



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Karon Byfield

**Respondent:** Solus (London) Limited

## RECORD OF A PRELIMINARY HEARING

**Heard at:** Bury St Edmunds (by CVP)

**On:** 16 November 2022

**Before:** Employment Judge (sitting alone)

### Appearances

**For the Claimant:** In person

**For the Respondent:** Mr S Liberadzky, Counsel

## Reserved JUDGMENT

### Pursuant to an Open Preliminary Hearing

#### Background

- (1) This matter came before me today as an Open Preliminary Hearing to be conducted by Cloud Video Platform (CVP) pursuant to a Preliminary Hearing and subsequent Case Management Summary in front of Employment Judge R Lewis which took place on 1 August 2022.
- (2) The Claimant presented a claim to the Watford Employment Tribunal on 19 August 2021. In it he pursues a suite of discrimination claims having ticked the boxes at paragraph 8 for age, race, disability and religion or belief discrimination, including suggesting that there was a whistle blowing claim as well as the box for unfair dismissal. The ET1 was home made and it was difficult to discern the nature of the Claimant's claims from the narrative attached to the ET1.
- (3) The matter came before my colleague Employment Judge Lewis on 1 August 2022 who conducted a Case Management Discussion.
- (4) Employment Judge Lewis identified that the disabilities the Claimant seeks to rely upon in this case are PTSD (Post Traumatic Stress Disorder), epilepsy and a tendency to seizures.

- (5) At that Hearing Employment Judge Lewis gave an Order that the Claimant do produce a statement containing the details set out in paragraph 5 of Employment Judge Lewis' Order and such further GP and other medical records to support the assertion that he was disabled for the purposes of the Equality Act 2010 in respect of the disabilities he relies upon.
- (6) Employment Judge Lewis also, pursuant to information provided by the Claimant, distilled the Claimant's claims into an Appendix which was attached to the Case Management Summary. The Appendix ran to some 31 pages and cited 28 acts upon which the Claimant relies in respect of his various claims in discrimination on the basis of the four protected characteristics he relies upon.
- (7) Employment Judge Lewis also made further directions, including listing the Full Merits Hearing for 10 days to take place in the Watford Employment Tribunal in June of 2024.
- (8) He listed a further Preliminary Hearing which is before me today. The purpose of that Hearing is as set out at paragraph 6 of Employment Judge Lewis' Summary and is as follows:
  - 8.1 To decide if still in dispute, whether during his employment the Claimant was a person with disability within the meaning of s.6 of the Equality Act 2010;
  - 8.2 to decide any Applications made for Strike Out or Deposit Orders, provided they are made in accordance with this Order;
  - 8.3 to set a Case Management timetable for the Final Hearing; and
  - 8.4 to consider / list an Application for Judicial Mediation provided both sides apply.
- (9) As at the time of today's Hearing, the issue of disability remains in dispute.
- (10) To assist me in my endeavours today, I had a Bundle of documents before me electronically, running to some 209 pages, albeit there was a further additional 58 pages added to that Bundle during the course of the Hearing as Mr Byfield had been unable to forward the entire Bundle to the Administration due to its size. I was, however, able to work with the two Bundles electronically. Mr Liberadzky on behalf of the Respondents, said that there were documents in the Bundle which had appeared late in the day but he was not going to take particular issue with that. Some of them related to the Claimant's medical records.
- (11) I heard evidence from the Claimant and he was cross examined on the disability issue by Mr Liberadzky.
- (12) That cross examination was followed by detailed submissions from both Mr Liberadzky and from the Claimant. I appreciate the Claimant is not legally

qualified and many of these issues before me today are technical and legal. Nevertheless, I was able to ask Mr Byfield to give me details and submissions on the points I needed to decide.

- (13) I am grateful to the Claimant and Mr Liberadzky who conducted themselves in a calm, assured and dignified manner. The matter was set down for a full day. However, at 1pm after hearing evidence and submissions and as I was about to retire to consider my Judgment, Mr Byfield explained that he was unlikely to be available in the afternoon as at 2pm he had a further Hearing before another Judge on another matter. He apologised for that. Mr Liberadzky pointed out to me that this matter had been listed for a day. Mr Byfield said he had tried to adjourn or put off the afternoon Hearing, but could not do so.
- (14) I therefore had something of a dilemma.
- (15) My intention was to attempt to deal with this matter and the issues raised in this Preliminary Hearing pursuant to the Order of Employment Judge Lewis today. However, it appeared likely that the Claimant would not be available this afternoon to hear the delivery of my Judgment should I be in a position to deliver one. I had not at that time been able to consider whether I could deliver such a Judgment or whether it would need to be reserved.
- (16) I had hoped to be able to deliver it in the afternoon.
- (17) I resolved therefore to reserve the Judgment and write to the parties with that Judgment.
- (18) Mr Byfield is unrepresented and is unversed in the Law and legal procedures. In the circumstances it seemed the most appropriate thing to do.
- (19) Therefore this is a Reserved Judgment. Of necessity, therefore I was not able to deal with any additional Case Management at the end of delivery of my Judgment and there will need to be a further Telephone Preliminary Hearing to deal with such issues.
- (20) I would point out that neither party indicated to me that they were interested in Judicial Mediation.
- (21) If they are, it may be something they can raise at the next Preliminary Hearing by Telephone for a Case Management discussion.
- (22) The Respondent, in accordance with the Orders of Employment Judge Lewis, did inform the Tribunal that they wished to continue to pursue Applications for Strike Out of all the Claimant's claims in disability.
- (23) Therefore, before me today I have to determine the issue as to the Claimant's disability or otherwise and deal with the Respondent's Application for a Strike Out and or Deposit Order.

## Disability

(24) For the purposes of pursuing discrimination claims on the basis of the protected characteristic of disability, a Claimant must satisfy the test under s.6 of the Equality Act 2010 ("EqA"):

6. Disability

(1) A person (P) has a disability if-

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

...

(25) When considering whether a person is disabled under s.6 EqA 2010, the supplementary provisions for determining that disability appear in Part 1 of Schedule 1 to the Equality Act 2010. Guidance is also given in the Disability Discrimination (Meaning of Disability) Regulations 1996 and the Equality Act 2010 (Disability Regulations 2010) as well as the Government Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). Tribunals must take this Guidance into account where they consider it to be relevant.

(26) The Claimant relies on the disabilities of PTSD, Epilepsy and a tendency to seizures. He confirmed this to Employment Judge Lewis and further confirmed it before me today.

(27) In the Order by Employment Judge Lewis, the Claimant was Ordered to provide specific information about each impairment, together with copies of relevant GP and other medical records. Pursuant to this Order, he served a six page statement and some medical documents which were before me.

(28) The Claimant was cross examined by Mr Liberadzky who took the Claimant through the documents he had produced and his statement.

(29) It was established in the giving of this evidence and admitted by the Claimant, that nowhere in that documentation was there any mention of PTSD and the Claimant confirmed that there had been no such diagnosis in his case.

(30) As to Epilepsy, it was confirmed that the Claimant underwent a test for Epilepsy and this took place on 19 September 2018. This is called an EEG and it revealed no evidence of Epilepsy, but revealed a background of activity within normal limits and no evidence of epileptiform activity. This was caveated with a comment that this does not necessarily exclude the possibility of previous episodes reported as 50% of patients with epilepsy can show an EEG as normal. However, what was clear was that there was no diagnosis of Epilepsy.

- (31) As with the Claimant's third disability, a tendency to seizures, the evidence he produced indicated that he had had three seizure episodes. The first being in March of 2016 and the last being in July 2020. Only one of those referred to in the documentary evidence occurred what can be termed the material period, being the period of the Claimant's employment with the Respondent between February 2019 and September 2021. The other two fell outwith that material period.
- (32) Under cross examination, the Claimant indicated that he had had other seizures, but that they were minor in nature, being two small seizures of one or two minutes. He said he sought no medical treatment for them.
- (33) The evidence before me suggests that the treatment that the Claimant underwent in the material period was more related to stress, often described as 'stress at work'. In fact, from June 2021 until the termination of the Claimant's employment in September of 2021, he was signed off sick for stress.
- (34) The Claimant was taken to his statement which is home made and has little information concerning diagnosis of the disabilities relied upon, or indeed information about the effect of the alleged impairments.
- (35) The Claimant was referred to paragraph 2.5 of his statement where he pointed out that in 2018, as a result of treatment he had received at a previous workplace, he had suffered from low self esteem and / or self-criticism, sleeping problems, loss of interest in daily activities like getting up in the morning, going to work and eating. To alleviate these issues he left that job and joined the Respondents in February of 2019. When cross examined about this he attempted to suggest that these effects had continued into the new job with the Respondents, but then rather resiled from that and explained that the reason that he wanted to move was to alleviate those effects and that when he suffered behaviours perpetrated upon him, the subject matter of his claim, in the new job he reported those behaviours in order to alleviate the onset of the effects he had previously felt in the former job.
- (36) He also confirmed that he had had no time off sick until June 2021 at the Respondents save for the odd batch of days here and there, for which he did not need a Doctor's certificate. When pressed on this he said he had taken time off, but it was quickly established that he was referring to two weeks holiday he had taken at the beginning of February 2019 when he joined the Respondent's.
- (37) The majority of his statement rehashes complaints about the behaviour he says he was subjected to in the Respondent's.
- (38) The one seizure he did have during the material time, took place on 13 July 2020 and he attended at A & E and followed that up with his GP. He says there was no neurological deficit on examination and lactate was normal.
- (39) Mr Liberadzky submits to me that there is simply insufficient evidence before me to convince me that the Claimant has satisfied the tests under s.6 EqA 2010. He says that there is no diagnosis of an impairment along the lines the Claimant

seeks to rely upon. There is no diagnosis of PTSD or Epilepsy and the tendency to seizure is also undiagnosed with only one seizure occurring during the material period that is documented, for which the Claimant sought medical attention. He said I simply do not have sufficient medical evidence in front of me to conclude that the Claimant has a mental impairment. He says that with respect to his assertion that he suffers from PTSD, Epilepsy and a tendency to seizure, this is essentially nothing more than self-diagnosis.

- (40) He says that if I am inclined to be charitable to the Claimant and accept that on the face of his statement and the documents produced, there is some evidence that the Claimant was suffering from stress and / or anxiety of some description, then there is no evidence before me to satisfy the latter part of the s.6 test as to the effect of that impairment. He says that is particularly so during the material period and any mention of any effect goes outside the material period.

### **Conclusions**

- (41) The Claimant is unrepresented and is unversed in the nature of the legal tests required to prove disability under s.6 EqA 2010. The burden of proof is on the Claimant in this respect.
- (42) He has produced no evidence to support the assertion that he has the impairment of PTSD and / or Epilepsy.
- (43) The test for Epilepsy does not preclude that he may have it, but that indeed would be the case for anyone else in the general population.
- (44) There is absolutely no evidence before me to support the impairment of PTSD and Epilepsy.
- (45) As for the tendency to seizures, the evidence is extremely thin. One episode for which the Claimant attended A & E and was then subsequently referred to his GP. Some anecdotal evidence of minor seizures were given orally, but not referred to in the documentation.
- (46) It is impossible not to have sympathy for the Claimant who is unrepresented, but the fact remains that at the first Preliminary Hearing, albeit not on this point, Employment Judge Lewis pointed out to him that the complexities of the Law in the areas of the claims he seeks to pursue might suggest that he should seek advice from an experienced expert in the field of Employment Law. He has not done so and no one would seek to penalise him for that fact. The whole purpose of the Tribunal is to enable parties, where possible, to represent themselves.
- (47) However, decisions concerning whether a Claimant is disabled for the purposes of s.6 of the Act can only be based on the evidence that is produced. The Claimant has had ample opportunity to produce that evidence should it exist and has not done so.

- (48) I conclude, therefore, that there is no evidence before me that the Claimant is suffering from the impairment of PTSD. I draw the same conclusion with respect to the suggestion that he is suffering from the impairment of Epilepsy.
- (49) As to the tendency to seizure, the evidence is extremely thin. I simply do not feel I have sufficient evidence in front of me to make a finding that this amounts to an impairment.
- (50) There is evidence before me that the Claimant was signed off for a period of time for stress, often described as 'stress at work'. I do not have enough information or evidence in front of me to enable me to conclude that this amounted to an impairment for the purposes of s.6 EqA 2010 and the Claimant has not sought to rely on stress and / or anxiety in the furtherance of this claim in any event.
- (51) For the avoidance of doubt, however, I am bound to say that there is no evidence in front of me in respect of any effect upon the Claimant's ability to carry out normal day to day activities. Which, even if I had found there was a mental impairment, would be sufficient to satisfy me that the Claimant had cleared the necessary hurdles in the s.6 test.
- (52) For the reasons set out above, therefore, I find that the Claimant is not a disabled person for the purposes of the Equality Act 2010 and his claims in disability discrimination fall away and are dismissed.

### **Respondent's Application for Strike Out**

- (53) The second issue before me is the Application pursued by the Respondents for a Strike Out, or alternatively a Deposit Order.
- (54) Applications for a Strike Out are contained in the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 at Rule 37. Rule 37 states as follows:

37. Striking Out

- (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-

- (a) that it is scandalous or vexatious or has not reasonable prospect of success;

...

- (55) I am also asked, in the alternative, to make a Deposit Order. Deposit Orders fall under Rule 39 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. Rule 39 states as follows:

39. Deposit Orders

- (1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

- (56) In respect of these Applications, I have before me some written submissions of Mr Liberadzky and a Bundle of Authorities.

Time Limits

- (57) Section 123 of the Equality Act 2010, stipulates that a Tribunal cannot hear a claim after the end of the period of three months starting with the date of the act to which the complaint relates, or such other period as the Employment Tribunal thinks is just and equitable.
- (58) Under sub-section 3, conduct extending over a period is to be treated as done at the end of that period.
- (59) Mr Liberadzky points out that working back from the date the claim was presented to the Tribunal and allowing for the ACAS Early Conciliation, on the basis of s.123 EqA 2010, any complaint relating to an act prior to the 9 April 2021 is potentially out of time. I cannot fault his calculations in that respect.
- (60) The Claimant’s claims in discrimination set out in the Appendix attached to Employment Judge Lewis’ Summary, cover some 28 paragraphs covering a wide range of legal claims including direct discrimination, harassment, age, race and religion or belief and victimisation. As a result of my finding above, all discrimination claims relating to disability have fallen away.
- (61) Mr Liberadzky points out that the first 21 are out of time on their face, dating between 19 February 2019 and 16 December 2020.
- (62) He then addresses me on the issue of acts or omissions which form part of conduct extending over a period and ending in time. He says the burden is on the Claimant to show that these various allegations are linked to one another and evident of a continuing state of affairs. He properly refers me to the case of Commissioner of Police at the Metropolis v Hendricks [2003] ICR530.
- (63) He says taking the Claimant’s case at its highest and assuming all of the allegations to be true, he cannot show that they together form conduct extending over a period. He points out that they cover a period of more than 2.5 years with significant time gaps between isolated incidents. In particular, there is a gap of some four months between 21st and the 22nd. The 22nd is an allegation which on the face of it is the first allegation that is in time, having allegedly taken place on 12 April 2021.



- (64) He points out that the allegations are levelled against at least nine separate perpetrators. He says that this is a relevant factor and refers me to the case of Aziz v FDA [2010] EWCA Civ304.
- (65) He says the subject matter of the allegations vary greatly covering comments about the Claimant's work performance, texts from a colleague about the BLM movement, a delay in placing him on furlough during the Covid-19 lock down, his book being damaged and more. He says some of the allegations are said to constitute harassment and / or direct discrimination related to one or more of four protected characteristics. He says some also refer to victimisation, associative discrimination and discrimination arising from disability.
- (66) He then addresses me on the question of extending time on the just and equitable principle under s.123(1)(b) EqA 2010, but says that the Claimant has given no plausible explanation as to why complaints were submitted late.
- (67) In fact, during submissions I asked him this point and he said that he was ignorant of the fact that there was any time limit.
- (68) He said he had no knowledge of the Law and was unaware that claims had to be brought within a certain time.
- (69) Mr Liberadzky points out that the incidents relied upon go back to 19 February 2019. That incident is more than two years out of time. He says that all of the first 21 incidents relied upon are out of time and enormous prejudice would be visited upon the Respondents in having to deal with these allegations as many of the alleged perpetrators have left the Respondent and are unlikely to be available as witnesses. He said Ken Warnock, Phillip South, Graham Darby and Stephanie Evans have also left. He points out that witnesses who may be able to give evidence are likely to have great difficulty in recalling conversations that took place as long ago as February 2019.
- (70) He says the claims are weak on their merits and that therefore there should be no contemplation of extending time on the just and equitable principle.

Strike Out / Deposit Order

- (71) It must be remembered that the above is all in the context of a strike out Application in front of me. I am not dealing with consideration of limitation on a substantive basis. It is put to me on the basis that those claims 1 – 21 are out of time and that there is no reasonable prospect of them being found to be conduct extending over a period. On that basis he tells me that I can strike out those claims as they have no reasonable prospect of success.
- (72) He points out that although Tribunals should exercise particular caution when asked to strike a claim out where the claim is in discrimination, this does not prevent power from being exercised in an appropriate case where a claim is clearly hopeless, even taken at its highest. The power to make a Deposit Order can be exercised more readily.

- (73) He refers me to paragraph 14 of Employment Judge Lewis' summary where he points out to the Claimant that he was left with very great concern that the Claimant has not understood the legal framework of the case and has used legal terms without sufficient understanding of them. He goes on to say that he is concerned that the Claimant may have fallen into a common trap, which is that he has assumed that negative events at work are related to a protected characteristic, without giving sufficient thought to how that is to be demonstrated. He also adds that there may be many questions about which he feels strongly, but which do not form part of the work of the Tribunal. He referred to the relevant case Law and in particular the case of Madarassy v Nomura [2007] IRLR 246. He says on the face of the Claimant's claims it can be concluded that there is little or no chance of the Claimant being able to establish a link between he protected characteristic and the behaviour complained of. He says that for all the allegations, the Claimant simply makes a bare assertion that the conduct was because of or related to his age, race, disability, or religion or belief. Those assertions have no, or alternatively, little reasonable prospect of success.
- (74) He refers me to the Authority of E v X, L and Z before the Honourable Mrs Justice Ellenbogen DBE, under UKEAT/0079/20/RN(V). In particular he refers me to paragraph 50 and beyond where LJ Ellenbogen sets out some key principles. These are to be employed at a Preliminary Hearing where a Judge is asked to strike out claims under Rule 37 because no prima facie case can be demonstrated. These principles are derived from an analysis of the various Authorities cited in that case and are key to the decision I have to reach today on the strike out Application. These are as follows:
- 74.1 In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form. In this case that is the Appendices attached to Employment Judge Lewis' Order.
- 74.2 It is appropriate to consider the way in which a Claimant puts his or her case and in particular whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination and harassment, is immaterial.
- 74.3 Nonetheless, it is not essential that a positive assertion that the Claimant is complaining of a continuing discriminatory state of affairs be explicitly stated either in the claim form, or in the List of Issues. Such contention may become apparent from evidence or submissions made once a time point is taken against the Claimant.
- 74.4 It is important that the issues for determination by the Tribunal at a Preliminary Hearing have been identified with clarity. That will include identification of whether the Tribunal is being asked, 1. to consider whether a particular allegation or complaint should be struck out because no prima facie case can be demonstrated; or 2. substantively to determine the limitation issue.

- 74.5 When faced with a strike out Application arising from a time point, the test which a Tribunal must apply is whether the Claimant has established a prima facie case in which connection it may be advisable for all evidence to be called. It will be a finding of fact for the Tribunal as to whether one act leads to another in any particular case.
- 74.6 An alternative framing of the test be applied on the strike out Application is whether the Claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an ongoing state of affairs.
- 74.7 The fact that different individuals may have been involved in the various acts of which complaint is made, is relevant, but not conclusive.
- 74.8 In an appropriate case a strike out Application in respect of some part of a claim, can be approached assuming for that purpose the facts to be pleaded by the Claimant. In that event, no evidence will be required – the matter will be decided on the Claimant’s pleadings.
- 74.9 A Tribunal hearing a strike out Application should view the Claimant’s case at its highest, critically by considering whether any aspect of that case is innately implausible for any reason.
- 74.10 If a strike out Application succeeds on the basis that even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits) that will bring that complaint to an end. If it fails, the Claimant lives to fight another day at the Full Merits Hearing.
- 74.11 Thus, if a Tribunal considers (properly) at a Preliminary Hearing that there is no reasonable prospect of establishing at trial that a particular incident complaint about which would by itself be out of time, form part of such conduct together with the other incidents such as to make it in time, that complaint may be struck out.
- 74.12 Definitive termination of an issue which is factually disputed requires preparation and the presentation of evidence to be considered at the Preliminary Hearing, findings of fact and as necessary the application of the Law to those facts, so as to reach a definitive outcome on the point. This cannot then be revisited at the Full Merits Hearing.
- 74.13 If it can be done properly, it may be sensible and potentially beneficial for a Tribunal to consider a time point at a Preliminary Hearing either on the basis of a strike out Application, or in an appropriate case, substantively so that time and resource is not taken up preparing and considering at a Full Merits Hearing, complaints which may be properly found to be truly stale such that they ought not to be considered. However, caution should be exercised having regard the difficulty of disentangling time points relating to individual complaints relating to other complaints and issues in the case, the fact that there may be no appreciable saving of preparational

hearing time in any event if episodes that could potentially be severed as out of time, are in any case relied upon as background for more recent complaints. The key facts of sensitivity of discrimination claims and the high strike out threshold and the need for evidence to be prepared and facts found, unless agreed in order to make a definitive determination of such an issue.

- (75) Mr Liberadzky, when asked by me as to the position with respect to the Claimant's constructive unfair dismissal claim, asks me to consider that albeit that some of the incidents relied upon here going back to February 2019 might form part of his reasons for resigning and therefore relied upon as a repudiatory, or part of a repudiatory breach, discrimination claims are very different. The fact that some evidence relating to those incidents which I am now considering, for which on the face of it are out of time, may need to be adduced in any event, should not deflect me from considering the strike out as he has put it.
- (76) He said the prejudice to the Respondents would be significant in allowing those claims going back to February 2019 to proceed.
- (77) He goes on to say that he is seeking a strike out of all of the Claimant's claims in discrimination. Including those that on the face of it are in time. He seeks the strike out of those numbered 22 to 27 inclusive, on the basis that they have no reasonable prospect of success.
- (78) In respect of all the claims he seeks to strike out, he also asked me that if I am not minded to grant such a strike out I consider the making of a Deposit Order on the lower threshold as set out above.
- (79) He does not seek to ask for strike out of the Claimant's claim of constructive unfair dismissal. That is not part of the clear brief set out at paragraph 6 of Employment Judge Lewis' Summary.

## Conclusions

- (80) This is one of those cases falling within the ambit of the Authority set out above presided over by Mrs Justice Ellenbogen being the case of E v X, L and Z where time is a significant factor in considering a strike out under Rule 37. The earliest act relied upon is 19 February 2019 and that is over two years out of time. Even the act cited at paragraph 21 on 16 December 2020 is some five months out of time. The acts relied upon numbered 22 to 27 are on their face in time.

### Claims numbered: 1 - 21

- (81) With respect to those that are on their face out of time, the only submission I received from the Claimant is that he would like me to consider them as continuing acts.
- (82) I am persuaded by Mr Liberadzky's argument that each of those allegations numbered 1 to 21 are distinct and deliberate. There is often large gaps between them and they concern allegations against a whole variety of individuals. It is

also the case that the Claimant has not argued or raised any issue as to those individuals working in concert or in conspiracy against him. Each and every act complained of, which is then cited as being discriminatory usually on the grounds of race, age, religion and belief and disability, is in my judgement distinct and separate. There is nothing connecting them. Individuals do reappear in different incidents at different times, but on any analysis of those separate incidents it is impossible to conclude that they can be appropriately judged as amounting to conduct extending over a period of time. Taking into account the principles set out in the Hendricks case, I cannot conclude that there is a prima facie argument that those acts do constitute conduct extending over a period of time.

- (83) Turning to whether time should be extended on the basis of the just and equitable principle, I am also once again persuaded by Mr Liberadzky. The Claimant advances no explanation for the late bringing of those claims, save that he was unaware that there was a time limit. He was able to consider and present these proceedings in August of 2021 after he had given his notice of resignation and therefore clearly had access to sufficient information to enable him to understand the processes involved. There is no plausible or obvious reason why he could not have brought claims in time in respect of a separate event complained of.
- (84) I do consider that extending time would be prejudicial to the Respondent. The difficulty they have with witnesses who have left may be a difficulty that they have to face to the same extent with respect to the extant and surviving unfair dismissal claim. However, I do accept that the claims in discrimination are markedly different and markedly more serious, both for the individuals themselves and for the Respondents. I am therefore not persuaded by the argument that some of this evidence will need to be adduced at the Full Merits Hearing in any event. It is a factor I have taken into account. There is of course prejudice to the Claimant if time were not extended in this case, but in any event, I do think that the prejudice to the Respondent would be greater.
- (85) For those reasons I do not think that there is reasonable prospect of those claims being either deemed to be conduct extending over a period of time, or for time to be extended. They therefore have no reasonable prospect of success. I therefore exercise my discretion under Rule 37 to strike out those claims. For the avoidance of doubt those claims in the Appendix attached to Employment Judge Lewis' Summary numbered 1 to 21 are struck out.

Claims numbered: 22 - 27

- (86) These are in time. The Respondent's arguments as to the weakness of these claims have some force. The point raised by Employment Judge Lewis at paragraph 14 of his Summary, also carries some force and on the face of it the Claimant may have some difficulty in surmounting the hurdle of being able to demonstrate a link between the events and the protected characteristic on the basis of the Authorities.
- (87) However, I do not consider that there is sufficient for me to persuade me that this at least should not be tested. Striking out on this basis is draconian. It seems to me that those incidents need to be ventilated and tested by evidence and only

then can it be determined whether the Claimant can show a link between those incidents and the protected characteristics he relies upon.

- (88) For that reason I do not conclude that there is no reasonable prospect of success of those claims numbered between 22 and 27 inclusive and they survive.
- (89) As to the making of a Deposit Order in respect of those claims, I do not, for the same reasons I have set out above, conclude that there is little reasonable prospect of success. There are six incidents which the Claimant relies upon and detailed evidence will need to be adduced of these incidents and it may be that having heard that evidence that the Tribunal will be able to draw inferences which assist them in bridging the link between the incidents and the protected characteristics. There is insufficient before me to persuade me that this should not be done and that the threshold of little reasonable prospect of success has been reached. I therefore do not make a Deposit Order in respect of those claims.
- (90) In summary, therefore, claims 22 to 27 survive but only in so far as the protected characteristic is other than disability.

Constructive Unfair Dismissal claim

- (91) This also survives.
- (92) It will be necessary to have a further three hour Telephone Preliminary Hearing to discuss further Case Management.
- (93) It is to be suggested that a definitive List of Issues can be produced with perhaps further detail as to the breaches relied upon in respect of the constructive dismissal claim and the parties should attend that Hearing with an Agreed List of Issues to put before the Judge. The Judge therefore will be able to definitively define the issues to go before the Tribunal at the Full Merits Hearing.
- (94) Consideration will then have to be given to other directions which will be required between now and the Full Merits Hearing. Perhaps also further thought can be given to whether the parties would be interested in pursuing Judicial Mediation.

**Other Matters**

- (95) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:  
[www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/](http://www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/)
- (96) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise) ...*" **If, when writing to the Tribunal, the parties do not comply with this rule, the Tribunal may decide not to consider what they have written.**

- (97) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (98) If the Tribunal determines that the Respondent has breached any of the Claimant's rights to which the claim relates, it may decide whether there were any aggravating features to the breach and, if so, whether to impose a financial penalty and in what sum, in accordance with section 12A Employment Tribunals Act 1996.

## ORDERS

### Made pursuant to Rule 53 of the Employment Tribunal Rules of Procedure

#### 1. Further Preliminary Hearing by Telephone

That there be a **3 hour** Preliminary Hearing to be conducted by Telephone to consider further case management issues to be listed **as soon as possible**, but not before 28 February 2023.

#### 2. Complaints and Issues

The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and / or incomplete in any important way.

#### 3. Other Matters

##### **Public access to Employment Tribunal decisions**

All Judgments and Reasons for the Judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.

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**Employment Judge K J Palmer**

Date: 11 January 2023

Sent to the parties on:

17 January 2023

For the Tribunal: