities contemplated by the legislation, and that person’s ability to carry them out would clearly be regarded as adversely affected.’

60 Appendix 1 to the EHRC Employment Code states account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that ‘a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation’ (our stress) — para 9.

61 The focus must be on the extent to which the impairment adversely affects the claimant’s ability to carry out normal day-to-day activities. Substantial is defined in S.212(1) EqA as meaning ‘more than minor or trivial’. In determining whether an adverse effect is substantial, the tribunal must compare the claimant’s ability to carry out normal day-to-day activities with the ability she would have if not impaired. Appendix 1 to the EHRC Employment Code states: ‘The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people’ — para 8. This should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of ‘normal’ ability — which would be very difficult to ascertain.

62 In cases where it is not clear whether the effect of an impairment is substantial, the Guidance suggests a number of factors to be considered. These include the time taken by the person to carry out an activity and the way in which he or she carries it out. A comparison is to be made with the time or manner that might be expected if the person did not have the impairment. Another factor to be taken into account, relevant to the claimant’s claim, is ‘how far a person can reasonably be expected to modify her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities. In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities’. The Guidance gives the example of a person who needs to avoid certain substances because of allergies who may find the day-to-day activity of eating substantially affected.

63 Paragraph B9 gives the example of a woman who experiences panic attacks who can achieve the day-to-day activity of travelling to work if she travels outside the rush hour. It states that in determining whether she meets the definition of disability, consideration should be given to the extent to which it is reasonable to expect her to place such restrictions on her working and personal life. Mrs Jones imposed no restrictions on her day-to-day activities.

Conclusion – applying the law to the facts

64 With reference to the first issue, namely, did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about being 21 May 2020 to 1 June 2021, I find on the balance of probabilities that the claimant has not discharged the burden of showing her diagnosis of post-traumatic stress disorder had a 'substantial adverse effect' on her ability to carry out normal day-to-day activities —S.6(1)(b) EqA concentrating on what the claimant cannot do as opposed to can do.

65 In oral submissions the claimant explained she had PTSD and has had the condition for a number of years "trying my best to keep afloat." The fact the claimant has PTSD is not in dispute, and I accept that this is indeed the case and have considerable sympathy with the claimant who suffered from domestic abuse many years ago and remained living in the same house in which she was abused afterwards. The problem the claimant faces is her less than reliable evidence given in relation to the effect of her medical condition, when medication was prescribed and taken as there were periods when it was not and the dosage was low, the total lack of any dates and refusal to produce medical evidence supporting her claims beyond 2016 despite being ordered to do so by the Tribunal. The claimant's evidence on cross-examination that she only redacted medical records that were not relevant to her claim was contradicted by the redactions which related to evidence the claimant did not want to come before the Tribunal concerning the prognosis, for example, the numerous drugs the claimant was prescribed, the claimant's discharge in 2016 from the Liverpool Mental Health team and so on. The medical evidence produced by the claimant was most unsatisfactory in the light of her unreliable evidence on other matters as referenced above including the contradictions in the claimant's own evidence that on the one hand she found it difficult to get out of the house, and on the other she wanted to get out of the house because that's where the trauma took place.

66 In relation to the first agreed issue, I accept the Claimant suffered from post-traumatic stress disorder during the relevant period of her employment with the Respondent. Whatever label is placed on the claimant's medical condition, when determining whether the claimant meets the definition of disability under the EqA the Guidance emphasises it is important to focus on what the claimant cannot do, or can only do with difficulty, rather than on the things that she can do (see para B9).

67 With reference to the second issue, namely, did the claimant have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about I concluded on the balance of probabilities that the claimant has not discharged the burden of proving she was disabled between 21 May 2020 to 1 June 2021 in that she has failed to satisfy me on the balance of probabilities that the PTSD had a substantial adverse effect on her ability to carry out day-to-day activities.

68 With reference to the third issue, namely, did the claimant have medical treatment, including medication, or take other measures to treat or correct the impairment, I found that the claimant did according to the CP letter dated 31 August 2022 that ran to 3 brief paragraphs touching on the 2015 diagnosis, the assessment with the Access Team in 2016 and 2017, a reference to counselling with no date being

given although the claimant confirmed in evidence that this was much earlier than the relevant period and various types of medication taken by the claimant "to help manage her symptoms."

69 With reference to the next issue, namely, if so. would the impairment have had a substantial adverse effect on her ability to carry out day-to-day activities without the treatment or other measures, I found there was no satisfactory evidence dealing with "deduced effects" to suggest that if the claimant stopped taking Duloxetine the PTSD would have a substantial effect. I have no knowledge about the dose, the claimant has not produced any relevant medical records and the only information I can go on is the GP's reference to the claimant "over the years" being on various types of medication to help manager her symptoms of "ongoing distressing symptoms, intrusive thoughts [and] flashbacks." Bearing in mind the claimant's less than reliable evidence on other matters and the inadequate disclosure of medical records coupled with the extent of the claimant's redactions in an attempt to hide relevant information from the Tribunal, some form of medical evidence was necessary to explain the degree to which the medication had an impact on the adverse effects of the claimant's impairment. It is insufficient for me to conclude in this particular case that because the claimant was diagnosed with PTSD then it must follow she was automatically disabled within section 6 of the EqA without more. It was for the claimant to produce the evidence satisfying me that she had not exaggerated the effect of her condition in 2020-2021and she has failed to do so.

70 In conclusion, taking into account my findings above, on the balance of probabilities the claimant has not discharged the burden to show she has an impairment which falls under section 6 of the EqA during the relevant period, the Tribunal does not have the jurisdiction to consider the complaints of disability discrimination, which are dismissed.

Remaining issues

71 There is no requirement for me to deal with the remaining issues, however, had I found the claimant was disabled (which I did not for the avoidance of doubt) briefly, I would have gone to find the following.

Compliance with orders

72 With reference to the issue, namely, has the claimant complied with order 4(iii) of the CMO dated 12 April 2022 in providing the respondent with a separate statement detailing: Why she believes claim two should proceed; Why it took so long for her to issue the proceedings in October 2021 when she was dismissed on 1 June 2021; and set out clearly what her financial circumstances are, I found that she did not and this was intended by her as recorded above.

73 With reference to the next issue, namely, has the claimant complied with the Tribunal's Order of 21 July 2022 ordering the Claimant to provide full medical evidence and two statements, setting out why she believes that her mental impairment has a substantial long-term effect on her ability to carry out day to day activities and what those day-to-day activities are. Secondly, to give details as to why she waited to issue

her proceedings until October 2021, I found the claimant had complied in part only and had intentionally redacted relevant medical evidence to prevent the respondent and Tribunal having sight of it, and failed to produce full medical evidence relating to 2020/2021 which has key relevance.

74 Mr McLean referred to the EAT decision in Harris v Academies Enterprise Trust [2015] IRLR 208 concerning a strike out application at a final hearing for non-compliance of a case management order relating to exchange of witness statements. Mr McLean submitted the claimant had failed to comply with the Tribunal orders repeatedly and the same would happen again in the future. I agreed; however I took the view that any future default could be managed with unless orders and strike out at the appropriate time followed by cost orders. In relation to the present default on the part of the claimant and the question of proportionality, I took the view that a strike out was not proportionate. Mr McLean is correct that the claimant had failed to comply with repeated case management orders, however, given the fact she was a litigant in person and the overriding objective in the 2013 Regulations requires me to deal with cases fairly and justly hence providing the claimant with the opportunity to redress her default by giving evidence under oath today which did not prejudice the respondent. I took the view that a strike out for failing to comply with case management orders should be clearly signposted by an unless order, and one was not made in the claimant's case although the claimant can be criticised for the way she has conducted this litigation which has had consequences as she has been unable to prove means and disability status. In arriving at this decision I recognise the frustration the claimant has caused to the respondent and its solicitors coupled with the unlikelihood of any costs order, should one be made, of ever being enforced against her.

75 With reference to the issue, namely, if the Claimant has not complied with one/both of the above, should her claim be struck out under rule 37(1)(c) for non-compliance with the Tribunal's orders, I concluded that it should not on the basis that the claimant was invited to deal with the out-of-time issue and disability status in oral evidence under oath, which she did, albeit in a contradictory and unsatisfactory manner at times. The burden was on the claimant to prove she was disabled in accordance with section 6 of the EqA and she took it upon herself to ignore case management orders and refused to produce up-to-date medical evidence with the exception of the GP report dated 31 August 2022 which is short and goes into very little detail.

Prospects of success and deposit order

Claim number 2400263/2020

76 With reference to the next issue, namely, has the Claimant demonstrated an arguable case in her ET1s and/or accompanying documents in respect of her discrimination and harassment claims, on the information before me I concluded the discrimination complaints brought under section 13 and 26 of the EqA set out in claim number 2400263/2020 had no reasonable prospects of success on the basis that the claimant explained in oral evidence on cross-examination that she did not discuss with other people PTSD because of the "stigma of mental health issues" and did not inform the respondent of this "because I wanted a job." The claimant is likely to fail at the first

hurdle, being the issue of the respondent's knowledge having conceded it did not know she had been diagnosed with PTSD.

77 Turning to the claimant's complaint of discrimination, she alleges she told two other cleaners who were strangers to her that she suffered from PTSD on the 21 May 2020, 11 days after the claimant started to work for the respondent . The respondent disputes this and there will be conflicting evidence which cannot be dealt with at a preliminary hearing. In the well-known case of Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330 the Court of Appeal held, as a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute. On a striking-out application (as opposed to a hearing on the merits), the Tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents or, as it was put in Ezsias, where the facts sought to be established by the claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' (para 29, per Maurice Kay LJ).

78 Whilst I find it is unlikely the claimant's allegations have any basis, I am mindful of the principles set out in Ezsias, and the reference by the Court of Appeal to 'a crucial core of disputed facts' that was 'not susceptible to determination otherwise than by hearing and evaluating the evidence.' Lord Justice Morris Kay in paragraph 26 stated the issue was "whether an application has a realistic as opposed to a merely fanciful prospect of success" and he accepted that there may be cases which "embraced dispute of facts but which nevertheless may justify striking out on the basis of their having no reasonable prospect of success. I took the view that Mrs Jones' allegations concerning the alleged discrimination of 21 May 2020 did not fall into that category despite the apparent contradictions in her case that she did not divulge her PTSD and yet informed two strangers of it soon after starting a new job.

79 In the House of Lords decision in Anyanwu v South Bank Student's Union [2001] IRLR 305 which dealt with striking out discrimination claims, Lord Steyn referred to discrimination cases as being "generally fact-sensitive, and their proper determination is always vital on our pluralistic society. In this field, perhaps more than any other, the bias is in favour of a claim being examined on the merits or demerits of its particular facts are a matter of high public interest". This decision is applicable to the claimant's claim today and on this basis the disability discrimination claim brought under section 26 of the EqA set out within claim number 2400263/2020 is not struck out.

Deposit Order

80 With reference to the issue concerning payment of a deposit, namely, if the claimant's claims proceed, should the Tribunal order that the Claimant pays a deposit order, taking into account the claimant's ability to pay I would have found it would have been just and equitable to order the claimant to pay a deposit. I assessed the deposit at a figure of £500 taking into her account her intentional failure to disclose all her income (including the family income) and her less than reliable evidence on what she

paid for and did not, unsupported by any documentation despite the fact that the claimant was ordered to provide the information on her phone and that shared with her husband (the bank accounts especially) and failed to do so. I could have ordered a deposit of £1000 per allegation of direct discrimination and harassment had it not been for the fact that the claimant was only recently released from bankruptcy exercising my discretion in accordance with the overriding objective to deal with cases fairly and justly.

81 I am satisfied that the claimant's discrimination claims brought under section 13 and 26 of the EqA have "little reasonable prospects of success" for the reasons explored when I came to reject the more draconian step of a strike out on the grounds of the claims having no reasonable prospects of success. The finding that the claimant's claims have little reasonable prospect of success has been factored into the time limit issue referenced below when I took the merits of the claim into account when considering the balance of prejudice.

Claim number 2414111/2021

82 The same cannot be said for the second claim number 2414111/2021 received on the 16 October 2021 following the claimant's dismissal on the 1 June 2021 given the claimant's evidence that she issued the disability discrimination complaint under section 15 of the EqA as a lever to force the respondent to pay notice and holiday pay when she had been told that all pay entitlement had been exhausted during her absence and she was in receipt of zero pay having been paid her holiday entitlement. It is undisputed the claimant had a number of absences from work and the claimant in oral evidence on cross-examination stated that her absences resulted from PTSD including being injured whilst getting out of the bath, dizziness and sickness, vomiting and so on, which were some of the reasons given by the claimant to justify her absence. There is no medical evidence to support the claimant's claims. The claimant did not return to work after her holiday and was signed off with work related stress until she was dismissed for capability after a number of attempts to have meetings which were unsuccessful and the claimant's refusal to consent to the release of an occupational health report, which the respondent has never seen. The claimant refused to engage with the absence review process or the respondent obtaining medical evidence and she was dismissed in a letter sent on the 1 June 2021 with immediate effect which the claimant received and immediately submitted an appeal on the 2 July 2021 regarding the non-payment of a payment in lieu of notice, which was the real issue for her.

83 Rule 37(1)(a) of the Employment Tribunal Rules provides that all or any part of a claim or response may be struck out if it is 'scandalous or vexatious or has no reasonable prospect of success'. The section 15 disability complaint falls squarely within Rule 37. The claimant's attempt at forcing the issue of what she perceived to be a wrongful dismissal claim by issuing proceedings for discrimination was an attempt by her to intimidate the respondent into making payment by causing it the inconvenience, distress, embarrassment and expense of defending a claim that had no reasonable prospects of success (a weak case which would have been known to the claimant given her intransigent behaviour and the length of time she was absent from work certified with work related stress). The claimant accepted in oral evidence

that had she been paid her notice and holiday pay claims she would not have made the claim under section 15 of the EqA. The claimant's motive in pursuing a claim that was bound to fail was improper, scandalous and vexatious. It was not in the interests of justice and public policy for it to proceed to a trial and it has no reasonable prospects of success.

84 Mr McLean referred me to the guidance set out in Cox v Adecco and ors [2021] ICR 1307, EAT when dealing with litigants in person given the fact strike out is such a draconian step. The EAT stated that, if the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are: 'Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is'. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person 'may become like a rabbit in the headlights' and fail to explain the case he or she has set out in writing. In some cases, a proper analysis of the pleadings, and of any core documents in which the claimant seeks to identify the claim, may show that there really is no claim and therefore no issues to be identified. More often, however, a careful reading of the documents will show that there is a claim, even if it might require amendment. I took the view in Mrs Jones' case that analysing her claim and taking into account the oral evidence given at this preliminary hearing amendment is not the answer given the reason why she made the claim in the first place, and even put at its highest, the section 15 claim is weak. There is also the additional factor of the claim being out of time (see below).

85 The section 15 discrimination complaint set out in claim number 2414111/2021 would have been struck out under rule 37(1)(a) on the basis that it no reasonable prospect of success and is both scandalous and vexatious.

Time limit/jurisdiction

86 Both claims were received by the Tribunal outside the statutory time limit, and they were not brought in time.

Claim number 2400263/2020

87 The claimant issued proceedings on the 12 November 2020 following ACAS early conciliation that took place on the 16 September to 16 October 2020. The alleged discriminatory act took place on 21 May 2020, approximately 4-months before the claimant commenced ACAS early conciliation when she was already out of time. As recorded above, the claimant has not provided a reasonable explanation as to why she was unable to issue proceedings within the statutory time limit.

Claim number 2414111/2021

88 The second claim number 2414111/2021 was presented on the 16 October 2021 outside the statutory time limit when the claimant had no legal standing as a bankrupt and she had not obtained the necessary consents. The section 15 EqA complaint relates to her dismissal; the effective date of termination was the 1 June 2021.

89 At the preliminary hearing held on 11 October 2021 it is recorded at paragraph 11 that the claimant believed she had misunderstood the process and when she contacted ACAS on the 1 July 2021 thought she had presented a second claim when the early conciliation certificate was issued on the 1 July 2021. As recorded above, I did not find the claimant's position credible, concluding from the claimant's oral evidence before me that she had no intention of issuing proceedings for discrimination and would not have done so had the respondent paid her notice and holiday pay, inferring proceedings were not issued after ACAS early conciliation because (a) the claimant's imminent bankruptcy and (b) her intention was to negotiate a payment through ACAS that she could spend before the bankruptcy order made on 14 July 2021. The claimant was well aware of the Tribunal process, she had issued proceedings before and it would have been a relatively straightforward matter for her to have made an application to amend the existing proceedings within the statutory time limit after ACAS early conciliation on the 1 July 2021.

90 The Case Management Summary sent to the parties on 15 October 2021 records the claimant stating her employment had terminated due to incapacity on the 1 June 2021 and having contacted ACAS on the 1 July 2021 a second claim had been presented. When it became apparent that there was not second claim the claimant was ordered to present a further claim form seven days from the date the case management order was sent to the parties, being 21 December 2021 which would be treated as an application to amend the claimant's claim to include disability related discrimination under section 15 of the EqA. The claimant issued proceedings 3-days after the preliminary hearing on 15 October 2021.

Extending the Time Limit – "Just and Equitable" Test

91 Whilst s.123(1)(b) EQA allows a Tribunal to consider a complaint out of time where it is just and equitable to do so, there is no presumption that the Tribunal should exercise its discretion to extend time.

92 Furthermore, a Tribunal should not extend a time limit unless the Claimant can demonstrate that it is just and equitable to do so as confirmed in the Employment Appeal Tribunal case of Robertson v Bexley Community Centre [2003] IRLR 434.

93 The exercise of discretion should be the exception rather than the rule. This approach was approved by the Court of Appeal in Department of Constitutional Affairs v Jones [2008] IRLR 128.

94 In British Coal Corporation v Keeble [1997] IRLR 336, where the Employment Appeal Tribunal indicated that the Tribunal's discretion is as wide as that of civil courts

under section 33 of the Limitation Act 1980. There is no legal obligation to go through the list (Southwark London Borough v Afolosi [2003] IRLR 220) and the Tribunal is entitled to consider anything that it deems to be relevant (Hutchinson v Westwood Television Ltd [1977] IRLR 69]).I have worked through the relevant aspects of the list set out in Keeble as a framework to ensure none of the relevant matters were omitted.

The prejudice each party would suffer if the extension was refused

95 Theoretically, if the weakness in the claimant's case was ignored, the balance of prejudice would have lay in the claimant's favour. The delay appears not prejudiced the respondent in respect of matters such as investigation and obtaining evidence from the two employees who alleged carried out the discriminatory act, however, the respondent would be substantially prejudiced if the claim went ahead weighing in the balance the weakness of the claimant's claims, so weak that a deposit order would have been ordered.

96 With reference to the second claim, given my conclusion that it would have been just and equitable to strike out the section 15 EqA claim out under rule 37(1)(a) on the basis that it had no reasonable prospect of success and was both scandalous and vexatious the respondent would be substantially prejudiced if time was extended.

97 I have also taken into account the matters below when balancing the prejudice each party would suffer if the extension was refused or granted.

The length and reasons for delay

98 The claimant's explanation for the delay has been less than satisfactory and is not credible for the reasons already stated above. However, it is apparent that after the preliminary hearing the claimant acted quickly. For the avoidance of doubt I did not accept given the lack of supporting evidence that the claimant's delay in both cases was attributed to PTSD for the reasons stated above. There is no evidence the claimant received incorrect advice from her union, the Tribunal or ACAS and I find her less than credible on this point.

99 With reference to this issue, namely, would it be just and equitable to extend time, I would have found that it was not. Tribunals have the power to grant amendments under their broad power in rule 29 of the Tribunal Rules 2013 to make case management orders, combined with the general power in rule 41 to regulate their own procedure in the manner they consider fair, having regard to the principles contained in the overriding objective in rule 2. Tribunals should seek to do justice between the parties having regard to the circumstances of the case. Cocking v Sandhurst (Stationers) Ltd and anor 1[974] ICR 650, NIRC, laid down a general procedure for tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim or adding or substituting respondents.

100 The key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, and in particular to any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in

subsequent cases and was restated by the EAT in Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT in which it was held an employment tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. The then President of the EAT, Mr Justice Mummery, explained that relevant factors would include:

a. The nature of the amendment —in Mrs Jones' case she is pleading a new cause of action.

b. The applicability of time limits —if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended. In Mrs Jones' case the claim was out of time.

c. The timing and manner of the application — an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery. In Mrs Jones' case her explanation was unsatisfactory.

101 In Vaughan v Modality Partnership EAT 0147/20 the EAT gave detailed guidance on applications to amend tribunal pleadings. It confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application and:

101.1 The parties must make submissions on the specific practical consequences of allowing or refusing the amendment. Where they do not do so, it will be difficult for them to challenge a tribunal judgment on the basis that the balancing exercise has not been carried out correctly. The factors identified in Selkent (above) should not be treated as a checklist to be ticked off to determine the application.

101.2 Representatives should start by considering **what the real, practical consequences of allowing or refusing the amendment will be** [my emphasis]. If the application to amend is refused, how severe will the consequences be, in terms of the prospects of success of the claim or defence? If permitted, what will be the practical problems in responding? Where the prejudice of allowing an amendment is additional expense, consideration should be given as to whether the prejudice can be ameliorated by an award of costs, provided that the other party can meet it.

102 The hardship and injustice test is a balancing exercise. Lady Smith noted in Trimble and anor v North Lanarkshire Council and anor EATS 0048/12 that it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. Thus, it will rarely be enough to look only at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important to look at the all the surrounding circumstances. When applying the "hardship and injustice balancing test" I had in mind that it was important to ensure that amendments are not denied as a punishment or where no real prejudice will be done by their being granted — Sefton Metropolitan Borough Council and anor v Hincks and ors [2011] ICR 1357, EAT. The appropriate balancing exercise reveals the balance of prejudice lies in favour of the respondent for the reasons covered above and the claimant's application to amend would not have succeeded and been dismissed.

103 In conclusion, the claimant was not disabled in accordance with section 6 of the Equality Act 2010 with an impairment of *post-traumatic stress disorder* in the relevant period 21 May 2020 to 1 June 2021. Had the claimant met the burden of proving she was disabled in accordance with section 6 of the EqA, the claimant's application to amend to include the complaint brought under section 15 discrimination complaint in case number 2414111/2021 would not have succeeded and the claim dismissed. The complaints brought under sections 13 and 26 of the EqA in case number 2417995/2020 dismissed on the basis that they was presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done) and in all the circumstances of the case, it was not just and equitable to extend the time limit to 12 November 2020 the cause of action having arisen on the 21 May 2020.

26.10.22
Employment Judge Shotter

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 November 2022

FOR THE SECRETARY OF THE TRIBUNALS