EMPLOYMENT TRIBUNALS

Claimant: Mrs K Foster

Respondents: 1.Tower Family Healthcare
2. Simon De Vial
3. Paul Massey
4. Victoria Moyle
5. Kiran Patel

Heard at: Manchester (remotely, by CVP) **On:** 28 July 2021

Before: Employment Judge Rice-Birchall (sitting alone)

Representatives
For the claimant: Mr Mahmood, Counsel
For the respondents: Mr Roberts, Counsel

JUDGMENT

1. The Claimant's claims of Protected Disclosure Detriment in Claim 1 (2409592/20) are out of time and are dismissed.
2. All claims and allegations against the Third Respondent are out of time and are dismissed.
3. All other claims and allegations will proceed to a final hearing.

REASONS

Background

(1) This was a preliminary hearing listed to determine jurisdiction regarding time limits for each of the claimant's claims.
(2) The claimant has filed two claims, claim 1 (2409592/2020) on 07/08/2020 and claim 2 (2405501/2021) on 29/04/2021.
(3) In claim 1, the claimant alleges 17 protected disclosures, 8 protected acts, and avers that she suffered 11 detriments between the period 31 July 2019 to 27 February 2020, 7 acts of victimisation, disability discrimination on 3 occasions, failure to make reasonable adjustments and harassment on two occasions. The last detriment/victimisation took place on 27.2.20.
(4) Both claims are brought against the five respondents listed above.

(5) Paragraphs 1-58 of claim 2 replicate paragraphs 1-57 of claim 1 and goes on to make additional claims and allegations following the claimant's expulsion from the first respondent (R1), referred to as "the additional allegations". The two sets of proceedings are now combined. The additional allegations in claim 2 are not out of time and are not the subject of this preliminary hearing.

(6) The respondent alleges that, with the exception of the additional allegations, the claims are out of time and, accordingly, that claim 1 should be dismissed in its entirety (and with it all claims against the third respondent (R3) and that claim 2 should be able to proceed only in respect of the additional allegations.

(7) For ease of reference, the full list of issues is set out in the Annex to this Judgment.

Issues

(8) The issues to be determined during this preliminary hearing are as follows:

(9) Were all of the claimant's claims brought in time?

(10) Does the conduct complained of amount to conduct extending over a period within the meaning of section 123(3)(1) of the EqA or part of a series of similar acts or failures under section 48(3) ERA?

(11) If not, would it be just and equitable to extend time for any claims brought under the EqA?

(12) Was it reasonably practicable for the claimant to bring her claims under the ERA in time?

(13) If not, were the claims nevertheless brought within such further period as the Tribunal considers reasonable?

(14) In particular there are the following issues for consideration. The respondent alleges:

(i) Claim 1 was filed one day late. It was reasonably practicable for the claim to have been submitted in time and it would not be just and equitable to extend time;

(ii) The claim against the third respondent is out of time as the last specific act pleaded against the third respondent is dated 14 January 2020; and

(iii) Claim 2 is only capable of covering acts after 29 January 2021. It is, in any event, denied that the events are part of a series of similar acts or failures.

Documents and Evidence

(15) The Tribunal had the benefit of a bundle of documents. It heard oral evidence from Mark Higgins, the claimant's solicitor. It received written submissions from both counsel. It also heard oral submissions.

Facts

Submission of claim 1

(16) Mr Higgins, solicitor, took instructions from the claimant in Spring 2020. He considered that the "last" act of alleged detriment/unlawful discrimination (under s47B), as the case then stood, occurred on 27 February 2020. He considered that this provided a primary time limit of 26 May 2020. Accordingly, he submitted ACAS early conciliation notifications in respect of each of the respondents around 22 May 2020. Early conciliation certificates were issued on 6 July 2020. He therefore understood that the last date to present the claim to the Employment Tribunals was 6 August 2020. That date is accepted by both parties as the last date to present the claim.

(17) As Mr Higgins was due to be on annual leave, he submitted the claim form and particulars of claim on 30 July 2020. However, he was unaware that ET1 claim forms may only be presented to HMCTS either by post (to the Central Office); by hand to a designated ET office; or by using the designated online claims submission form. He mistakenly believed that he could file an ET1 in the same way as an ET3, by email as an attachment. He knew that, in the past, claims had to be submitted online, but assumed this had changed when fees for bringing claims were abolished.

(18) Mr Higgins did not receive an automated response e-mail from the Tribunal. He became concerned when he still had received no automated response the following day. As he was on annual leave, he contacted his colleague, ES, and asked him to contact the Tribunal to confirm receipt of the ET1.

(19) ES did as instructed. He wrote a note of his call which stated "The clerk informed me that the ET1 would have been submitted by the portal and not by email and I explained that it had been sent by email. The clerk asked if the ET1 had been printed and attached to the email and I confirmed that it had." According to the note at least, the Tribunal did not inform ES that a claim submitted in such a way could not be processed.

(20) ES then contacted Mr Higgins to confirm that the automated response was not working but that the email had been received. Mr Higgins assumed that the claim would be processed in due course.

(21) At 1134 on 31 July 2020, Mr Higgins resubmitted the claim, again as an attachment to an email, having noticed that a box remained unticked.

(22) On 7 August 2020, whilst on annual leave in Cumbria, Mr Higgins received an email from the Tribunal at 1213 to which was attached a letter entitled "Return Claim Form Notice." It indicated that as the ET1 had not been submitted using one of the prescribed methods it was being returned to resubmit using one of the prescribed methods.

(23) Mr Higgins drove to Cockermouth to re-submit the ET1 via the online form. It was submitted at 1521.

Claim against the third respondent (R3)

(24) The claim against R3, in claim 1 includes allegations of unlawful detriments under s47B, victimisation and harassment. There is no new claim against R3 in claim 2.

(25) The last detriment complained of which is attributed to R3 was on 6 Aug 19 (paragraph 20, claim 1).

(26) The last pleaded act of harassment in claim one against R3 is 14 January 2020, when it is alleged that R3 "made a series of derogatory comments in relation to mental health within the workplace in full knowledge of the Claimant's own circumstances." Paragraph 38 of claim 1 goes on to particularise what, it is alleged, was said by R3.

(27) Accordingly, the ordinary time limit would expire on 13 April 2020.

(28) Day A of the EC certificate against R3 is 22 May 2020 and Day B is 6 July 2020.

(29) Claim 1 was filed on 7 August 2020.

Effect of submission of claim 2

(30) As stated above, paragraphs 1-58 of claim 2 broadly replicate paragraphs 1-57 of claim 1. The additional allegations relate to the claimant's expulsion from the first respondent. The two sets of proceedings are now combined. The additional allegations in claim 2 are not out of time and are not therefore the subject of consideration at this preliminary hearing. However, the question for consideration is what is the impact of paragraphs 1-58 having been effectively repeated in claim 2, which is in time.

(31) Notably, claim 2 pleads an additional three detriments to the eleven pleaded in claim 1.

Law

Submission of claim 1

(32) Claim 1 includes claims of discrimination and detriments. The relevant time limits are set out below.

(33) Section 123 of the Equality Act 2010 (EqA) provides as follows:

> (1) …..a complaint within section 120 may not be brought after the end of— (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of— (a) the period of 6 months starting with the date of the act to which the proceedings relate, or (b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section— (a) conduct extending over a period is to be treated as done at the end of the period; (b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something— (a) when P does an act inconsistent with doing it, or (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

(34) It is evident from the wording of s.123 that the ET has a wide discretion in deciding whether or not to extend time as being just and equitable.

(35) The Tribunal's discretion is as wide as that of the civil courts under section 33 of the Limitation Act 1980 (***British Coal Corporation v Keeble (1997) IRLR 336***). Tribunals are therefore required to consider factors relevant to the prejudice that each party would suffer if an extension were refused, including: the length of, and the reasons for, the delay and the extent to which the cogency of the evidence is likely to be affected.

(36) There is no presumption in favour of extending time. In fact, Tribunals should not extend time unless the claimant convinces them that it is just and equitable to do so.

(37) Section 48 ERA provides as follows:

(38) (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(39) (3) An [employment tribunal] shall not consider a complaint under this section unless it is presented— (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)— (a) where an act extends over a period, the "date of the act" means the last day of that period, and (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer [, a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

(40) The test under section 48 imparts a two part test: was it reasonably practicable to file the claim within the deadline; and if not, did the claimant file within such further period as was reasonable. It is important to separate the two stages.

(41) The burden of proof is on the claimant (***Porter v Bandridge Ltd***).

(42) The enquiry is to consider the substantial cause failure and ask whether this demonstrates it was not reasonably practicable to present the claim in time. (***Palmer and Saunders v Southend-on-Sea Borough Council***). Practical is the equivalent of feasible.

(43) According to ***Wall's Meat Co Ltd v Khan***, "ignorance" of rights or a time limit is "not just cause or excuse unless it appears that he or his advisors could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault and he must take the consequences."

(44) Case law clearly distinguishes the reasonable practicability of presenting a claim within the time limit when the claimant is represented by a "skilled adviser" from other circumstances. Where a claimant's skilled advisors are at fault for failing to submit a claim in time, the Tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time (***Dedman v British Building and Engineering Appliances Ltd [1973]IRLR 379***).

Claim against R3

(45) In determining whether it is just and equitable to extend time under the EqA, the just and equitable application must be considered in respect of each Respondent separately (***Harden v Wootlif, Smart Diner Group Limited UKEAT/0448/14/DA***).

(46) It is important to understand the distinction between being a respondent and being a witness.

(47) In ***Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193, CA***, the Court of Appeal held that S.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. There is no requirement for the acts to be committed by one person, or for all the acts to be very similar in context or even in proximity. In Lord Justice Mummery's words, 'there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them'. Such a link might be established by considering whether the acts had all been committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised in any way. It would also be relevant to inquire why the perpetrators did what was alleged.

(48) *"29 Parliament considered it necessary to make exceptions to the general rule where an act (or failure) in the short 3-month period is not an isolated incident or a discrete act. Unlike a dismissal, which occurs at a specific 10 moment of time, discrimination or other forms of detrimental treatment can spread over a period, sometimes a long period. A vulnerable employee may, for understandable reasons, put up with less favourable treatment or detriment for a long time before making a complaint to a tribunal. It is not*

always reasonable to expect an employee to take his employer to a tribunal at the first opportunity. So an act extending over a period may be treated as a single continuing act and the particular act occurring in the 3-month period may be treated as the last day on which the continuing act occurred. There are instances in the authorities on discrimination law of a continuing act in the form of the application over a period of a discriminatory rule, practice scheme or policy. Behind the appearance of isolated, discrete acts the reality may be a common or connecting factor, the continuing application of which to the employee subjects him to ongoing or repeated acts of discrimination or detriment. If, for example, an employer victimised an employee for making a protected disclosure by directing the pay office to deduct £10 from his weekly pay from then on, the employee's right to complain to the tribunal would not be limited to the deductions made from his pay in the 3 months preceding the presentation of his application. The instruction to deduct would extend over the period during which it was in force and the last deduction in the 3 months would be treated as the date of the act complained of.

(49) *30 The provision in section 48(3) regarding complaint of an act which is part of a series of similar acts is also aimed at allowing employees to complain about acts (or failures) occurring outside the 3-month period. There must be an act (or failure) within the 3-month period, but the complaint is not confined to that act (or failure.) The last act (or failure) within the 3 month may be treated as part of a series of similar acts (or failures) occurring outside the period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time.*

(50) *31 The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3-month period and 11 some outside it. The acts occurring in the 3-month period may not be isolated one-off acts, but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3-month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a "series" and (b) being acts which are "similar" to one another."*

(51) In the case of ***Pugh v The National Assembly of Wales (2006) UKEAT/0251/06***, HHJ Serota QC clarified that there is no need for an employee to establish the existence of a "policy rule or practice in accordance with which decisions are made from time to time" but rather a Tribunal should look at the allegations in the round (including the allegations relating to the failure to consider the grievances) and ask whether looking at matters in the round, the employer was responsible for a continuing state of affairs (see also ***Barclays Bank v Kapur*** (1991) IRLR 136).

Claim against R3

(52) It is necessary to consider the just and equitable application in respect of each respondent separately (***Harden v (1) Wootlif (2) Smart Diner Group Limited UKEAT/0448/14/DA***).

Effect of submission of claim 2

(53) The respondent relied upon **Bexley Community Centre v Robertson [2003] EWCA Civ 576,** in particular paragraph 18, set out below, as authority for the proposition that the additional allegations in claim 2 could not "revive" the allegations pleaded in claim one.

(54) Paragraph 18 states: "*in any event, the Appeal Tribunal was not entitled to take the 5th October 1999 incident into account in considering whether there was a continuing act. That behaviour took place, as I have said, after the date of Mr Robertson's application, and could not properly be taken into account for the purpose of determining whether the complaint was out of time. Though it may be that it could have been relevant to the second and quite distinct issue whether it was just and equitable to consider the claim out of time*."

(55) The doctrine of res judicata prevents parties from re-litigating issues. It covers cause of action estoppel which prevents a party from pursuing a cause of action more than once.

Respondent's Submissions

Submission of claim 1

(56) The respondent argues that Mr Higgins was ignorant of the prescribed method of filing the ET1 rather than of the time limit or the need to file the ET1 within that time limit. It states that information about how to lodge a claim is readily available and that Mr Higgins' ignorance cannot therefore be reasonable, particularly in circumstances in which he had also assumed that rules must have changed following the abolition of fees.

(57) The respondent argues that the ERA claim is "dead" but that the EqA claims are "less clear cut". It says that the Tribunal must consider the reason advanced as a starting point and then consider the balance of prejudice.

Claim against R3

(58) The respondent says this is not about whether R3's conduct lies at the heart of the case. The respondent makes the point that individual respondents cannot be jointly and severally liable for some acts, for example, reasonable adjustments and that this emphasises that the Tribunal must look at causes of action and respondents separately.

(59) The respondent argues that the ***Arthur*** principle only applies where there is one respondent, not as against multiple respondents. In other words the principles in ***Arthur*** only apply if the respondent is one entity.

Effect of submission of claim 2

(60) Whilst the respondent has conceded that the additional allegations have been brought in time, there is no concession as regards the repeat of the claims listed in claim 1.

(61) The claimant has sought to repeat the content of claim 1, but that does not allow them to circumvent the out of time issues they face with that claim. That would, in any event, be an abuse of process, especially if the only purpose of repeating those claims is to circumvent the out of time issue with claim 1.

Claimant's Submissions

Submission of claim 1

(62) The claimant admits that claim 1 was lodged one day late. The claimant says:

(i) It was not reasonably practicable for the claimant to submit the detriment claim in time given that the claim was emailed to the court on 30 July 2021 (in time) and despite efforts to chase the Tribunal, the claimant's representatives were only made aware that the claim had been rejected on 7 August 2021 by which stage the time limit had expired. The claimant says it is a relevant factor that the claim was only rejected and notice given of that rejection after it was too late to comply with the deadline for filing a claim, thereby rendering it impossible to do so.

(ii) The time limit for the EqA claims can be extended on the grounds that it is just and equitable to do so on the following basis:

a. The mistake was made innocently by the claimant's solicitor and was not discovered until after expiry of the time limit;

b. The claim was filed in time, albeit that there was a technical breach;

c. Immediate steps were taken to remedy the matter;

d. Zero prejudice to the respondents;

e. If the claim is rejected it would result in considerable prejudice to the claimant and a windfall to the respondents; and

f. The allegations are still justiciable as part of the factual matrix relevant to claim 2.

(iii) Claim 2 was issued in time and has the same factual matrix as claim 1. There is no proper basis to conclude that the acts are not part of a series of similar acts at this stage.

Claim against R3

(63) The claimant says that R3's conduct lies at the heart of the case, and that it would be artificial to cherry pick out individuals, because the same claims exist in any event against R1.

(64) The claimant says that the claim is against all of the respondents, and the fact that the last pleaded incident against R3 was on 14 January 2020 makes no difference, as R3's conduct was part of a series of acts by a number of connected individuals, which the claimant relies on in totality as demonstrating acts extending over a period of time. The claimant says it is therefore wrong to consider the discrete acts of each individual to establish time limits.

(65) For the purposes of section 48(3) ERA the Tribunal is entitled to consider the similarity of the acts extending over a period of time to establish whether the last act is attributable to the same/similar core events which led to the proceedings. To do otherwise would defeat the effect of section 48(3) and would run counter to ***Arthur.***

(66) Nothing in section 48(3) ERA states that the specific acts in issue must be committed by the same individual before they can be viewed as a series of similar acts.

(67) The allegations against R3 can still be pursued in any event against R1 as a principal, consequently his removal from proceedings will achieve nothing of value.

Effect of submission of claim 2

(68) The claimant alleges that claim 2, which the respondent accepts is a validly issued claim and is not out of time, must mean that all of the allegations are now in time as they form a continuing act/ series of similar acts, or at very least that the determination of that fact ie whether they do form a continuing act/series of similar acts is something which needs to be determined at the final hearing.

(69) According to the claimant, the only relevant question is whether or not the additional allegations form part of the continuing act. If they do, everything is in time.

(70) The claimant says that the respondent cannot raise any abuse of process points at the hearing as that is an argument which was not previously mentioned.

Conclusions

Submission of claim 1

ERA claims

(71) The burden remains on the claimant to show that it was not reasonably practicable for the application to have been lodged within time.

(72) The claimant was represented at all material times by a skilled advisor.

(73) Mr Higgins could, and should, have checked the appropriate method for submission of the claim form and not made an assumption that, as fees were no longer payable, a claim form could be submitted by email.

(74) The Tribunal specifically queried whether the claim form had been submitted via the online portal, albeit that ES was left with the impression that the email would be processed.

(75) The Tribunal is not under any duty or obligation to notify a claimant in a timely manner that a claim has been lodged incorrectly. In reality, that notification could have been received sooner or later.

(76) The fact that Mr Higgins was able to submit the claim by email to the Tribunal within the time limit is evidence that it was reasonably feasible or practicable for him to have lodged the claim in time correctly. His ignorance of the correct method of filing the claim was not reasonable, as a skilled advisor, based on an assumption as it was, in all the circumstances.

(77) The allegations of detriment in claim 1 are therefore out of time.

EqA claims

(78) The starting point is that there is public interest in the enforcement of time limits which are exercised strictly in employment tribunals.

(79) However, in this case, the delay is not substantial: one day. Although the reason for the delay was of Mr Higgins' own making, in that he did not think to check how to present a claim and further made an erroneous assumption about how claims could be submitted, the error was genuine and made innocently and was rectified as soon as it was brought to his attention.

(80) The claimant would be unable to pursue the claims of disability discrimination and victimisation articulated in claim 1 (ignoring for the moment claim 2 and any effect, if any, it may have on claim 1) if the Tribunal was not to exercise its discretion in her favour. Plainly, the one day by which the claimant has missed the deadline could not affect the cogency of the evidence about any material issue of fact. In any event, the respondent will still have to defend, as a minimum, the additional allegations set out in claim 2.

(81) Having considered all of the above, and the balance of prejudice as it weighs between the parties, the Tribunal considers that it would be just and equitable to extend time and allow the EqA claims in claim 1 to proceed.

(82) <u>Claim against R3</u>

(83) The last detriment complained of which is attributed to R3 was on 6 Aug 19 (paragraph 20, claim 1).

(84) The Tribunal has already found (under "Submission of claim 1" above) that the allegations of detriment under the ERA in claim 1 are out of time as it was reasonably practicable for the claim to have been lodged in time. This includes the allegations which are attributed to R3.

(85) The last pleaded act of harassment in claim 1 against R3 is 14 January 2020, when it is alleged that R3 "made a series of derogatory comments in relation to mental health within the workplace in full knowledge of the Claimant's own circumstances." Paragraph 38 of the claim form goes on to particularise what, it is alleged, was said by R3.

(86) Accordingly, the ordinary time limit would expire on 13 April 2020.

(87) The Tribunal is not persuaded by the claimant's argument that the Tribunal needs to consider things in the round and consider the allegations made against all of the respondents when determining whether the claim is out of time. The Tribunal agrees that that would be the correct approach if the issues being considered related to R1, which is, in any event, vicariously liable for the acts of its employees.

(88) Whilst it is true that, for the purposes of section 48(3) ERA the Tribunal is entitled to consider the similarity of the acts extending over a period of time to establish whether the last act is attributable to the same/similar core events which led to the proceedings, that is relevant where a respondent may be vicariously liable for the acts of a number of individuals. Here, the Tribunal is tasked to consider whether the claims and allegations against one respondent of a number of respondents are out of time. That respondent (R3) cannot be vicariously liable for the acts of others and therefore the appropriate consideration is of the allegations made against him, and him alone. That does not run counter to ***Arthur,*** which concerns itself with the potential liability of one respondent, usually an employer, from acts or omissions which may be committed by a number of different individuals and which may be connected.

(89) As regards the allegations of discrimination against R3, the last of which was on 20 January 2020, the Tribunal considers that it is not just and equitable to extend time.

(90) The Tribunal considers that the balance of prejudice weighs in favour of R3. There is a significant difference between being a witness and a respondent in a claim and the allegations made against R3 can still be pursued against R1.

(91) For the reasons stated above, all claims and allegations brought against R3 are out of time, and are struck out.

<u>Effect of submission of claim 2</u>

(92) Obviously, in this case, the consideration of the effect of claim 2 is limited to the ERA claims as the Tribunal has concluded that it was just and equitable to extend time to bring the EqA claims in claim 1.

(93) As to the question of whether claim 2 effectively resurrects the detriments pleaded in claim 1 despite claim 1 being out of time, the Tribunal concludes that that cannot be the case, and that the impact of the detriments pleaded in claim 1 being out of time cannot be avoided by the repetition of those detriments in claim 2.

(94) The claimant cannot use the submission of claim 2, in which the allegations made in claim 1 are repeated, as a way to avoid the consequences of the late submission of claim 1.

(95) The doctrine of res judicata applies to prevent parties from re-litigating the same issues. Cause of action estoppel prevents a party from pursuing a cause of action more than once, and prevents the claimant from having two "bites of the cherry".

Employment Judge Rice-Birchall

DATE: 11 November 2021

JUDGMENT SENT TO THE PARTIES ON
16 November 2021

FOR THE TRIBUNAL OFFICE

Annex
Complaints and Issues

Detriment related to whistleblowing – section 47B Employment Rights Act 1996 ("ERA")

1. Did the claimant make protected disclosures? In particular, did she disclose information which in her reasonable belief tended to show that one of he six specific types of wrongdoing set out in section 43B ERA was being committed or likely to be committed? The claimant relies on the following protected disclosures as set out in her claim forms:

    (a) Ongoing significant concerns in regard to the lack of skills and competence of the third respondent to fulfil his role as Finance Director (PIDA 1, 2, 3, 4 as referred to in the claimant's Particulars of Claim);

    (b) Ongoing concerns in relation to the persistent misallocation of NHS funding at the first respondent's Minden site (PIDA 5, 6, 8, 12, 13);

    (c) Ongoing concerns in respect of the perceived abusive behaviour of Dr A Kotegaonkar towards others (including partners and employees) in breach of the Good Medical Practice Guidance as laid down by the General Medical Council (GMC) and the consequent impact on others including the potential impact on patient safety (PIDA 15 and 16);

    (d) Ongoing concerns in relation to the perception that the first respondent's Executive Board Members decided to conceal the misallocation of funding at the Minden site from all the other partners (PIDA 5, 6, 11, 16);

    (e) Reports of a suspected data protection breach (PIDA 14);

    (f) Reports of aggressive behaviour from the third respondent since the claimant had made alleged protected disclosures (PIDA 7, 8, 10).

2. Did the claimant reasonably believe that her disclosures were in the public interest?

3. Did the respondents deny the claimant a freestanding investigation into the alleged conduct of the third respondent?

4. Did the respondents fail to investigate any concerns raised about the behaviour of the third respondent because of his close connection with the second respondent?

5. Did the third respondent lodge a complaint against the claimant that was "retaliatory" in nature?

6. Did the first respondent fail to make any reasonable adjustments following the claimant's disclosures on 5 and 13 August 2019 that she was distressed?

7. Did the third respondent subject the claimant to aggressive behaviour at the Board Development Session on 6 August 2019?

8. Did the respondents fail to provide assistance to the claimant in a timely manner?

9. Was the claimant compelled top take time off which was inconsistent with medical advice?

10. Did the respondents fail to take sufficient steps to remediate the alleged failed relationship between the claimant and the third respondent and/or protect the claimant from the third respondent?

11. Was the conduct of the second and fourth respondents at the sickness absence meeting on 25 February 2021 cold and hostile?

12. When making the decision to retire the claimant, did the first respondent fail to take any steps to resolve the workplace issues?

13. Did the respondents fabricate the contents of the grievance sent to the claimant at her request on 2 April 2021?

14. If so, did the above amount to detriments?

15. If so, was the reason for the above treatment because the claimant had made protected disclosures?

Direct disability discrimination – section 13 Equality Act 2010 ("EqA") / Discrimination arising from disability – section 15 EqA

16. Is the claimant disabled in accordance with the Equality Act 2010?

17. If so, did the respondent shave knowledge (whether actual or constructive) of the claimant's disability and its impact on her day-to-day activities?

18. Did the respondents prevent the claimant from working in the office for four weeks, contrary to medical advice?

19. Did the respondents fail to arrange mediation and/or take appropriate steps to remediate the alleged failed relationship with the third respondent?

20. Did the second, fourth and fifth respondents ambush the claimant at the "without prejudice" meeting on 27 February 2020?

21. It is agreed that the claimant was retired from the first respondent.

22. The respondents assert that the events set out at 18-20 did not occur. However, if the respondents did any of 18-20 above, was the main reason for this treatment the claimant's disability and/or was it unfavourable treatment because of something arising *(namely, her failing mental health and the perceived impact of this on her ability to work) in consequence of the claimant's disability?

23. Was the main reason for number 21 because of the claimant's disability and/or was it unfavourable treatment because of something arising in consequence of the claimant's disability?

24. In respect of the claimant's claim for direct discrimination, who is the claimant's comparator?

25. In respect of the claimant's claims for discrimination arising from disability, were the respondents' actions a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments – sections 20/21 EqA

26. Did the first respondent operate PCPs which put those sharing the claimant's disability at a disadvantage? The claimant contends that the PCPs included a requirement for workers in her position to continue to function in their roles without inconveniencing and/or otherwise disrupting the established *modus operandi* of the Executive Board and its members.

27. If so, was the claimant substantially disadvantaged by these PCPs such that the first respondent was under a duty to make reasonable adjustments?

28. If so, did the first respondent fail to discharge that duty?

Harassment related to disability – section 26 EqA

29. On 14 January 2020, did the third respondent make a series of derogatory comments in relation to mental health in the workplace, whilst discussing a particular candidate for appointment as a salaried GP?

30. Did the second, fourth and firth respondents make comments in the meeting on 27 February 2020 regarding the breakdown of the working relationship and the written grievance received regarding the claimant's capability to do her role?

31. It is agreed that the respondents made the comments as alleged in the letter of 17 March 2021.

32. It is agreed that the respondents sent the claimant a redacted grievance in April 2021.

33. The respondents assert that the events set out at 29-30 did not occur. However, if the respondent did any of 29-30 above was it unwanted conduct related to the claimant's disability?

34. Was 31 or 32 unwanted conduct related to the claimant's disability?

35. If any of the actions were unwanted conduct related to the claimant's disability, did it have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

36. If so, was it reasonable for the claimant to perceive it as such in all the circumstances?

Victimisation – section 27 EqA

37. Did the claimant di protected acts? The claimant alleges that the following amount to protected acts in her claim forms:

(a) On 7 August 2019, she called the fifth respondent to explain how distressed she was about the incident at the Board development meeting the day before. She referred to her failing mental health and pleaded for the fifth respondent to take steps to stop the third respondent's bullying and aggressive conduct.

(b) On 8 August 2019, the claimant spoke to the fourth respondent and disclosed the significant stress eh was under and the impact on her mental health.

(c) Between 14 and 28 August 2019, in Microsoft Teams messages and emails and then verbally on 27 August 2019, the claimant advised the second fourth and fifth respondents of her significant medical distress and pleaded with them again to intervene.

(d) On 14 November 2019, the claimant met with the second respondent and repeated her earlier concerns.

(e) On 22 November 2019, the claimant met with the fourth respondent and expressed concerns about the third respondent's tendency to retaliate when confronted. The claimant explained that she feared the third respondent wished to destroy her because he was continuing to behave in an antagonistic manner towards her.

(f) On 19 December 2019 the claimant spoke to the fourth respondent and stated that she desperately needed a resolution to the ongoing issues with the third respondent in view of his antagonistic behaviour and that her mental health could not take much more.

(g) On 9 January 2020 the claimant pleaded with the second and fourth respondents to bring matters to an amicable resolution and referred to her failing mental health.

(h) On 25 January 2020, at the preliminary mediation meeting, the claimant expressed her concerns at the lack of action and lack of adjustments made to date had exacerbated her condition.

(i) On 28 January 2020, the claimant met with the fourth respondent and complained about the delay in the entire process. She referred to the negative impact this was having on her mental health.

(j) On 28 January 2020, the claimant complained that her mental condition has significantly deteriorated over time and that the respondent had failed to make adjustments.

(k) On 3 February 2020 the claimant met with Dr Hampson (a GP partner who is not a named respondent in these proceedings) and advised him of her mental health difficulties.

(l) On 4 February 2020, during a text message exchange with the fourth respondent, the claimant stated that Spring Lane Practice could not continue to function safely without additional clinical support and that it

had become increasingly clear that the quality of service at the site was becoming unsafe.

38. If so, did the respondents fail to give assistance in a timely manner, fail to arrange mediation and fail to make adjustments to alleviate the mental distress that the claimant was allegedly suffering?

39. On or around 16 September 2019, was the claimant compelled to take time off work, which was inconsistent with medical advice?

40. Did the third respondent act aggressively towards the claimant and actively seek to “destroy” her?

41. Did the first respondent fail to take any substantive action to protect the claimant from the alleged aggressive behaviour of the third respondent?

42. Did the first respondent fail to action the claimant's complaints and fail to take any/sufficient steps to remediate the alleged failed relationship and alleviate the impact of the situation on the claimant's mental health?

43. It is agreed that on 31 January 2020 the claimant received an email from the fourth respondent to the effect that not all parties feel they are able to move forward to the mediation process.

44. Subject to Jurisdictional Issues, paragraph 51 below, it is agreed that on 27 February 2020 the claimant was invited to attend the meeting which the respondent contends was “without prejudice” and the claimant contends was not so. It is denied that the claimant was ambushed at this meeting.

45. Was the behaviour of the second and fourth respondents at the sickness absence meeting on 27 February 2021 cold, unfriendly, lacking in empathy and hostile?

46. It is agreed that the claimant was retired from the Partnership on 18 March 2021.

47. It is agreed that on 2 April 2021 the claimant received a redacted copy of the grievance lodged against her.

48. The respondents assert that the events set out at 38-42 and 44-45 did not occur. However, if they did occur, did they amount to detriments?

49. Did 43, 46 and 47 amount to detriments?

50. If so, did the respondents subject the claimant to detriment because she had done a protected act?

Jurisdictional Issues

51. Is the evidence in respect of the meeting on 27 February 2020 admissible? The respondents contend that it is not admissible given the “without prejudice” nature of the discussions. The claimant contends that the meeting was not “without prejudice”.