THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr D J Curry	**AND**	**The Chief Constable of Northumbria Police**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On: 7 June 2017**

Before: **Employment Judge A M Buchanan (sitting alone)**

Appearances

For the Claimant: Miss C Casserley of Counsel
For the Respondent: Mr G Thomas of Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:-

1. The application to amend the claim in order to rely on section 61 of the Equality Act 2010 to advance the claims of disability discrimination is granted.

2. The matters alleged do not fall within the provisions of section 108 of the Equality Act 2010.

3. It is not appropriate to strike out the claims pursuant to Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 at this time on the basis that they are not justiciable in the Tribunal or are otherwise scandalous or vexatious.

REASONS

Preliminary matters

1 By a claim form filed on 5 March 2017 the claimant brings claims of disability discrimination against the respondent namely a claim of direct disability discrimination (section 13 of the Equality Act 2010 ("the 2010 Act")), a claim of discrimination arising from disability (section 15 of the 2010 Act), a claim of harassment related to disability (section 26 of the 2010 Act), a claim of victimisation (section 27 of the 2010 Act) and a claim of failure to make reasonable adjustments (sections 20/21 and schedule 8 of the 2010 Act). It was subsequently clarified that the claimant relied on section 108 of the 2010 Act as the gateway to allow this Tribunal to determine the allegations pursuant to section 120(1)(b) of the 2010 Act. The claimant relied on an early conciliation certificate on which Day A was shown as 20 January 2017 and Day B as 6 February 2017.

2 The respondent filed a response on 13 March 2017 ("the Response"). At the same time the respondent applied for a public preliminary hearing ("PH") to strike out the claims of the claimant on the grounds that the Tribunal did not have jurisdiction to determine the matters and/or that the proceedings amounted to an abuse of process and/or that the matters alleged did not fall within the provisions of section 108(1)(a) and/or (b) of the 2010 Act. In addition application was made to strike out the claims under the provisions of rule 37 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the 2013 Rules") on the basis that the claims had no reasonable prospect of success. An alternative application was made that the claimant be ordered to pay a deposit pursuant to the provisions of rule 39 of the 2013 Rules on the basis that the claims had little reasonable prospect of success. An alternative claim was made that certain paragraphs of the particulars of claim be struck out on the basis that they were scandalous and/or vexatious.

3 The Response pleaded that the respondent had duties to review pension awards pursuant to the Police (Injury Benefit) Regulations 2006 ("the 2006 Regulations") and that acting under his statutory duty under the 2006 Regulations, the respondent had sought to begin a process of review of the claimant's injury pension in May 2016. It was pleaded that the Tribunal lacked jurisdiction to deal with the claims and further or alternatively that they had no reasonable prospect of success. No admission was made in relation to the disabled status of the claimant and it was denied that the respondent had knowledge of any pre-proceedings conciliation process. Time issues were pleaded. In the alternative, the respondent contended that it would seek to justify its actions following a reasonable process to undertake a statutory duty to review injury pensions.

4 On 13 April 2017 a private PH took place before Regional Employment Judge Reed by telephone. That hearing resulted in orders ("the Orders") being made which, amongst other matters, convened the public PH which came before me and the issues to be determined at the public PH.

5 It was noted in the Orders that the respondent had sought to have other matters determined at the public PH including a strike out of the claims on the basis that they had no reasonable prospect of success because the premise of the claimant's claims was fundamentally misconceived and/or that the respondent was at all times acting under a duty imposed by the 2006 Regulations and therefore acting pursuant to statutory authority in accordance with schedule 22 of the 2010 Act. It was asserted that as a result no infringement of the 2010 Act could have occurred. Those matters however were not added to the issues which were before me at the public PH and the following note was added to the Orders:-

"7(b) If the outcome of the preliminary hearing which I have ordered is that the Tribunal has jurisdiction then, plainly, there are matters to be addressed against allegations of discrimination because of disability. I am not presently persuaded that it would be appropriate to consider disposing of such claims without a full merits hearing".

6 It was noted at the private PH that the parties had agreed that any time limit issues would be more appropriately dealt with within the context of a full merits hearing rather than as a preliminary issue.

7 On 28 April 2017 solicitors for the claimant sought to make an amendment to the particulars of claim attached to the claim form and there was no objection from the solicitors for the respondent to the proposed amendment. Accordingly, the amendment was allowed by an order communicated to the parties on 10 May 2017. The summary at paragraph 1 above of the claims advanced embodies the amendments allowed by order of 10 May 2017.

8 On 24 May 2017 the Tribunal became aware of another claim registered against the respondent by claimant Mr R J Taylor under file number 2500527/2017 ("the first Taylor claim"). The issues in that claim appeared to be similar, and to give rise, to common and related issues of fact and law as those in respect of this present claim. The Tribunal sought comments on 24 May 2017 from the parties as to whether or not the claims should be formally combined. The respondent objected to the combination of the two claims on the basis that it was only this claim which was to be dealt with at the public PH. The claimants' representatives agreed with that approach. Accordingly the Tribunal ordered the two files should be kept together but not formally combined. The same representatives appear in this claim and in the first Taylor claim.

9 On 5 June 2017 the claimant sought to make a further amendment to the claim form in what was described as a "*relabeling amendment".* The terms of the application were summarised as:
"In short, rather than bringing the post-termination claim solely on the basis of section 108 (post-employment discrimination) the Claimant seeks permission from the tribunal to rely upon s. 61 of the Equality Act 2010, further and in the alternative to that s. 108 claim".
It was determined by the Tribunal that that matter should be dealt with at the PPH and thus that became a further issue for me to determine. On 6 June 2017 the respondent made plain its objection to the amendment in any event.

10 The public PH came before me on 7 June 2017. The hearing proceeded with submissions from counsel. It was indicated that whichever party lost before me, there would very likely be an application to the Employment Appeal Tribunal ("EAT"). Accordingly I determined it was appropriate to reserve my judgment and to give this matter detailed consideration and to issue a written judgment which I now do in accordance with Rule 62(2) of the 2013 Rules. I regret the time it has taken me to conclude this judgment. A variety of matters have conspired to prevent me doing so at an earlier stage. I regret any inconvenience caused to the parties by this delay.

11 Subsequent to the hearing and before I issued this judgment I was made aware that the claimant Mr R J Taylor had issued a further claim ("the second Taylor claim") against the respondent under number 2500600/2017 which sought to deal with further alleged detrimental events which had occurred since the issue of the first Taylor claim.

12 On 7 June 2017, it being agreed by the representatives that it was appropriate to do so, I issued an order in the first Taylor claim formally amending the name of the respondent. The first Taylor claim had been issued against the Chief Constable of Northumbria Constabulary rather than Police and that small matter was amended by my order.

13 In relation to the second Taylor claim, I directed that the claim be registered and served and that the time for the filing of a form of response (ET3) should be extended to 14 days after the day this Judgment is sent out to the parties. On reflection I have reconsidered that matter and deal with the matter further below. A private PH had been set in the second Taylor claim for 10 July 2017 and by letter of 3 July 2017 that hearing was vacated.

14 **The PPH and the Issues to be determined**

14.1 At the public preliminary hearing I heard no evidence but simply received submissions from counsel for the parties. I had before me an agreed bundle of documents which extended to some 210 pages to which were added further documents namely page numbers B2-B11. I made reference in the course of my deliberations to such of the documents within the bundle to which I was referred at the PPH. Any page number in this Judgment is a reference to the corresponding page within the agreed bundle.

14.2 Accordingly **the Issues** to be determined at the PPH were defined as follows in the Orders and subsequently as being:

14.3 Whether the claims should be struck out on the grounds that the Tribunal has no jurisdiction to hear them because –

14.3.1 The claims are not justiciable in the Employment Tribunal being in substance an attempt to challenge a process set out in the 2006 Regulations over which the Employment Tribunal has no jurisdiction; and/or

14.3.2 The claims are an abuse of process and thereby vexatious in seeking to litigate matters in the Tribunal which fall within the jurisdiction of the administrative court; and/or

14.3.3 The matters alleged do not fall within subparagraphs (a) and (b) of section 108(1) of the 2010 Act.

14.4 Whether or not to allow the claimant to amend the claim form to include reliance on section 61 of the 2010 Act further or in the alternative to reliance on section 108 of the 2010 Act.

15 **An agreed statement of facts**

For the purposes of the public PH the parties had agreed the following facts:-

15.1 The claimant became a police constable with the respondent on 15 April 1985. On duty, whilst seeking to apprehend several criminals, he was violently assaulted and suffered a serious head injury on 23 January 1987. Further to this injury on duty he was medically retired on health grounds on 19 April 1988.

15.2 Police officers who sustain injury on duty which permanently disables them from undertaking the ordinary duties of a police officer may be entitled to injury benefits, including an injury pension under what are now the 2006 Regulations (pages 36-181).

15.3 The specific qualifying conditions for the award of such injury benefits are set out in regulation 30(2) of the 2006 Regulations and are –

(a) whether the person concerned is disabled;

(b) whether the disablement is likely to be permanent;

(c) whether the disablement is the result of an injury received in the execution of duty without default on the part of the individual concerned; and

(d) the degree of the person's disablement.

15.4 The terms set out in paragraph 15.3 above are defined in the 2006 Regulations as follows –

(a) "*disablement*" means "*inability, occasioned by infirmity of mind or body, to perform the ordinary duties of a member of the force".* Regulation 7(4) (page 48);

(b) "*permanent disablement*" means "*a person being disabled at the time when the question arises for decision and to that disablement*

being at that time likely to be permanent" – regulation 7(1) (page 48);

(c) "*degree of disablement"* means "*the degree to which a person's earning capacity has been affected as a result of the injury received without his own default in the execution of his duty as a member of a police force"* – regulation 7(5) (page 48).

15.5 Following his retirement from the respondent, the claimant was assessed by a Force Medical Officer ("FMO") and was determined to have met the qualifying criteria for an injury award under the regulations as set out at paragraphs 15.3(a)-(c) above.

15.6 The degree of his disablement under the condition set out at paragraph 15.3(d) above was assessed at Band 4 which is the highest level of degree of disablement under the 2006 Regulations.

15.7 For the purposes of the 2006 Regulations, the claimant's permanently disabling condition was diagnosed by a FMO in January 1988 to be "*short term memory disorder second*ary to head injury" (page 182) and subsequently in June 1989 to be "*short and long term memory loss as the result of a head injury and also epilepsy*" (page 184).

15.8 Once a former officer has been assessed as meeting the injury benefit qualifying criteria at paragraph 15.3(a)-(c) above, those qualifying criteria cannot later be challenged on a review carried out as set out in the following paragraphs.

15.9 Although the injury pension is payable for life, the banded injury award is subject to regulation 37(1).

15.10 Regulation 37(1) states –

"*The police authority shall at such intervals as may be suitable consider whether the degree of a pensioner's disablement has substantially altered, the pension shall be revised accordingly".* (Page 101)

15.11 The review itself is conducted by the Selected Medical Practitioner ("SMP") under regulation 30(2). Under the regulation 37(1) review, the SMP is required only to determine the criteria at paragraph 15.3(d) above (regulation 30(2)). When undertaking such a review, the criteria at paragraphs 15.3(a)-(c) above must be accepted as originally determined and shall not be reopened

15.12 As set out in regulation 37(1), the purpose of a review is to consider whether there has been a substantial alteration in the degree of disablement.

15.13 The scheme of the 2006 Regulations is that –

(a) upon an initial application for an injury award the four medical questions at regulation 30(2) must be referred to a SMP (page 91);

(b) upon subsequent reviews of the degree of disablement, it is only medical question (d) in regulation 30(2) namely the degree of the person's disablement, which the SMP must consider (page 91);

(c) where a person is dissatisfied with a decision of an SMP on a medical question, there is a right of appeal to a board of medical referees (regulation 31(2) (page 93) now known as a Police Medical Appeal Board (PMAB);

(d) the decision of the PMAB is generally final (regulation 31(3)) (page 93) but it may be reconsidered under regulation 32(2) or challenged by way of judicial review.

15.14 The PMAB only has jurisdiction to consider the same medical questions as were referred to the SMP.

15.15 Part of the Regulations (regulations 30-36) provides for "Appeals and Medical Questions" (page 91-100).

15.16 Under regulation 34 (page 97) and under regulation 35 (pages 98/99) in the respective circumstances they set out, there are rights of appeal on certain matters to the Crown Court (regulation 34) and the High Court (regulation 35).

15.17 The claimant has undergone a number of regulation 37(1) reviews since he was first awarded an injury pension in 1988 namely in 1989 (page 184), 1991 (page 186), 1994 (page 188), 1996 (page 189), and 1998 (page 190) and on each occasion was examined by FMO.

15.18 The Home Office issued non-statutory guidance about the Regulations in 2004 (Circular 46/2004).

15.19 On 19 January 2010, the respondent commenced the process of a regulation 37(1) review as set out above by writing to the claimant (page 191).

15.20 In response the claimant returned to the respondent a completed Injury Award Review Consent Form (page 192).

15.21 At or around the same time a number of legal challenges were brought before the administrative court by former police officers who believed that their injury pensions had been unlawfully reduced under the influence of the Home Office Guidance.

15.22 In September 2009 the then Minister of State for Security, Counter Terrorism, Crime and Policing, David Hanson had announced that he had ordered a review of the Guidance on police authorities exercising their

duties to review police injury awards, particular where former officers reach age 65.

15.23 During the course of the said legal challenges, the Home Office issued a letter to police forces on 10 March 2010 (pages 193/94). The letter refers to police authorities' "duty to review police injury awards" and it stated that:-

"Good progress has been made on the review of this guidance and it is intended that this should result in revised and expanded guidance being produced in due course. However further development of revised guidance is currently constrained by the fact that a legal issue which is central to the final shape of the guidance will take, is currently awaiting the decision of the Court of Appeal (paragraph 2)".

15.24 It added at paragraph 4 –

"With one exception we therefore advise police authorities to defer any planned reviews until the Court of Appeal has made its decision".

The exception was stated to be -

"Any case involving deterioration in a medical condition either where an individual requests a review on those grounds or by the police authorities already aware of such a situation".

15.25 The Court of Appeal case referred to is that of **Belinda Laws –v- Metropolitan Police Service**. Ms Laws successfully challenged the decision of the PMBA dated 17 March 2009 to reject her appeal against the decision of the SMP that her degree of disablement for the purposes of her police injury pension should be reduced from 85% to 25%. The case was first heard on 12 November 2009 at the High Court of Justice before the Administrative Court Queens Bench Division, Mrs Justice Cox presiding. The decision was upheld at appeal on 13 October 2010.

15.26 In consequence of the issue of the Home Office letter referred to at paragraph 25-26 (*sic but in reality a reference to paragraph 23*) above (pages 192/94) the respondent took no further steps in relation to the intended review at that time.

15.27 Following the legal challenges referred to the Home Office responded by issuing Circular 007/0012 (page 195).

15.28 On 21 February 2014 the sections of the Home Office Guidance 46/2004 successfully challenged were formally withdrawn by the Home Office (page 196).

15.29 The Home Office promised new guidance but none has yet been published.

15.30 In May 2016 the respondent sought to continue the review originally begun in 2010 purportedly in accordance with its statutory duty to do so under regulation 30(2) and regulation 37 (pages 91 and 101) namely – "*If they are considering whether to revise an injury pension shall so refer question (d) above",* and so wrote to the claimant (pages 197/198).

15.31 The respondent wrote again to the claimant in similar terms on 5 July 2016 (pages 199/200).

15.32 There was a telephone conversation between the claimant's wife and the respondent's Injury Awards Advisor during week commencing 11 July 2016.

15.33 Further to this telephone conversation, the claimant's wife wrote an undated letter to the respondent (received on 26 July 2016) (page 201) attaching a letter dated 9 July 2016 from Hollins Park Hospital relating to the claimant (pages 203/204). She stated that the claimant was admitted to a "*mental health unit"* following receipt of the review request of May 2016 and that he was unable to make any decisions in relaying information or remember any information due to long term memory problems and depression and his condition was far worse than when he retired (when he was assessed to warrant a Band 4 injury pension).

15.34 On 24 October 2016, the respondent wrote further to the claimant responding to the queries in her letter referred to in paragraph 15.33 above and requesting a completed questionnaire and his GP records so that it could carry out the regulation 37(1) review (pages 205/206).

15.35 The claimant's wife wrote further to the respondent on 12 November 2016 (page 207) explaining that since the letter of 24 October 2016 the claimant remained "*severely ill"* and was again "*expressing suicidal thoughts*".

15.36 The respondent wrote to the claimant's wife on 4 January 2017 asking for an update as to the progress on the information requested on 24 October 2016 (page 208). They repeated this request subsequently in letters of 7 February 2017 (page 209) and 2 March 2017 (page 210).

15.37 The current Tribunal proceedings were commenced on 7 March 2017.

Submissions

16 It was agreed that I should hear first from counsel for the respondent.

Submissions for the respondent

17. Mr Thomas filed written submissions extending to 48 paragraphs which were supplemented by oral submissions. The written and oral submissions are summarised:-

17.1 The respondent is under a statutory duty to review the claimant's degree of disability at suitable intervals. In May 1998 it was recommended that a review take

place two years later but in fact the first attempt to review took place some 12 years later in 2010 and even that review did not proceed. Thus the acts complained of taking place in 2016 are a full 18 years after the last proper review. It is unsustainable to argue that the respondent was not under a duty to instigate a review when there had been no review for 18 years. The respondent wrote a series of letters requesting the claimant to engage in the statutory review process. All the letters written by the respondent after it was made aware of the claimant's particular problems in 2016 were addressed at his request to his wife and all of them extended an offer to the claimant's wife to contact the respondent's HR Department. At no time did the claimant's wife take up that offer. Nor did the claimant at any time indicate a refusal to engage in the process or request that the letters stop. The last response from Mrs Curry prior to the claimant issuing this claim was that set out at page 207 in which she wrote, *"I'll be in contact soon".*

17.2 On any objective reading of the correspondence at pages 197-210 the claims for discrimination, failures to make reasonable adjustments, harassment or victimisation are groundless to the point of being vexatious. It is in that context that the Tribunal must consider the application to strike out.

17.3 A detailed chronology of events was provided and it was noted that there had been regular reviews of the claimant's award on 12 June 1989, 8 July 1991, 11 January 1994, 3 April 1996, 12 May 1998 and then at the beginning of 2010, a further review request on 19 January 2010 with the claimant completing a consent form as requested on 9 February 2010. That review did not proceed whilst the guidance in respect of reviews was the subject of litigation and further advice from the Home Office. The respondent began the review, which is at the centre of these proceedings and which has not completed, by letter to the claimant on 27 May 2016. It was submitted that the respondent was obliged pursuant to regulation 37 of the 2006 Regulations to review the degree of a disablement but that obligation extended to a consideration of the degree to which the claimant's earning capacity had been effected – regulation 7(5). It was submitted that it was an inherent part of the process on review to determine whether the claimant's degree of disablement altered and if so then to reassess the claimant's actual earning capacity at the time of the review, what the claimant's earning capacity would have been had it not been for the injury and the degree to which the difference in earning capacity is due to the effects of the injury. It was submitted that that process included the assessment of a number of matters other than the claimant's medical condition. It was submitted that there may be officers with substantial disabilities who are nevertheless able to retrain and thus become eligible for alternative employment at a level of earnings close to (or at least in principle higher) than that which they would have received as Police Officers. This was on the basis that employment opportunities for some of those with disabilities have undoubtedly changed in the last 19 years.

17.4 Reference was made to **R (Turner) –v- The Police Medical Appeal Board [2009] EWHC1867**. It was noted that the potential to decrease a pensioner's degree of disablement to take account of their having obtained a law degree was recognised by the Court of Appeal in **R (Laws) –v- The Police Medical Appeal Board [2010] EWCA Civ 1099** and it was submitted that the courts had consistently confirmed that an assessment of the degree of disablement is not confined to an individual's medical condition but requires an assessment also of his individual earning capacity. The claimant's contention in the particulars of claim that the only basis to undertake a review

is where there might have been a change in his medical condition is fundamentally incorrect. The claimant is also unable to sustain his assertion that there should never be a review in his case because of his medical condition.

17.5 It was submitted that the case was an abuse of process because it seeks to interfere in a statutory process which the respondent is required to undertake and seeks to prevent the respondent from carrying out a compulsory review. The Employment Tribunal has no jurisdiction to undertake either of the tasks required of the respondent under the 2006 Regulations. The Tribunal could not make a declaration that the respondent's actions were unlawful without determining that the attempt to instigate the review required by regulation 37 of the 2006 Regulations was unjustified and it follows that the Tribunal does not have jurisdiction to entertain a claim that would pre-empt the statutory determination of the Medical Practitioner or PMAB and what the claimant is asking the Tribunal to undertake is unquestionably an abuse of process. The Tribunal may in addition consider the extent to which the claimant's pre-action conduct confirms that these proceedings are an abuse of process. If it is apparent the claimant has acted vexatiously that would be a strong if not an inevitable basis for concluding the action was an abuse and therefore on any objective assessment these proceedings are vexatious. If the claimant seeks to stop the review process on the grounds that it is unlawful, the only appropriate way to do so would be by an injunction in the High Court. Alternatively on conclusion of the process the claimant could consider whether he wished to bring a claim in the Tribunal or the County Court but instead of doing so the claimant has launched a pre-emptive strike and the Tribunal should declare it an abuse of process and decline to allow a claim to proceed which inevitably requires it to usurp the statutory function of the SMP.

17.6 In relation to section 108 of the 2010 Act both paragraphs (a) and (b) of subsections 108(1) and 108(2) need to be satisfied in order for conduct to fall within this section of the 2010 Act. Once an officer is granted an award the nature of his service or relationship with the respondent becomes irrelevant and the statutory scheme applies irrespective of any features of the individual officer's service. Thus actions taken by the respondent are taken pursuant to and arise out of or are closely connected with the statutory scheme and it is extremely difficult to see how any alleged discrimination or harassment could be said to arise out of the officer's period of service rather than the scheme. But even if there is a close connection paragraph (b) could not be met because the conduct alleged relates solely to the operation of the scheme and could not have arisen out of the relationship which used to exist. It only arises in the context of the statutory scheme. That does not leave the claimant without a remedy for his claim clearly falls within section 29 of the 2010 Act but that would be an application to be made to the County Court and not to the Tribunal.

17.7 In respect of the application to amend, it was submitted that the scheme enshrined in the 2006 Regulations is not an occupational pension scheme defined in section 61(5) of the 2010 Act. It is plain on looking at section 1(5) of the Pension Schemes Act 1993 that schemes that are solely injury benefit schemes do not fall within the scope of the Pension Schemes Act 1993 although they might do so if on retirement or on reaching a certain age or on termination of employment they provided benefits. But the distinction is clear on examination of the Finance Act 2004. The 2006 Scheme only applies when there has been an injury in the execution of duty and thus that would not fall within the definition of a pension scheme in section 150 of the Finance Act 2004.

Furthermore the statutory machinery set out in Chapter 2 of Part V of the 2010 Act is singularly ill suited to the 2006 Scheme where no one becomes a member: there is no membership of the 2006 Scheme. The amendment ought not to be permitted. In **RMC –v- Chief Constable of Hampshire UKEAT/0184/16/LA** it was confirmed that where facts are not in dispute and oral evidence would not be necessary, a strike out on the grounds that there is no reasonable prospect of success may be appropriate. This is a case where oral evidence would not be necessary. There appears to be no basis on which to assert that the letters the respondent sent did not genuinely set out the reasons for seeking a review under regulation 37. If the Tribunal decides it does have jurisdiction to consider the claim this remains a case where it would be suitable to consider dismissing the claim as having no reasonable prospect of success in any event.

17.8 In oral submissions Mr Thomas stated that there were two key points to the respondent's case. First the 2006 Regulations were effectively decoupled from the Police Pension Regulations via the Police Pension Act 1987 in 2006. Public functions are exercised under the 2006 Regulations. This is a statutory process and no private law rights are involved. There is an appeal process provided for in the 2006 Regulations and if there is any error then remedy lies on judicial review to the Administrative Court of the High Court of Justice.

17.9 It is important to look at the terms of the letters sent by the respondent to the claimant as the review process got underway. These are said to be acts of harassment and victimisation but they cannot be both and it is difficult to see that they are either. In any event it is difficult to see how the circumstances of this case could lead to a claim that the actions of the respondent were unreasonable or unjustifiable and to seek a further review after 18 years from the last assessment is not unreasonable.

17.10 The claimant is effectively asking the Tribunal to say that his degree of disability cannot change and therefore to seek a review under the terms of the 2006 Regulations is disability discrimination or harassment. However the Tribunal cannot make the assessment because the 2006 Regulations themselves say that it is a matter for the SMP. If the Tribunal were to say that there was no scope for the respondent to carry out a review under regulation 37 then effectively the 2006 Regulations would be stymied by the Employment Tribunal judgment and that is why this claim is not justiciable. It is a matter for the SMP and then for the pension authority to say when a review should take place.

17.11 In terms of jurisdiction it was submitted that it appears that section 61 of the 2010 Act gives jurisdiction and not section 108. However, the scheme in which the claimant is involved does not fall within the definition of the pension scheme set out in section 61. The benefits under the 2006 Regulations are not a pension but instead a right under the Personal Injury Benefit Regulations which could not conceivably be classified as a pension. The claimant is simply not a member of any pension scheme. Accordingly unless the Personal Injury Benefit Regulation schemes are brought in by specific statutory provision to the ambit of section 61 it is not covered by section 61 and it is not covered by section 108 of the 2010 Act.

17.12 Section 108 of the 2010 Act does not apply because it is over 25 years since the claimant left the employment of the respondent. Subsection 108 simply does not apply to the circumstances of this case.

17.13 It is accepted that the claimant has a remedy if there was a failure to make reasonable adjustments but that comes within section 29 of the 2010 Act and must be taken to the County Court. Because there is a remedy there is no need to construe section 61 or section 108 widely in accordance with the European Union Directive. However it is necessary to look at the potential merits of the claim which have no reasonable prospect of success. The amendment to rely on section 61 should not be allowed for to do so would be to allow an amendment to resurrect a claim which has no merits in any event. The claims should be dismissed.

Submissions for the claimant

18. For the claimant Miss Casserley submitted written submissions extending to paragraphs which were supplemented by oral submissions. These are briefly summarised:-

18.1 The recent application to amend to rely upon section 61 of the 2010 Act deals to a large extent with any points the respondent may have to make in respect of section 108 of the 2010 Act.

18.2 Details of the claims advanced as direct discrimination, discrimination arising from disability, harassment and failure to make reasonable adjustments were referred to.

18.3 The claim to amend to rely on section 61 is a relabeling exercise. There is no new claim of discrimination and the claimant seeks permission to replace section 108 with section 61.

18.4 In relation to the application to amend it is for the Tribunal to consider the factors set out in **Selkent Bus Company Limited, t/a Stagecoach –v- Moore [1996] IRLR 661**, namely the nature of the amendment, the applicability of time limits and the timing and manner of the application. Whilst it is accepted the application could have been made earlier it has been made in advance of the preliminary hearing and the respondent has had time to consider the application and the relative hardship and injustice to the claimant would be significant if the application was not granted. There are no time limit issues given that it is a relabeling exercise. It is submitted the application should proceed. It was submitted that the wording of rule 37 of the 2013 Rules and in particular the words “scandalous or vexatious” include an abuse of process.

18.5 Reference was made to the jurisdiction provisions set out in section 120 of the 2010 Act. The burden is on the respondent to show that the Tribunal does not have jurisdiction or that pursuing a claim under the 2010 Act would be such an abuse. The Tribunal has prima facie jurisdiction under section 120 of the 2010 Act. Reference was made to Article 47 of the European Charter which provides that the rights and freedoms guaranteed by the European Union must give rise to a fair and public hearing by an independent and impartial tribunal. Reference was made to **Roy –v- Kensington and**

Chelsea Westminster Family Practitioner Committee [1992] 1AER 705 where Lord Lowery held that unless the procedure adopted by the moving party is ill suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings. In **Davy –v- Spelthorne Borough Council [1984] AC 262** Lord Wilberforce made it plain that the onus lies with the respondent to show that what the claimant is seeking to do is an abuse of court procedure. In this case the respondent is seeking to deprive the claimant of his right to litigate in respect of injury awards which he acquired based on his disability. The 2006 Regulations do not provide a means of challenging a breach of the non-discrimination rules and there is no provision in the 2006 Regulations for such a challenge. Accordingly the respondent's application should fail.

18.6 Section 61 brings into pension schemes a non discrimination rule. The non discrimination rule does not require that the individual must be an employee thus there is no need for reliance to be placed on section 108 in respect of this claim. An example of how section 61 of the 2010 Act has been used is to be found in **Innospec –v- Walker [2014] ICR 645**.

18.7 In the alternative it is submitted that section 108 of the 2010 Act would apply. The claimant contends that the discrimination alleged arises out of and was closely connected to the employment relationship which used to exist between the claimant and the respondent. His former employers are the administrators of the award scheme. Section 108 was introduced to give statutory effect in the decision in **Rhys-Harper –v- Relaxation Group Plc [2003] IRLR 484**. Much of the rationale of that case was based on European obligations under the directive in respect of sex discrimination. The claimant relies in particular on paragraphs 37 of the decision in **Rhys-Harper**.

18.8 In oral submissions it was said that the Employment Tribunal is the most appropriate forum to have matters of alleged discrimination determined. There is no lack of jurisdiction or abuse so long as the claimant has the avenue to a claim under either section 61 or section 108 of the 2010 Act. The claimant can choose his venue. There is a very high threshold to oust the jurisdiction of the Tribunal and the respondent has not met that threshold. It was submitted that there was nothing in the 2006 Regulations which suggested that section 61 did not apply to the scheme under which the claimant receives a benefit. If it were so then the scheme from which the claimant receives the benefit would be without the benefit of a non discrimination rule and that is a very strong factor to point in favour of allowing the application to proceed pursuant to section 61.

18.9 In relation to the application to amend, the merits of these claims are yet to be tested and will be very much evidence and fact sensitive as far as the harassment claims are concerned. The other claims will much depend on disclosure which is yet to take place. If section 61 is permitted to be relied upon then the claimant would have no need to rely on section 108 and it would fall away. In the alternative, the claimant does rely on section 108 if the Tribunal decides not to allow reliance upon section 61, where the respondent is the administrator of the scheme and everything points to the fact that the conditions set out in subparagraphs (a) and (b) of section 108(1) and (2) are met. Even if that is not correct the Tribunal should construe those provisions in order to

provide the claimant with a remedy given that those provisions were invoked to fulfil the decision in **Rhys-Harper**.

The Law

19. I have reminded myself of the statutory and other provisions relevant to this matter:-

Section 108 of the 2010 Act reads:-

"(1) A person (A) must not discriminate against another (B) if –
(a) the discrimination arises out of and is closely connected to a relationship which used to exist between them; and
(b) conduct of a description constituting the discrimination would, if it occurred during the relationship, contravene this Act.
(2) A person (A) must not harass another (B) if –
(a) the harassment arises out of and is closely connected to a relationship which used to exist between them; and
(b) conduct of a description constituting the harassment would, if it occurred during the relationship, contravene the Act".

20. I have reminded myself of the provisions of **Section 61 of the 2010 Act** where relevant:-

"(1) An occupational pension scheme must be taken to include a non discrimination rule.
(2) A non discrimination rule is a provision by virtue of which a responsible person (A) –
(a) must not discriminate against another person (B) in carrying out of various functions in relation to the scheme;
(b) must not in relation to the scheme harass B;
(c) must not in relation to the scheme victimise B.
.....
(4) The following are responsible persons –
(a) the trustees or managers of the scheme;
(b) an employer whose employees are or maybe members of the scheme;
(c) a person exercising and appointing function in relation to an office the holder of which is or may be a member of the scheme".

21. I have reminded myself of the provisions of **Section 212 of the 2010 Act**, the definition of occupational pension scheme which reads:-

"- Occupational pension scheme has the meaning given in section 1 of the Pension Schemes Act 1993".

22. I note the provisions of **Section 1 of the Pension Schemes Act 1993** which reads:-

"(1) In this Act, unless the context otherwise requires –

1. Categories of Pension Schemes
"Occupational Pension Scheme" means a pension scheme –
(a) that –
(i) for the purposes of providing benefits to, or in respect of, people with service in employments of a description, or
(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,
Is established by or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force, and
(b) that has its main administration in the United Kingdom or outside the EEA states.
Or a pension scheme that is prescribed or is of a prescribed description.

(5) In subsection (1) "Pension Scheme" (except in the phrases "occupational pension scheme", "personal pension scheme" and "public service pension scheme") means a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of people –
(a) on retirement;
(b) on having reached a particular age; or
(c) on termination of service in an employment".

23. I have reminded myself of the provisions of **Rule 37 of the 2013 Rules**:-

"(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 any part of a claim or response on any of the following grounds –
(a) that it is scandalous or vexatious or has no reasonable prospect of success …".

24. I have noted the provisions of **Section 150 of the Finance Act 2004** –

Meaning of "pension scheme":-
(1) In this Part ("pension scheme") means a scheme or other arrangements comprising one or more instruments or agreements having or capable of having effect so as to provide benefits to or in respect of a person's –
(a) on retirement;
(b) on death;
(c) on having reached a particular age;
(d) on the onset of serious ill health or incapacity; or
(e) in similar circumstances".

25. I reminded myself of the provisions of **Sections 29 and 31 of the 2010 Act**. In particular:-

"29 (1) A person (a "service provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring a service by not providing the person with the service.
(2) A service provider (A) must not in providing the service discriminate against a person (B) –
(a) as to the terms on which A provides a service to B;
(b) by terminating the provision of the service to B;
(c) by subjecting B to any other detriment.

31 Interpretation and exceptions
(1) This section applies for the purposes of this Part.
(2) A reference to the provision of the service includes a reference to the provision of goods or facilities.
(3) A reference to the provision of a service includes a reference to the provision of a service in the exercise of a public function.
(4) A public function is a function that is a function of a public nature for the purposes of the Human Rights Act 1998".

26. I have reminded myself of the decision of Mummery J in **Selkent Bus Company Limited –v- Moore [1996] ICR 836**. I note that the question whether or not to grant an amendment is a judicial discretion to be exercised in a judicial manner and in exercising such discretion I must take account of all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I note that the relevant circumstances to take account of are the nature of the amendment, the applicability of time limits and the timing and manner of the application. It is relevant to consider why an application was not made earlier and why it is being made at the time it is made. I note the words of Mummery J:-

"Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision".

27. I have noted the words of Lord Lowry in **Roy –v- Kensington & Chelsea & Westminster Family Practitioner Committee [1992] 1AER 705**:-

"… It seems to me that unless the procedure adopted by the moving party is ill suited to dispose of the question at issue, there is much to be said in favour of the proposition that a court having jurisdiction ought to let a case be heard rather than entertain a debate concerning the form of the proceedings".

28. I have noted the words of Lord Wilberforce in **Davy –v- Spelthorne Borough Council [1984] AC262 to 287 (D/E)**:-

"So prima facie the rule applies that the plaintiff may choose the court and the procedure which suits him best. The onus lies upon the defendant to show that in doing so he is abusing the court's procedure".

29. I have noted the words of Purchas LJ in **Regina –v- East Berkshire Health Authority, Ex Parte Walsh [1985] QB152**:-

"*By whatever language the preliminary point is described, it involves the denial of the particular form of justice sought at the hands of the court by one party upon the application of another. A party inviting a court to take this draconian step assumes a heavy burden".*

30. I have reminded myself of the decision in **Rhys-Harper –v- Relaxation Group Plc [2003] IRLR 484** the speech of Lord Nicholls of Birkenhead:-

"To my mind the natural and proper interpretation of section 6(2) of the Sex Discrimination Act and the correspondent provisions in the other two acts in this context is that once two persons enter into the relationship of employer and employee, the employee is entitled to be protected against discrimination by the employer in respect of all the benefits arising from that relationship. The statutory provisions are concerned with the manner in which the employer conducts himself vis a vis the employee with regard to all the benefits arising from his employment where there is a matter of strict legal entitlement or not. That being the purpose, it would make no sense to draw an oratory line at the precise moment when the contract of employment ends protecting the employee against discrimination in respect of all benefits up to that point but in respect of none thereafter".

31. In terms of rule 37 of the 2013 Rules I note that the word "scandalous" means irrelevant and abusive of the other side. It does not signify something that is "shocking". I note that "vexatious" includes anything which could be described as an abuse of process. I note that in **Attorney General –v- Barker [2001] FLR 759** Bingham LCJ (as he then was) described vexatious as:-

"A familiar term in legal parlance and said that the hallmark of vexations proceedings was that they had "little or no basis in law (or at least no discernable basis): that whatever the intention of the proceedings may be its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant: and that it involves an abuse of the process of the court meaning by that a use of the court process for a purpose of in a way which is significantly different from the ordinary and proper use of the court process".

32. In terms of no reasonable prospect of success within rule 37 I note the guidance of Lady Smith in **Balls –v- Downham Market High School & College [2011] IRLR 217** the effect of when considering whether a claim has reasonable prospects of success the

Tribunal must first consider whether it can conclude that the claim has no such prospect. The test is not whether the claim is likely to fail nor is it a matter of asking whether it is possible that the claim will fail. It is a high test and I must have regard to all matters before me including the contents of the Tribunal file.

Conclusions

33. I have considered how I should approach the various issues which are before me. I consider it logical to deal first with the application to amend to rely on section 61 of the 2010 Act instead of or in addition to section 108 of the 2010 Act. Secondly, I will deal with the questions raised as to the applicability or otherwise of section 108 to the circumstances of this case. Thirdly, I will deal with the application to strike out these claims on the basis put forward by the respondent and in considering that application I will take account of my conclusions on the first and second matters.

34. I note that the merits of the claims advanced by the respondent are not before me. I note that at the private PH on 13 April 2017 it was specifically ordered that there was no application before me to strike out these claims on the basis that they have no reasonable prospect of success. The application to strike out is effectively framed under rule 37(1)(a) of the 2013 Rules namely that the claims advanced are an abuse of process and thus scandalous and/or vexatious: in reality the respondent relies on the ground that the claims are vexatious. That will involve my consideration of the issues set out at paragraphs 14.3.1 and 14.3.2 above.

The application to amend

35. The first matter to consider is whether the scheme established by the 2006 Regulations ("the Scheme") of which the claimant has been a beneficiary since 1988 falls within the definition of "*occupational pension scheme*" in section 61 of the 2010 Act. The answer to that question takes me on a somewhat circuitous route through various statutes. However, first I set out in paragraphs 36 and 37 which follow my conclusions in respect of the Scheme from a review of the 2006 Regulations.

36. I refer to and adopt the relevant agreed facts set out in paragraph 15 above. The 2006 Regulations provide for a police officer injured on duty to receive injury benefits in the form of a lump sum gratuity and also an annual pension. If a police officer dies because of injury then, in certain circumstances, benefits are payable to an "*adult survivor"* (subject to termination on remarriage or other event- regulation 16) and/or to a child of the deceased police officer. In certain circumstances more remote relations of a deceased police officer may also qualify for benefits. No matter what the class of beneficiary, the benefit payable will be in the form of a lump sum gratuity or an annual pension or both. Thus if a non- discrimination rule applies to 2006 Regulation scheme, there are several potential classes of beneficiary who have not worked for or been involved in a relationship akin to a working relationship with the police officer's employer who could potentially advance a claim to the Tribunal pursuant to the provisions of Part 5 (Work) of the 2010 Act relying on the gateway provided by section 61 of the 2010 Act. I do not consider that to be unusual or objectionable. The gateways to the Tribunal jurisdiction set out in sections 44-58 of the 2010 Act provide several such opportunities for people who have similarly not been employees or involved in such a relationship.

37. Mr Thomas asked me to find that section 61 of the 2010 Act had no application to the Scheme because if a police officer was killed his/her spouse would potentially obtain only a lump sum under the provisions of the Scheme and that could not conceivably be described as a pension. Any such claimant could not bring him/herself within section 108 or part 5 of the 2010 Act and would thus have to bring a claim under section 29 of the 2010 Act. I do not agree that the fact such a beneficiary of the Scheme would potentially be able to bring a claim under section 61 is necessarily a reason in itself to interpret section 61 and the words "occupational pension scheme" so as to exclude the Scheme from the definition.

38. The definition of "*occupational pension scheme*" is found in section 212 of the 2010 Act and it is defined by reference to section 1 of the Pension Schemes Act 1993 ("the 1993 Act"). I have considering that statute and the definitions in it. An occupational pension scheme is defined in section 1(1)(a) as set out above but is a scheme for the purposes of providing benefits to people with service in employments of a description or for that purpose and also for the purpose of providing benefits to or in respect of other people. I was not taken to any definition of "benefits" or "other people": the words are clearly wide enough to cover the benefits provided under the Scheme and the people other than the police officer who can potentially benefit under the Scheme. There is no dispute that the claimant was a person in employment of an appropriate description.

39. Section 1(5) of the 1993 Act and the definition of "pension scheme" falls for consideration next for that limits the definition further by making reference to providing "*benefits to or in respect of people (a) on retirement, (b) on having reached a particular age or (c) on termination of service in an employment"* and Mr Thomas urged that it was plain that a scheme which is solely an injury benefit scheme does not fall within that definition. That argument was developed further by reference to the Finance act 2004 which I have considered.

40. I do not agree. I consider that the Scheme provides benefits to people on retirement and/or on termination of service in employment. I take the 2006 Regulations as a whole but go in particular to regulation 11 which provides the basis for an award on injury to a member of a police force. Regulation 11(1) is key and reads:
"This regulation applies to a person who ceases or has ceased to be a member of a police force and is permanently disabled as a result of an injury received without his own default in execution of his duty...".
Thus benefits under the Scheme only arise if an officer has ceased to be a member of a police force. But if an officer has so ceased then he has retired from the police force albeit because of that disability. The word "retirement" must cover a situation different to retirement on reaching a particular age for that is specifically provided for. Furthermore the benefits to the claimant clearly arise on the termination of his employment as Regulation 11 only applies when membership of the police force has ceased and thus employment ended.

41. I was urged by Mr Thomas to find that the fact other people can benefit from the Scheme on the death of the police officer (and in circumstances where the officer cannot and has not so benefitted) means that the definitions are not complied with. I do not agree. The wording of section 1(5) of the 1993 does not say that the benefits to be provided under the Scheme have <u>only</u> to be provided to a person on retirement or on termination of service. The Scheme is capable of having effect and does have effect to

provide benefits to people who fulfil the conditions in section 1(5) and the fact that others may qualify under the Scheme does not in my judgment mean that the definition is not fulfilled. In any event the other beneficiaries under the Scheme who qualify on the death of the officer do so on the termination of service in an employment. The definition does not say whose service that has to be - the definition is wide enough in my judgment to cover benefits to people on the termination of service (through death) of another person. In effect I prefer the submission of Miss Casserley that the definition set out in section 1(5) of the 1993 Act is inclusive rather than exclusive. Thus I conclude the Scheme falls within the definition of Occupational Pension Scheme contained in section 212 of the 2010 Act. I reach this conclusion by interpreting the words of section 1 of the 1993 Act in an ordinary way and I do not consider that I have had to strain the plain and clear meaning of the wording of that section to reach the conclusion I have reached.

42. If that is wrong, then I have considered the provisions of Article 47 of the Charter of Fundamental Rights of the European Union to which Miss Casserley referred and whether it would have been necessary to construe any statutory provision purposively in order to ensure that the claimant is able to pursue his rights through the gateway provided by section 61 of the 2010 Act. I consider there is every reason why a non-discrimination rule should apply to the Scheme. It is a scheme which clearly provides benefits in the nature of a pension. Not necessary says Mr Thomas because if acts of discrimination are present, the claimant would have a remedy in the County Court through the provisions of part 3 of the 2010 Act. Miss Casserley answers that by saying that the claimant should be able to choose the venue for the determination of any claim and he is entitled to have access to the specialist experience in discrimination matters of the Tribunal. I consider the force of that submission is lessened somewhat by the right of the County Court to transfer a claim relating to a non-discrimination rule to the Employment Tribunal for determination pursuant to section 122 of the 2010 Act. However, section 122 is not a complete answer and I am persuaded by the submissions of Miss Casserley that a purposive interpretation would have been necessary if my conclusions in respect of the interpretation of the relevant statutory provisions had been otherwise. However, in light of the conclusion I have reached on the interpretation of the relevant provisions, it is not necessary for me to engage further with that question.

43. I have therefore considered whether to allow the amendment to permit the claimant to rely on the gateway to this claim provided by section 61 of the 2010 Act. I have considered **Selkent**. I have noted that the application to amend comes some three months after the claim was filed. The claim itself seeks to litigate events which began with the review instituted by the respondent in 2016 and therefore it could be said that the application is considerably out of time. However I must balance the prejudice and hardship to the claimant in not allowing the amendment against that to the respondent in allowing it. The respondent has been able through Mr Thomas cogently and without any evident prejudice to argue the points in relation to the amendment. Miss Casserley makes a strong point that this is a relabelling exercise. There are no new allegations of discrimination advanced to the Tribunal by reason of the amendment but simply the request to be permitted to use an additional or alternative gateway into the Tribunal to have the already pleaded allegations of discrimination adjudicated on. I accept that submission. I am satisfied that given the respondent has been able to deal with this amendment application without difficulty and given that there are no new allegations of discriminations advanced, then the balance of hardship and prejudice lies in favour of

granting the amendment rather than in refusing it. Accordingly I grant the amendment to the claimant set out in the application to the Tribunal of 5 June 2017 in order to rely on section 61 as an alternative or additional gateway to the Tribunal for the purpose of advancing the claims of disability discrimination contained in the claim form. In doing so I have not considered the merits of the allegations advanced for they were not before me. I refer to that point again below.

The availability of section 108 of the 2010 Act

44. As originally pleaded the claimant sought to rely on section 108 of the 2010 Act in order to advance these claims. I have noted the provisions of section 108 and in particular the decision in **Rhys-Harper**. I considered the submissions made to me by counsel for the parties. Both counsel in effect agreed that section 61 was the most appropriate section to advance these claims rather than section 108. Miss Casserley indicated that if I granted the application to amend to rely on section 61, the claimant would withdraw any reliance on section 108 of the 2010 Act. Mr Thomas agreed that section 61 would be the appropriate route to advance the claims but submitted that neither it nor section 108 applied in the circumstances of this case.

45. I have first considered whether the allegations of discrimination now advanced arise out of and are closely connected to the relationship which used to exist between the claimant and the respondent. The claimant was formerly a police officer and his employer (for the purposes of the 2010 Act) was the respondent. The employment relationship ended in 1988 when the claimant retired – that is almost 30 years ago. The respondent has responsibilities in relation to the Scheme but those responsibilities arise not because the respondent was the former employer of the claimant but because the respondent is given responsibilities under the 2006 Regulations in respect of the Scheme: it seems to me that those responsibilities could equally well be carried out by another official or body.

46. I have considered whether the allegations now advanced arise out of the relationship which used to exist between the parties. I am not satisfied that they do. I prefer the submission of Mr Thomas to the effect that the alleged acts of discrimination arise not from the employment relationship but from the exercise by the respondent of his duties under the Scheme. Furthermore the allegations of discrimination are not closely connected to the relationship which used to exist. I take account of and accept that but for his employment by the respondent, the claimant would not be a member of the Scheme but that is not sufficient in my judgment to say that the allegations of discrimination are closely connected to the employment relationship which used to exist. There is a connection but not a close connection particularly given that it is almost 30 years since the employment relationship subsisted. Accordingly I conclude that the requirements of section 108(1) and (2) (a) of the 2010 Act are not met in the circumstances of this case.

47. In case that is wrong, I have considered the provisions of subparagraph (b) of section 108(1) and (2) of the 2010 Act. Again I prefer the submission of Mr Thomas that the conduct of the respondent which is impugned by this claim could not have occurred during the employment relationship because the allegations arise out of the Scheme into which the claimant was admitted only after the relationship ended and as a consequence of it ending. The provisions of subparagraph (b) are therefore not met.

48. It follows that however I look at section 108 of the 2010 Act, I conclude that it has no application to the circumstances of this case and cannot be relied on as the gateway through which to advance these claims to the Tribunal. In reaching this decision I have taken full account of the decision in **Rhys-Harper**.

Strike out on the basis that the application is not justiciable in the Tribunal or is otherwise scandalous or vexatious.

49. I have considered whether the allegations advanced by the claimant are seeking to raise in the Tribunal matters over which it has no jurisdiction. I reject that submission. The allegations which the claimant makes are set out in the pleadings and are also summarised by Miss Casserley in her submissions. They are allegations of direct discrimination, of discrimination arising from disability, failure to make reasonable adjustments and harassment or victimisation. The allegations relate to the conduct of the review process which began in May 2016 and the manner in which that process has been prosecuted by the respondent. Those are not matters which would fall within the ambit of the appeal process which is set out in the 2006 Regulations. That process deals with an appeal arising from dissatisfaction with decisions made on granting or refusing an award or a decision made on a review of an award. What these proceedings seek to do is to have the Tribunal adjudicate on matters which clearly relate to the manner in which the respondent has conducted his obligations under the 2006 regulations and not whether he should conduct those obligations at all in respect to the claimant's case. That said I accept that one of the allegations of discrimination appears to be directed to the decision in May 2016 to subject the claimant to review but that is one of several different allegations and if that allegation is subjected to the scrutiny of the Tribunal at a later stage, the respondent will clearly have much it can say in relation to that particular allegation.

50. The merits of the claims themselves are not before me at this stage. Mr Thomas sought to say I should strike out the claims because the stated aim of the claimant is to have an outcome from the Tribunal (presumably by recommendation) that there should be no review at all in the case of the claimant going forward. I am not clear that that is what the claimant seeks but if it is, then it seems to me that that would be a recommendation only if it was decided by the Tribunal that such would be a reasonable adjustment to the Scheme. Given that the Scheme requires awards to be reviewed by the respondent that would appear to be a very difficult argument to sustain although not one I can rule out at this stage.

51. I do not read the allegations made by the claimant as other than allegations of discrimination which clearly fall within the jurisdiction of the Tribunal to consider. The details of the claims themselves are not before me. I conclude that the matters which are sought to be litigated in these proceedings are not matters which fall within the jurisdiction of the Administrative Court of the High Court or for that matter the Crown Court. The claimant does not seek to challenge the process per se but seeks to have a Tribunal adjudicate upon whether or not in doing what he has done the respondent has breached the provisions of the 2010 Act in the way he has carried out his duties.

52. I have reminded myself that it is generally incorrect to strike out claims of discrimination before they are tested. I have reminded myself of the guidance in

Langstaff P in **Chandhok –v- Tirkey 2014 EAT/0190** to the effect that the exercise of a discretion to strike out should be sparing and cautious. I have noted the reliance by Mr Thomas on the decision in **RMC** to which I refer at paragraph 17.7 above.

53. I do not consider the matters raised as being outwith the jurisdiction of this Tribunal. I do not consider that the matters raised are either vexatious or scandalous on that basis.

54. I reiterate that I have not considered the detailed merits of the claims which the claimant advances as they were specifically excluded from me by the Orders. For that same reason I have not considered whether or not a deposit order would be appropriate in relation to the merits of this matter. I was urged nonetheless to strike out as looking at the claims and the details of the letters sent by the respondent to the claimant, it is clear the claims are without merit. I cannot reach that conclusion at this stage.

55. It seems to me that once this matter has been moved forward and disclosure has taken place and if the respondent sought then to make a further application for the merits of the claim to be considered then that is something which could be the subject matter of an application to the Tribunal when consideration could be given to striking out the claims or ordering a deposit on the basis that they have no/little reasonable prospect of success.. That said, I note the terms of the Orders and the comments of Regional Employment Judge Reed on 13 May 2017 and I note the guidance which I have referred to above from Lady Smith and others in respect of the test for considering whether claims have no reasonable prospect of success. No matter how I look at these matters at this stage, I conclude it would be wrong to strike out the allegations and I will not do so.

Final Matters

56. I will issue an instruction to convene a telephone private preliminary hearing in this matter and in the first Taylor claim and in the second Taylor claim (which will all be heard together) and I will set out in that instruction the matters to be discussed at that hearing. I will arrange that hearing at the earliest convenient time

EMPLOYMENT JUDGE A M BUCHANAN

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 14 September 2017

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JUDGMENT SENT TO THE PARTIES ON

18 September 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL