



# EMPLOYMENT TRIBUNALS

**Claimant:** REV DR JAMES GEORGE HARGREAVES

**Respondents:** (1) EVOLVE HOUSING + SUPPORT  
(2) MR SIMON MCGRATH  
(3) MR LUKE WATKEYS

## RECORD OF A PRELIMINARY HEARING

**Heard at:** London Central (by video)

**Date:** 1 February 2022

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

### Appearances

For Claimant: in person

For Respondent: Mrs C. Urquhart (Counsel)

## Decision

1. The Respondents' application to strike out the Claimant's complaint of discrimination on the grounds of religious belief in his second claim form (the "**Religious Discrimination Claim**"), case number: 2204276/2021 ("**the Dismissal Claim**") succeeds.
2. The Religious Discrimination Claim is struck out, being presented outside the three months' time limit, and the Claimant having no reasonable prospect of success to establish that the alleged discriminatory conduct was conduct extending over a period within the meaning of s.123(3)(a) of the Equality Act 2010 ("**EqA**").
3. The Respondents' application to strike out the claimant's claims against Mr Luke Watkeys (the "**Third Respondent**") succeeds.

4. All claims against the Third Respondent are struck out, being presented outside the three months' time limit, and the Claimant having no reasonable prospect of success to establish that the alleged breaches of s.111 and s.112 EqA was conduct extending over a period within the meaning of s.123(3)(a) of the Equality Act 2010 ("EqA").
5. The Third Respondent is removed as a party to the proceedings.
6. The Respondents' application to strike out the Claimant's claim for breach of contract against Mr Simon McGrath succeeds (the **Second Respondent**).
7. The Claimant's claim against the Second Respondent for breach of contract is struck out, because the tribunal does not have the jurisdiction to consider it, and as having no reasonable prospect of success.
8. The Respondents' application to strike out other Claimant's claims against the Second Respondent succeeds in part.
9. The Claimant's claims against the Second Respondent under s. 111 and s. 112 EqA with respect to the detriment of dismissal (under s. 27 Equality Act 2010) shall proceed to be determined at the final hearing.
10. All other claims against the Second Respondent are dismissed as having no reasonable prospect of success and for want of jurisdiction.
11. The Respondents' application to strike out the claimant's claim for breach of contract against Evolve Housing + Support (the "**First Respondent**") in the Claimant first claim (case number 2207740/2020) ("the "**Suspension Claim**") – (the "**Breach of Contract Claim**") succeeds.
12. The tribunal does not have jurisdiction to consider the Breach of Contract Claim, and it is struck out for want of jurisdiction.
13. The Claimant's application to add Ms Elspeth Hayde and Mr Jeremy Gray fails and is dismissed.
14. The parties must liaise to agree on the final list of issues to be ready for the preliminary hearing on 12 May 2022.
15. The parties must seek to agree further case management directions the tribunal will be asked to make at the preliminary hearing on 12 May 2022.

# Reasons

## Background and issues

1. This was an open preliminary hearing (the “**OPH**”) to consider the Respondents’ five strike out/deposit order applications and the Claimant’s application to add Ms E Hayde and Mr J Gray as respondents.
2. By way of summary, the First Respondent is a charitable housing organisation that supports homeless and vulnerable people in London. The Claimant was employed by the First Respondent as a Supported Housing Night Concierge Worker from 22 October 2018 until 8 February 2021, when he was summarily dismissed for alleged gross misconduct.
3. While still being employed by the First Respondent the Claimant brought a tribunal claim (case no 2202654/2019) for religious and race harassment/direct discrimination in relation the First Respondent conducting a disciplinary case against the Claimant for the alleged homophobic remarks made by the Claimant (“the **Original Tribunal Claim**”). The Original Tribunal Claim was heard in February 2020. The Claimant succeeded with respect to some allegations and a remedy hearing was set for 9 October 2020.
4. In September/October 2020, in preparation for the remedy hearing, the Claimant wrote to more than 90 councillors, plus several third-sector community leaders and an MP, with what the First Respondent considered to be a misleading and damaging account of how the First Respondent had reacted to the judgment in the Original Tribunal Claim.
5. The First Respondent decided that the Claimant writing the emails in those terms was a disciplinary offence and commenced a disciplinary investigation against the Claimant. The Claimant maintained that the purpose of writing the emails was to collect evidence for the remedy hearing to support his claim for aggravated damaged.
6. On 15 October 2020, Ms Hayde, the Director of People and Culture of the First Respondent carried out a suspension risk assessment and on 16 October 2020, based on which Mr Gray (the CEO of the First Respondent) took the decision to suspend the Claimant.
7. On 21 December 2020, the Claimant lodged a claim against the First Respondent for harassment on the grounds of race and religious belief, victimisation and breach of contract in relation to his disciplinary suspension (“the **Suspension Claim**”).
8. On 8 February 2021, following a disciplinary hearing on 20 January 2021, the Claimant was summarily dismissed.
9. On 14 July 2021, the Claimant lodged another claim against the First Respondent and against the Second and the Third Respondents for unfair

dismissal and discrimination on the grounds of religious belief (“the **Dismissal Claim**”). In the Dismissal Claim the Claimant brings specific claims for contravention of s.111 and s.112 EqA against the Second and the Third Respondents, and a claim for breach of contract against the Second Respondent. He claims unfair dismissal and religious belief discrimination against the First Respondent. On 13 October 2021, Employment Judge Spenser ordered that the Suspension Claim and the Dismissal Claim be heard together.

10. On 6 October 2021, the Respondents applied for an order to strike out or make a deposit order in relation to various aspects of the Claimant’s claims.
11. On 20 October 2021, the Claimant applied to add Ms Hayde and Mr Gray as respondents to his consolidated claims.
12. There was a case management preliminary hearing on 28 October 2021, before Employment Judge Professor A C Neal. At the hearing, various aspects of the Claimant’s claims were clarified and his claim for harassment was dismissed upon withdrawal. EJ Neal ordered an open preliminary hearing to consider the parties’ application.
13. The following applications were considered at the OPH:

*By the Respondents:*

- (i) *Application for the Claimant’s claim of discrimination on the grounds of religious belief to be dismissed on the grounds that the Employment Tribunal does not have jurisdiction to hear it as it has been made out of time. In the event the Employment Tribunal determines that it does have jurisdiction to hear this claim, the First Respondent applies for the claim to be struck out on the basis that it has no reasonable prospects of success or, in the alternative, that a deposit order is made. (“**Application 1**”);*
- (ii) *Application for the Claimant’s claims against Mr Watkeys, the Third Respondent, to be dismissed on the ground that the Employment Tribunal does not have jurisdiction to hear it, as it has been made out of time. In the event the Employment Tribunal determines that it does have jurisdiction to hear this claim, the First Respondent and Mr Watkeys apply for the claim to be struck out on the basis that it has no reasonable prospects of success or, in the alternative, that a deposit order is made. If the claim is dismissed or struck out, the First Respondent and Mr Watkeys apply for Mr Watkeys to be removed as a respondent to these proceedings. (“**Application 2**”)*
- (iii) *Application for claim for breach of contract relating to the delay in providing the disciplinary outcome to be dismissed or struck out on the ground that the Employment Tribunal does not have jurisdiction to hear it or, in the alternative, that it has no reasonable prospects of success. Alternatively, the respondents request that a deposit order is made. (“**Application 3**”)*
- (iv) *If the claim for breach of contract is not(sic) dismissed or struck out, that the Second Respondent, Simon McGrath, is removed as a respondent in*

*respect of this allegation. That Mr McGrath is removed as a respondent in respect of any allegation of ordinary unfair dismissal. That the inducement claim against Mr McGrath is struck out on the basis that it has no reasonable prospects of success or, in the alternative, that a deposit order is made. (“Application 4”)*

- (v) *That the claim for breach of contract set out in the Suspension Claim is be dismissed or struck out on the ground that the Employment Tribunal does not have jurisdiction to hear it or, in the alternative, that it has no reasonable prospects of success. Alternatively, the Respondents request that a deposit order is made. (“Application 5”)*

*By the Claimant*

- (vi) *To add Ms Hayde and Mr Gray to the proceedings as respondents.*

14. At the hearing the Claimant represented himself and Ms Urquhart appeared for the Respondents. I was referred to various documents in the agreed bundle of documents of 207 pages and in the bundle of authorities of 529 pages. Both parties presented skeleton arguments, which they supplemented by oral submissions. I am grateful to both the Claimant and Ms Urquhart for their submissions and assistance to the tribunal.

## The Law

### Tribunal Powers

15. Under rule 53(1) of Schedule 2 of the ETs (Constitution & Rules of Procedure) Regulations 2013 (“the **ET Rules**”), at a preliminary hearing the Tribunal may:

- a. ... *make a case management order;*
- b. *determine any preliminary issue;*
- c. *consider whether a claim or response, or any part, should be struck out under rule 37;*
- d. *make a deposit order under rule 39...*

16. Under rule 37(1)(a) of the ET Rules, a claim can be struck out on the ground that “*it has no reasonable prospect of success*”.

17. Under rule 39(1) of the ET Rules, if a Tribunal considers that a claim “*has little reasonable prospect of success*” it can order a party to pay a deposit of up to £1,000 to continue to advance that claim.

18. Under rule 34 of the ET Rules, the Tribunal has the power to add, substitute or remove any party, “*if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included*”.

19. Relevant legal principles relevant to the Claimant's application to add a party can be summarised as follows:

- (i) The Tribunal may add any person as a party to existing litigation (Rule 34 / **Cocking v Sandhurst (Stationers) Ltd** [1974] ICR 650.
- (ii) The overarching test is the 'interests of justice' test (Rule 34).
- (iii) It is a matter of judicial discretion (**Drinkwater Sabey Limited v Burnett** [1995] ICR 328).
- (iv) The usual principles established in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 apply: the Tribunal should take into account all circumstances so as to balance the injustice and hardship of allowing the amendment against the injustice/hardship of refusing it, the nature of the amendment, the time limits, the timing and manner of the application.
- (v) An application to amend to add a new party which is 'out of time' is not an absolute bar on any amendment (**Drinkwater Sabey Limited v Burnett** [1995] ICR 328).
- (vi) The '**Presidential Guidance – General Case Management**' emphasises that an application to add a party should be made promptly (at para 18).
- (vii) The failure to obtain an Early Conciliation certificate for a proposed named respondent is a factor to take into account when determining whether an application to amend should be permitted (**Payco Services Limited v Sinka**, UKEAT/0124/19/OO paras 55 to 56).

### Time Limits

20. Under **s123 Equality Act 2010** a claim 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.*

(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.*

21. If a claim under the Equality Act is *prima facie* out of time, the Tribunal has a wide discretion to extend time where it would be "*just and equitable*" to do so.

22. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal held that when employment tribunals consider exercising the discretion under S.123(1)(b) EqA, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it*

*that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule.*' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13.

23. The relevant principles and authorities are summarised in **Thompson v Ark Schools** [2019] I.C.R. 292, EAT, at paragraphs 13-21:
- a. Time limits are exercised strictly;
  - b. The onus is on the claimant to persuade the tribunal to extend time;
  - c. The decision to extend time is case- and fact-sensitive;
  - d. The tribunal's discretion is wide;
  - e. Prejudice to the respondent is always relevant;
  - f. The factors under s33(3) Limitation Act 1980 (such as the length of and reasons for the delay and the extent to which the claimant acted promptly once he realised he may have a claim) may be helpful but are not a strait-jacket for the tribunal.
24. In **E v X** (UKEAT/0079/20/RN and UKEAT/0080/20/RN), Ellenbogen J reviewed the authorities on preliminary hearings in time cases and identified the relevant principles. The position can be summarised as follows:
- (a) There are two different types of public preliminary hearing about time limits.
  - (b) The first type is a determination of time limits as a preliminary issue under rule 53(1)(b). This will involve hearing evidence, making findings of fact and applying section 123 Equality Act 2010 to determine the issue once and for all. In general, such a hearing may be appropriate where the only issue is whether the claimant should be granted a just and equitable extension of time, since the evidence required is unlikely to overlap with the substantive evidence needed at the final hearing.
  - (c) However, it is only in exceptional cases that it is worth directing that there be such a hearing in relation to a continuing act point. This is because, if it is reasonably arguable that there was an act extending over a period, the tribunal must not determine that issue until it has heard all relevant evidence (**Aziz v. FDA** [2010] EWCA Civ 304). The evidence required is very likely to overlap with the evidence required at the final hearing.
  - (d) The second type of hearing is consideration under rule 53(1)(c) of striking out under rule 37 on the basis that the claimant has no reasonable prospect of success in establishing that the claim (or relevant part of the claim) has been brought within time. Such consideration is commonly combined with consideration of a deposit order under rule 39 as an alternative on the basis that the claimant's time limit contention has little reasonable prospect of success.

- (e) This type of hearing is more likely to be appropriate for a continuing act argument than a just and equitable extension. In theory there could be consideration of striking out allegations if the claimant has no reasonable prospect of achieving a just and equitable extension of time at the final hearing, or of ordering a deposit, but in practice it may be preferable for that to be determined on the merits as a preliminary issue because an evidential overlap with the final hearing is much less likely.
- (f) Where the issue is whether or not the alleged discrimination formed part of an act extending over a period, the test is whether or not that contention is reasonably arguable. If it is not, the relevant allegations can be struck out. If it is, the question of time limits and continuing acts is not definitively resolved but is deferred to the final hearing. Such a hearing can sometimes be dealt with on the basis of the pleaded case alone. It may be appropriate in such strike out applications for the claimant to provide a witness statement and give oral evidence as part of demonstrating that he or she has a *prima facie* case on the point. It is unlikely, however, that evidence from the respondent will be needed
- (g) In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form. It is appropriate to consider the way in which a claimant puts his or her case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor.
- (h) A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason.
- (i) The rule in **Serco Ltd v Wells** [2016] ICR 768 that any interference with a previous interlocutory order by a judge of equivalent jurisdiction had to be "necessary in the interests of justice", in accordance with rule 29, which was to be interpreted as requiring a material change of circumstances since the order was made, or that the order had been based on a material omission or mistreatment, or some other substantial reason necessitating interference, remain good law and must be followed.

### Exercise of Strike Out Power

- 25. The strike out power must be exercised by the tribunal in accordance with reason, relevance, principle and justice — **Williams v Real Care Agency Ltd** 2012 ICR D27, EAT.
- 26. In **Abertawe Bro Morgannwg University Health Board v Ferguson** 2013 ICR 1108, EAT, the EAT remarked that, in suitable cases, applications for strike-out may save time, expense and anxiety. However, in cases that are likely to be



heavily fact-sensitive (such as those involving discrimination or public interest disclosures ('whistleblowing')) the circumstances in which a claim will be struck out are likely to be rare.

27. However, there is no blanket ban on striking out a particular class of cases such as discrimination if, taking it at its highest, and without conducting a "mini trial", it is clear that there is no real substance in the factual assertions made, for example if they conflict with contemporaneous documents (see **Ukegheson v Haringey LBC** [2015] ICR 1285 at paragraphs 4 and 23)

Personal Liability of Employees and Agents

28. Under s 110 EqA: A person (A) contravenes S.110 if -

- (a) A is an employee or agent
- (b) A does something that by virtue of S.109(1) or (2) is treated as having been done by A's employer or principal (as the case may be), and
- (c) the doing of that thing by A amounts to a contravention of the EqA by the employer or principal (as the case may be).

29. Under s.83(2)(a) EqA "Employment" includes *employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.*

30. Section 109(2) EqA makes a principal liable for discriminatory acts committed by an agent while acting under the principal's authority. It provides that: '*Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*' It does not matter whether that thing is done with the principal's knowledge or approval — S.109(3).

31. In **Ministry of Defence v Kemeh 2014** ICR 625, CA, the Court of Appeal held that S.109(2) applies only where '*the agent discriminates in the course of carrying out the functions he is authorised to do*'.

32. Section 111 EqA makes it unlawful for a person to instruct, cause or induce someone to discriminate, harass or victimise another person on any of the grounds covered by the Act, regardless of whether the person so instructed, etc, actually does so.

33. In order for s. 111 to apply, the relationship between the person giving the instruction, etc (A) and the person so instructed, etc (B) must be '*such that A is in a position to commit a basic contravention in relation to B*' – s.111 (7). This means there must be a relationship in respect of which discrimination, harassment or victimisation is itself prohibited (for example, an employment relationship).

34. In **NHS Trust Development Authority v Saiger & Anor** [2018] ICR 297, Judge Hand QC held (at para 118) that "*there must be evidence of instruction or causation or inducement for there to be a breach of section 111. That Mr Blythin was in a position to instruct cause or induce a basic contravention is not enough to establish liability. The evidence must show that he behaved in that*

*way, not that he had the potential to do so. Likewise, concluding that he did participate in the decision or that he was a party to a discussion or that he played a material part in the decision is in my judgment not, without more, to be equated with an instruction, causation or inducement. Nor do any of these findings amount to giving help knowingly.”*

35. S.112(1) EqA states that a person (A) must not knowingly help another (B) to do anything which contravenes Parts 3–7, S.108(1) or (2), or S.111 of the EqA.
36. The EHRC Employment Code states that ‘*help*’ should be given its ordinary meaning, and that help given to someone to discriminate, harass or victimise will be unlawful ‘*even if it is not substantial or productive, so long as it is not negligible*’ — para 9.27.

### Breach of Contract claims

37. Article 3 of the Employment Tribunals (Extension of Jurisdiction) (England and Wales) Order 1994 (“the **Order**”) states: *Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if- ... (c) the claim arises or is outstanding on the termination of the employee's employment.*
38. In **Oni v UNISON** 2018 ICR 1111, EAT, the EAT rejected an argument that the words ‘other contract connected with employment’ in S.3(2) extend jurisdiction under Article 3 of the Order to claims against non-employer respondents. It held that on its proper construction Article 3 of the 1994 Order was confined to claims of an employee against her employer for breach of the contract of employment or of another contract connected with that employment.

### Discussions and Conclusions

39. Considering the **Serco** principles (see paragraph 24 (i) above) I must deal with all the applications in front of me, even if on applying **E v X** principles it might be argued that some of the issues should have been left for the final hearing. There was no material change in the circumstances since the EJ Professor Neal’s order of 28 October 2021. Neither party argued that any of the applications should not be heard at the OPH.

### Application 1

40. The Respondents argue that the Claimant’s complaint of religious discrimination is significantly out of time, being brought in his Dismissal Claim on 14 July

2021, because the alleged discriminatory conduct was the act of suspension on 15-16 October 2020.

41. The Respondents submit that it will not be just and equitable to extend the time because the balance of prejudice test lies in the Respondents' favour, in particular because the Claimant seeks: (i) to involve Mr Deakin (as a comparator), who had no involvement in the decision to suspend the Claimant and to whom the First Respondent owes a duty of care, and (ii) to reopen the matters determined in the Original Tribunal Claim, namely the matter concerning Mr Deakin's approach to the Information Commissioner, and under the principle of *res judicata* it is not permissible.
42. In the alternative, the Respondents submit that the claim must be struck out or a deposit order made as it has no or little reasonable prospect of success because in advancing this claim, the Claimant compares the First Respondent's decision to suspend him with the First Respondent deciding not to suspend Mr Deakin, where the circumstances of the two cases are materially different. The Claimant was suspended because the First Respondent was investigating an allegation of gross misconduct against him, where in Mr Deakin's case there was the Claimant's allegation against Mr Deakin of perjury brought as part of the Claimant's grievance, and it is not the First Respondent's standard practice to suspend someone who is the subject of a grievance by a colleague, without more. Finally, the Respondents submit that Mr Deakin is a wrong comparator because the Claimant has no evidence as to Mr Deakin's religious belief and simply makes an assumption.
43. The Claimant resists the application on the basis that the alleged act of discrimination by suspension was conduct extending over a period of time within the meaning of s.123(3)(a) EqA ("**a continuing act**") from 15-16 October 2020 to his dismissal and therefore the claim was brought in time.
44. He also says that allegations of discrimination should not be dismissed summarily, and it is in the public interest that all evidence are heard at an open hearing, and claims must not be struck out when central facts are in dispute. He referred me to various authorities on this point. The principle that there is a public interest in claims of discrimination to be heard at a full merits hearing was accepted by the Respondents.
45. The Claimant submits that while there is no dispute that the Suspension Risk Assessment was done by the First Respondent on 15 October 2020, which was relied upon by the First Respondent in suspending the Claimant, there is a dispute "*as to motive for the construction and use of the document and a continued act of discrimination related to religion or belief. These matters of dispute must be dealt with in a full Employment Tribunal hearing; not in a mini-trial at the preliminary stage*".

Was the claim brought in time?

46. To answer this question, I need to decide whether the claim, as pleaded in the Dismissal Claim, is in relation to a "one off" act of suspension or a continuing

act of suspension. If the former, it will be *prima facie* out of time, if the latter – it is in time.

47. The relevant paragraph in the Claimant's Grounds of Claim state (**my emphasis**):

[...] However, the claim of discrimination related to belief is specific to Evolve Housing + Support; **as the discrimination took place before Mr Watkeys and Cllr. McGrath took on their roles in the unfair dismissal process.**

**I therefore claim that on 15th and 16th October 2020, when a bogus suspension risk assessment was concocted upon which I was suspended, it was done without the same consideration that was given to Jon Deakin in light of an allegation of perjury against him. This was an act of discrimination based on the fact that I hold Christian beliefs on abortion, marriage homosexuality and the protection of the unborn child (aka pro-life), which neither Jon Deakin or influential executives, managers and decision-makers in Evolve Housing + Support hold.**

48. The Claimant brings separate complaints against the Second and Third Respondents, including in relation to his on-going suspension. In those complaints he alleges that by “condoning of the suspension” of the Claimant the Second and Third Respondent contravened s. 111 and 112 EqA.

49. There he claims that (**my emphasis**) “The suspension was not only unlawful because of the bogus Suspension Risk Assessment, **but also because it was a response to my protected act of giving testimony in an Employment Tribunal.**

50. He then repeats that the Third Respondent action by reviewing and allowing the suspension to continue was “an unlawful response **to a protected act** and a disciplinary process, which led to my unfair dismissal”.

51. With respect to the Second Respondent, he complains that: (**my emphasis**)

**Cllr. Simon McGrath admits that my Employment Tribunal remedy hearing testimony played some part in the decision to suspend me** and enter into a disciplinary process. **My Employment Tribunal remedy hearing testimony should have played no part in the decision. It was and is a protected act**

“Cllr. McGrath, in his Outcome of Disciplinary/dismissal letter **condoned use of part my testimony, in the decision to suspend me and enter into a disciplinary process and argued** that my legitimate actions in pursuit of exemplary and aggravated damages in the Rev J G Hargreaves + Evolve case (ET Case Number: 2202654/2019) was gross misconduct. **In so doing, Cllr. McGrath thus aided and abetted the unlawful actions under the Equality Act 2010, thereby breaching section 112 of the Equality Act 2010**”

52. While giving full allowance to the fact that the Claimant is a litigant in person, and the tribunal should be slow to engage in nitpicking the pleadings looking for

flaws and inconsistencies, nevertheless, the purpose of ET1 and the Grounds of Claims is to describe what exactly the complaints are about.

53. In my judgment, on a fair reading of the Claimant's Grounds of Claim, he complains that the decision to suspend him, which he says was made on the basis of a bogus Risk Assessment by Ms Hayde, was an act of religious discrimination committed by the First Respondent. He, however, specifically distinguishes that with his continued suspension, which he claims was an act of victimisation committed by the First Respondent and "*condoned*" and *added and abetted*" by the Second and the Third Respondents.
54. He says that the unlawful act of suspension on the grounds of religious belief "*took place before*" the Second and the Third Respondents got involved in the process. Nowhere in his Grounds of Claim he says that the Second and/or the Third Respondent allowing his suspension to continue were the acts of discrimination on the grounds of his religious belief. On the contrary, he refers to his testimony in the Original Tribunal Claim being the alleged cause of the Second and the Third Respondent's conduct of allowing the suspension to continue.
55. In his Suspension Claim, while the Claimant ticked the boxes of "I was discriminated against on the grounds of religion or belief and race", in his Grounds of Claim he made no complaints of discrimination on these grounds, and only made claims for victimisation and breach of contract.
56. Further, he compares the First Respondent's decision to suspend him in October 2020 with the First Respondent's decision not to suspend Mr Deakin. In his skeleton argument the Claimant submits (***my emphasis***) that *the unlawful act of discrimination by way of the putative Suspension Risk Assessment **gave rise to a continued act of discrimination**, namely; 115 days of the claimant's suspension - each day of suspension being a linked and continuing act of discrimination, the continuance of which both the second and third Respondents, as individual persons in their own right, 'aided and abetted' and condoned in contravention to Sections 111 and 112 of the Equality Act 2010.*
57. In essence, the Claimant says the initial discriminatory decision to suspend him (on the grounds of his religious belief) "*gave rise*" to a state of affairs – his continued suspension. However, he claims that the continued suspension was an act of victimisation by the First Respondent "*aided and abetted*" and "*condoned*" by the Second and the Third Respondents, but that was by reason of him giving testimony at the Original Tribunal Hearing, and not an act of direct discrimination on the grounds of his religious belief.
58. In ***Barclays Bank plc v Kapur and ors*** 1991 ICR 208, HL the House of Lords drew a distinction between a continuing act and an act that has continuing consequences. Their Lordships held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an employee

will not be treated as continuing, even though that act has ramifications which extend over a period of time.

59. To summarise, in my judgment, the Claimant complains about a distinct and one-off act of religious belief discrimination (the decision to suspend him based on the “bogus” Risk Assessment), which had continuing consequences of him remaining on his suspension until his dismissal. He separately complains that the decision to suspend him and keep him suspended was a continuing act of victimisation. However, this is a separate complaint and must not be conflated with the complaint of religious belief discrimination, which relates only to the initial decision to suspend.
60. It follows, that I find that the Claimant’s claim against the First Respondent for direct discrimination on the grounds of religious belief was brought out of time.
61. For the same reasons, I find that the Claimant’s assertion that the decision to suspend him, as an act of discrimination on the grounds of his religious belief, was a continuing act of discrimination on that ground has no reasonable prospect of success.

*Is it just and equitable to extend the time limit?*

62. The onus is on the Claimant to persuade the tribunal that it is just and equitable to extend the time limit. The Claimant’s claim is about six months late. He brought his Suspension Claim, complaining of the very decision to suspend him, in time, but did not claim that the decision was an act of discrimination on the grounds of his religious belief, albeit he ticked “religious belief” and “race” boxes on his ET1.
63. He compares the First Respondent’s decision to suspend him to the First Respondent’s decision not to suspend Mr Deakin, following the Claimant making an allegation of perjury against Mr Deakin in September 2020. The Claimant’s case is that his “*Christian beliefs on abortion, marriage homosexuality [sic] and the protection of the unborn child (aka pro-life)*” which beliefs, he says, are not shared by Mr Deakin.
64. Given that the Claimant raised a grievance against Mr Deakin as far back as February 2020 and reported him to the police for perjury in September 2020, before his suspension on 16 October 2020, and considering the background of the matters in the Original Tribunal Claim, in which Mr Deakin played a prominent role, it appears that the Claimant had all necessary information at the time of lodging his Suspension Claim to bring a complaint of discrimination on the grounds of his religious belief.
65. At the hearing the Claimant said that he had discovered evidence, which caused him to conclude that the decision to suspend was because of his religious beliefs after he had lodged his Suspension Claim. He did not explain what that evidence was, except to say that he had been talking to some people at the First Respondent, who told him they were afraid of being sacked if they spoke up. The Claimant, however, said that information had become available

to him over Christmas 2020. He did not explain why he did not then seek to amend his Suspension Claim to include a complaint of religious belief discrimination and waited a further seven months to make it.

66. It might appear that by allowing the claim to proceed, there will be no or little prejudice to the First Respondent, as it will still have to deal with the matter of suspension as part of defending the claim that the decision to suspend was an act of victimisation. However, the First Respondent would also have to deal with the issue of not suspending Mr Deakin in response to the Claimant's grievance and the allegation of perjury, which would necessitate the First Respondent making enquiries into historic events and most likely calling additional witnesses.
67. I do not accept the Respondents' submission that involving Mr Deakin, to whom the First Respondent owes a duty of care, in the proceedings *per se* is a sufficient to show that the First Respondent will suffer a prejudice, which outweighs the prejudice to the Claimant for not allowing his religious discrimination claim to proceed. I also reject the Respondents' *res judicata* argument. While Mr Deakin was involved in the Original Tribunal Claim, that claim was not about the Claimant's suspension, and therefore none of the issues in the Suspension or the Dismissal Claims have been finally determined by the tribunal adjudicating the Original Tribunal Claim. To the extent in the Original Tribunal Claim the tribunal made findings of facts, which might be relevant for the purposes of the Suspension and/or the Dismissal Claims, the tribunal hearing those claims will be bound by those, but that it is not the same as to say that there was the final determination of the Claimant's complaint related to his suspension.
68. Nevertheless, considering that the Claimant has brought a claim related to his suspension on 21 December 2020, and, on his own case, by Christmas 2020 had all necessary information to make a complaint of religious belief discrimination, but waited a further seven months before doing that, the Claimant must have much stronger reasons to show that it is just and equitable to extend the time. In these circumstances, the prejudice to the First Respondent of having to deal with this additional complaint and potentially having to call more witnesses, in my judgment, is sufficient to tilt the balance of prejudice test in favour of the First Respondent.
69. Accordingly, I find that it will not be just and equitable to extend the time, and the Claimant's claim for discrimination on the grounds of religious belief shall be struck out.
70. Given my decision on the jurisdiction point, I do not need to consider the alternative strike out/deposit order applications in relation to this claim.

### Application 2

71. As with the first Application, the first issue is whether the Claimant's claim against the Third Respondent was brought in time.

72. The Claimant claims that the Third Respondent contravened s.111 and s. 112 EqA by reviewing the Claimant's suspension and finding it appropriate and by giving "*credence to the Suspension Risk Assessment in his report*". The Claimant says that by these actions and omissions the Third Respondent "*aided and abetted the continuation of my unlawful suspension by deliberately not pointing out that [the statements in the Suspension Risk Assessment] were false and that the Suspension Risk Assessment was incomplete*".
73. The Third Respondent completed his report on 10 December 2020, concluding that the Claimant's suspension was appropriate in the circumstances. It was known to the Claimant. In fact, prior to the completion of the report, on 6 December 2020, the Claimant wrote to the Third Respondent arguing that his suspension was unlawful and drawing his attention to case-law authorities on the point.
74. However, the Claimant made no claims against the Third Respondent in his Suspension Claim, lodged on 21 December 2020. He did not seek to add him as a respondent to his Suspension Claim and only made a claim against him in his Dismissal Claim, lodged on 14 July 2020, over seven months after the alleged contravention of the s.111 and s.112 of the Equality Act by the Third Respondent.
75. The Claimant says that was a continuing act of the Third Respondent of not intervening and allowing the suspension to continue until the Claimant's dismissal and therefore his claim was brought in time. He argues that the Third Respondent had delegated powers from the First Respondent, and therefore it was within his powers to intervene and stop the suspension, and by not doing that he continued the unlawful act of suspension.
76. The Respondents argue that [the Third Respondent's] *decision-making as regards the Claimant's disciplinary process was complete by the date he finalised his investigation report, on or around 10 December 2020*".
77. In deciding the time limit issue, I must consider the nature of the claims that are being pursued against the Third Respondent. These are claims under s. 111 and s. 112 of the Equality Act 2010.
78. S. 111 prohibits "*instructing, causing or inducing contraventions*", s. 112 prohibits to "*knowingly help*" another person to contravene the relevant Parts of the Equality Act 2010.
79. While I accept that producing a report, which state that the suspension was appropriate could be said (subject to all other relevant requirements being met) to be "*causing or inducing*" and perhaps "*knowingly helping*", I reject the notion that not intervening later to stop the suspension can equally be held to be "*instructing, causing or, inducing*". In my judgment to trigger "*instructing, causing or inducing*" provisions some active element is required on the part of person A, and a simple passivity, even when person A has authority to act and



can change the state of affairs, is not sufficient to amount to “*instructing, causing or, inducing*”.

80. I find (see paragraph 9797(iv) below) that “helping” does not necessarily require an active element. However, having decided that the suspension was appropriate, the Third Respondent has done the alleged act of “helping”, and his then continued inaction was a mere and obvious consequence of his decision on the Claimant’s suspension, and not cannot be viewed as a separate and distinct omission from his initial act.

81. In any event, even if it can be said that the subsequent omission to intervene could be “causing”, “inducing” or “knowingly helping”, under s. 123(3)(b) of the Equality Act 2010 “*failure to do something is to be treated as occurring when the person in question decided on it.*” Subsection (4) states:

*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.*

82. On the Claimant’s own case, the Third Respondent should have stopped his suspension, but instead in his report he found it appropriate. Therefore, it can be concluded, taking the Claimant’s case at its highest, that the Third Respondent decided not to act on or before 10 December 2020.

83. His subsequent inaction, in terms of not stopping the Claimant’s suspension, was consistent with his decision that the suspension was appropriate. Accordingly, under s.123(3)(b) the three months’ limitation period started on 10 December 2020. It follows that the Claimant’s claims against the Third Respondent are out of time.

84. For the same reasons I find that the Claimant’s claim that the Third Respondent’s alleged breaches of s.111 and s.112 EqA was a continuing act has no reasonable prospect of success.

*Is it just and equitable to extend the time limit?*

85. The Claimant did not provide any satisfactory explanation why he did not bring his claims against the Third Respondent earlier. He had all necessary information to bring these claims in his Suspension Claim. It appears the Claimant is familiar with discrimination laws and even before the Third Respondent completed his report, the Claimant had done some legal research and was quoting various legal authorities to the Third Respondent in support of his contention that the suspension was unlawful.

86. There is a clear prejudice for the Third Respondent to allow the claims against him to proceed. He will have to defend the proceedings as a respondent. The Third Respondent is not an employee of the First Respondent. The claims are against him personally and the liability under s.111 and s.112 is personal.

87. On the other hand, the Claimant's primary claim of victimisation, including in relation to his suspension, against the First Respondent remains unaffected. The First Respondent intend to call the Third Respondent as a witness and the Claimant would be able to cross-examine him in advancement of his victimisation claim.
88. For these reasons, I find that the balance of prejudice lies in favour of the Third Respondent, and it will not be just and equitable to extend the time. It follows that the Claimant's claims against the Third Respondent must be struck out as being brought out of time.
89. Having struck out the Claimant's claims against the Third Respondent, I shall now need to consider whether there are any other issues between the remaining parties and the Third Respondent within the jurisdiction of the employment tribunal, which it is in the interest of justice to have determined in the proceedings.
90. While, under s.110 EqA an agent of his principal can be sued alongside the principal for acts of discrimination/victimisation, the Claimant specifically framed his claims against the Third Respondent under s.111 and s.112 EqA. In any event, to the extent it can be argued that the First Respondent and the Third Respondent having joint and several liability for the alleged victimisation by continued suspension, there are no evidence to suggest that the First Respondent would not be able to meet any resulting liabilities. The First Respondent does not advance the "reasonable steps" statutory defence under s.109(4) EqA in respect of the Third Respondent.
91. In these circumstances, I find that there are no issues between the remaining parties and the Third Respondent within the jurisdiction of the employment tribunal, which it is in the interest of justice to have determined in the proceedings. Accordingly, the Third Respondent is removed as a party.
92. Given my decision, on the jurisdiction point, I do not need to consider the alternative strike out/deposit order applications in relation to this claim. However, because the issues were extensively argued in front of me, and more importantly - because my conclusions are equally applicable to the claims against the Second Respondent (which are subject to Application 4), I shall give my conclusions on the merits of the Respondents alternative strike out arguments.

Section 111 EqA claim

93. The Respondents argue that the Claimant's claim under s.111 EqA against the Third Respondent have no reasonable prospect of success because:
- (i) The Claimant will not be able to establish that the continuation of his suspension was unlawful under the Equality Act.

- (ii) The Claimant will have to show that the Third Respondent “*instructed, caused or induced*” the continuation of his suspension (and not the suspension itself, which was not the Third Respondent’s decision), and simply finding that the suspension was appropriate cannot be said to be “instructing, causing or inducing” the continuation of the suspension, because the suspension was already continuing and the Third Respondent did not cause that state of affairs – he simply reviewed it; and
- (iii) Under s.111(7) EqA the Third Respondent must be Ms Hayde’s employer, and he is not.

94. Dealing with each argument in turn:

- (i) Whether or not the original decision to suspend and the continuation of suspension were acts of victimisation is something for the tribunal to determine at the full merits hearing. It is not sufficient for the Respondents to simply assert that the Claimant will not be able to prove his case as the basis for a strike out application.
- (ii) I find that producing an investigation report, which states that the suspension was appropriate, and therefore if not expressly, certainly implicitly confirming that it is appropriate for the suspension to continue, can reasonably be argued to be acts of “causing” or “inducing” the continued suspension. Probably it will not satisfy the natural meaning of “instructing”.  
Further, the fact that the suspension was the then state of affairs is no answer. The task of the Third Respondent was to review the appropriateness of the suspension and tell the First Respondent whether, in his view, it could continue. Therefore, if the Third Respondent’s decision that the suspension was appropriate caused or induced the First Respondent to continue with the suspension, the fact that the First Respondent might have committed a prior act of victimisation by placing the Claimant on suspension in the first place, does not mean that the Third Respondent could not be liable under s.111 for his subsequent action.
- (iii) s.111(7) states: “*This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B*”. A is the Third Respondent. The Respondents suggests that this section require the Third Respondent to be the employer of Ms Hayde, the First Respondent’s Head of HR to whom the Third Respondent addressed his report. I disagree. I find that s.111(7) is broader, and the Third Respondent, being an outside HR consultant brought in by the First Respondent to provide a service and acting as an agent of the First Respondent, was in a position to commit a basic contravention in relation to Ms Hayde, for example by an act of sexual harassment or direct discrimination, for which the First Respondent would be liable under s.110 EqA.

It would be a curious outcome if s.111 was only effective if it is the employer itself that “*instructs, causes or induces*” a person to commit a basic contravention, but not, for example, an employee or an agent of the employer. Given that s.111 introduces personal liability, the requirement for person A to be the employer of person B for the section to apply will make it largely ineffective.

The EHRC Employment Code states (***my emphasis***): “*For the Act to apply, the relationship between the person giving the instruction, or causing or inducing the unlawful act, and the recipient must be one in which discrimination, harassment or victimisation is prohibited. **This will include employment relationships, the provision of services and public functions, and other relationships governed by the Act.***”

95. For these reasons I would have concluded that the Respondents’ application to strike out the Claimant’s s.111 EqA claim or make a deposit order must fail.

Section 112 EqA claim

96. The Respondents submit that this claim against the Third Respondent has no reasonable prospect of success and must be struck out because:

- (i) The Claimant will not be able to establish that the continuation of his suspension was unlawful under the Equality Act 2010;
- (ii) The Claimant failed to specify who person B is and therefore the elements of the claim are not made out;
- (iii) “helping” requires an active element and a mere omission to act does not suffice; and
- (iv) in any event, a person cannot help another to do something, which has already been done.

97. I shall deal with each argument in turn.

- (i) As with respect to s.111, the first argument, without more, is not sufficient to show that the Claimant has no reasonable prospect of success;
- (ii) Although the Claimant did not specifically name person B, reading his Grounds of Claim it is apparent that person B is the First Respondent. The Claimant complains that the Third Respondent being given the task to review his suspension should have realised, as an HR professional, that the suspension was unlawful under the Equality Act, but yet found it appropriate, thus helping the First Respondent to continue with the unlawful suspension.
- (iii) The EHRC Employment Code states that ‘help’ should be given its ordinary meaning, and that help given to someone to discriminate,

harass or victimise will be unlawful ‘*even if it is not substantial or productive, so long as it is not negligible*’ —para 9.27.

The Respondents rely on the judgment in **Hallam v Avery** [2001] UKHL 15, in which Lord Millett held that “*aiding requires a much closer involvement in the actual act of the principal than do either encouraging or inducing on the one hand or causing or procuring on the other*”. They also referred me to **Anyanwu & Anor v South Bank Student Union & Anor** [2001] UKHL 14, a case decided under the predecessor legislation to ss111-112 EqA, being ss30-33 of the Race Relations Act 1976, in which Lord Hope of Craighead said that in interpreting the section “[..] requires that the facts be examined to provide the answers to two questions: (i) what was the act done by the other person which was made unlawful by the Act? (ii) did the act which is in question aid the other person to do that act?”.

I, however, find that these cases are of little assistance. **Anyanwu** dealt with s.112 of the Race Relation Act 1976, and the wording of the relevant provisions are very different: “*who knowingly aids another person to do an act made unlawful by this Act*” in RRA 1976 vs. “*must not knowingly help another (B) to do anything which contravenes*” EqA.

Where the former provision does suggest that there must be an act by person B, which act was assisted by person A, s.112 in the Equality Act has a very different linguistic construction: “*to do anything which contravenes*”. In my judgement the wording is broad enough to include person B failing to act, where such failure contravenes the relevant Part of the Equality Act.

Furthermore, while “aiding” might suggest a closer and more active involvement in the unlawful act than “encouraging” or “inducing”, I find that the natural meaning of the word “help” does not require such active or close participation in the unlawful act. If what is done or not done by person A makes it easier for person B to contravene the relevant Parts of EqA, that should be sufficient to engage s.112 of EqA, subject, of course, to person A doing or not doing that knowingly.

- (iv) Finally, I do not accept that “help” cannot be given after the initial act resulting in a particular state of affairs has been done. Help to further a particular state of affairs, namely the continuation of the suspension, is also a form of help. If the continuation of the suspension was unlawful and the Third Respondent knowing that, found the suspension was appropriate, by doing that, he made it easier for the First Respondent to continue with the unlawful suspension in contravention of the Equality Act, and therefore has “helped” the First Respondent to continue to contravene the Equality Act.

98. For these reasons I would not have struck out the Claimant’s s.112 EqA claim against the Third Respondent or made a deposit order.

Application 3

99. In **Oni v Unison Trade Union** [2018] ICR 1111, it was held that the Tribunal does not have jurisdiction to hear breach of contract claims against anyone other than the employer. While that decision was with respect to a claim against the claimant's trade union under her contract of membership, the EAT conclusion on the construction of the Order appears to apply to claims for breach of contracts against other potential respondents, who are not the employer of the claimant.
100. It is common ground that the Second Respondent was not at any material times the Claimant's employer. Therefore, the tribunal does not have jurisdiction to hear the Claimant's breach of contract claim against the Second Respondent and it must be struck out.
101. In any event, I find that the Claimant's breach of contract claim has no reasonable prospect of success against the Second Respondent, as taking it at its highest, it falls far short of showing that there was any legally binding contract between the Claimant and the Second Respondent upon which a claim for breach of contract can be founded. A mere alleged promise by the Second Respondent at the start of the disciplinary hearing to provide to the Claimant the disciplinary outcome within 7 days of the disciplinary hearing is not sufficient to establish a legal contract. The usual elements of offer and acceptance, consideration, and intention to create legal relations are plainly absent.

Application 4

102. Dealing with the remaining claims against the Second Respondent. The Claimant brings s.111 EqA and s.112 EqA claims against him. At the preliminary hearing on 28 October 2021, it was clarified that for the purposes of s. 111 EqA "the act" complained about was the Claimant's dismissal, and for the purposes of s.112 EqA "the unlawful action" complained about were (1) the condoning of the suspension of the Claimant and (2) the subsequent dismissal of the Claimant.

Section 111 claim

103. The Claimant claim that the Second Respondent "induced" his unfair dismissal. However, s.111 only operates in respect of a "basic contravention", that is a contravention of a relevant Part or a section of the Equality Act. It does not operate in relation to contravention of other statutes, for example s.94 of the Employment Rights Act 1996 (the right not to be unfairly dismissed). Therefore, that part of the Claimant's claim has no reasonable prospect of success and must be struck out.
104. However, the Claimant also claims that his dismissal was unlawful under the Equality Act because, he claims, it was an act of victimisation. He claims that the Second Respondent recommended his dismissal thus inducing a basic contravention.

105. The Respondent submits the same arguments why the Claimant's s. 111 EqA claim has no reasonable prospect of success as with respect to the Third Respondent (see paragraph 93 above). For the same reasons as set out in paragraph 94 I reject the Respondents' submissions.

Section 112 claim

106. The Claimant claims that in his dismissal letter the Second Respondent "condoned" the use of part of the Claimant's testimony at the remedy hearing in the Original Tribunal Claim in the decision to suspend the Claimant and decided that the Claimant's actions, which the Claimant claims were legitimate actions in pursuit of exemplary and aggravated damages, was gross misconduct.
107. Therefore, the Claimant submits, the Second Respondent "*aided and abetted the unlawful action under the Equality Act 2010, thereby breaching section 112 of the Equality Act*".
108. With respect to the "condoning" the Claimant's suspension, I find that this allegation has no reasonable prospect of success, because the Second Respondent was not involved in the decision to suspend the Claimant, nor in the Third Respondent's decision that the suspension was appropriate, and the Claimant did not argue otherwise. Therefore, the Second Respondent could not have "knowingly helped ...to do anything that contravenes" the statute, in so far as it relates to the initial decision to suspend or the continuation of the suspension.
109. The Claimant pleaded case is that the Second Respondent "*in his Outcome of Disciplinary/dismissal letter condoned*" [the suspension]. He complains that the Second Respondent found that the suspension was not an act of victimisation or otherwise unlawful. The relevant part of the dismissal letter reads:

*Your suspension was not [victimisation], in our view, because you gave evidence at the Employment Tribunal. Something you said during your evidence was a factor (and by no means the only factor) taken into account when considering suspension. Therefore, based on our belief that all relevant factors and evidence were taken into account, we do not consider that your suspension was an act of victimisation.*

...

*The suspension was carried out after due consideration, it was not a knee-jerk reaction, it was in line with the disciplinary procedure and it was reviewed by Elspeth at appropriate intervals. You were also assured in your suspension letter that the act of suspension was not intended to be punitive. We do not, therefore, agree that the suspension was either unlawful or a breach of the implied term of trust and confidence.*

110. However, by that letter the Second Respondent, acting on behalf of the First Respondent, dismissed the Claimant, which dismissal brought the

Claimant's suspension to an end. Therefore, it cannot be said to be an act of "*knowingly helping*" the continuation of the suspension.

111. In his skeleton arguments and in the oral submissions at the hearing, the Claimant attempted to expand his s.112 claim against the Second Respondent in relation to the suspension, submitting that at the end of the disciplinary hearing on 20 January 2021, the Second Respondent "extended" his suspension and "instructed" the First Respondent to continue the suspension. This, however, has never been part of the Claimant's claim against the Second Respondent until this preliminary hearing. Neither before, nor at the hearing, did the Claimant make any application to amend his claim. I, therefore, do not accept that his pleaded case against the Second Respondent includes that new allegation.
112. With respect to the decision to dismiss the Claimant the same considerations arise as with respect to the s.111 claim. The Claimant claims that by finding the Claimant guilty of gross misconduct and recommending his dismissal, the Second Respondent helped the First Respondent to contravene the Equality Act. It appears to me a perfectly legitimate, albeit a rare, claim to make.
113. The Respondents arguments why it must be struck out are the same as with respect to the Third Respondent (see paragraph 96) and for the same reasons I dismiss them (see paragraph 97).
114. It follows that the Claimant's s.111 and s.112 claims against the Second Respondent with respect to his dismissal (being a detriment because of a protected act under s.27 EqA) shall proceed to be determined at the full merits hearing. All other claims against the Second Respondent are struck out, as having no reasonable prospect of success.

#### Application 5

115. The Respondents apply to have the Claimant's claim for breach of contract made in his Suspension Claim struck out, because the Claimant's claim is for recovery of damages in respect of personal injury and under Article 3 of the Order, employment tribunal does not have jurisdiction to consider such claims.
116. The Claimant claims that his suspension was in breach of the implied term of trust and confidence. It is, however, unclear what remedy he seeks. The Respondents say that it is a claim for personal injury because the Claimant claims that the alleged unlawful suspension caused him "stress and anxiety and physical ill health". However, reading the Particulars of Claim, it appears that the Claimant complains that in deciding to suspend him the First Respondent "*showed no regard for [his] health and safety; in particular in light of recorded health issues and .....work related stress and anxiety*". He, however, does not expressly state what remedy he is seeking.



117. At the hearing the Claimant confirmed that he had suffered no financial loss due to the suspension. He also said that he was not a lawyer and did not know what remedy he could claim, and that he would leave it to the tribunal to decide. In his skeleton argument he appears to be making a case that in suspending him, the First Respondent has failed the common law test of duty of care and therefore was negligent. He then argues that it is not reasonable to be negligent, and therefore the First Respondent does not pass the reasonableness tests in **British Homes Stores Ltd v Burchell** [1978] UKEAT/108/78. The latter argument might be relevant to his unfair dismissal claim, but not to the issue in Application 5.
118. Therefore, it appears that the claimant claim is either a contractual claim for recovery of damages in respect of personal injury or a claim in tort for recovery of non-pecuniary damages caused by the alleged negligence. In either case such claims are not judicable in employment tribunals.
119. Furthermore, if his claim is for breach of contract, he had brought it before the effective date of termination of his contract of employment. Under Article 7 of the Order contractual claims must be made within the period of three months beginning with the effective date of termination of the contract giving rise to the claim. In **Capek v Lincolnshire County Council** 2000 ICR 878, CA, the Court of Appeal confirmed that an employment tribunal does not have jurisdiction to hear a claim for breach of contract if it is presented *before* the effective date of termination of the employee's contract of employment.
120. For these reasons the claimant's claim for breach of contract against the First Respondent in his Suspension Claim is struck out.

Claimant's application

121. On 20 October 2021 the Claimant applied to add Ms Hayde and Mr Gray to the proceedings as respondents. In support of his application the Claimant submits that: *"Jeremy Gray and Elspeth Hayde played a significant role in the unfair dismissal /discrimination against me. The First Respondent (Evolve Housing + Support) may seek to argue that they took all reasonable steps (e.g. hired an independent HR consultant) to prevent Mr Gray's and Ms Hayde's wrongdoing and thus absolve themselves from legal culpability. (N.B. I have made serious allegation against the HR consultant (Luke Watkeys) hired by the First Respondent and have included the HR consultant (Luke Watkeys) as a Respondent for similar reasons.) Therefore, in the interest of justice, it makes sense that Mr Gray and Ms Hayde also be Respondents in their own right"*.
122. The Claimant also suggested that adding Ms Hayde as respondent would allow him to pursue s.111 EqA claim against her. However, he made no application to amend his particulars of claims to include such new claim. He does not say that he intends to pursue s. 111 or s. 112 EqA claims against Mr Gray.

123. Finally, he says that he is not seeking to amend any facts in his claims, and the amendment will not cause any additional burden to the tribunal or the added respondents, who are scheduled to appear at the tribunal in any event.
124. In his skeleton arguments the Claimant supplemented his application by submitting that there was a risk that Ms Hayde and Mr Gray, if not added as respondents, may not appear at the tribunal (which seem run contrary to his earlier “no additional burden” argument), and he would not be able to cross-examine them. He also argued that there was a risk of him being threatened with a defamation lawsuit if Ms Hayde and Mr Gray were not named as respondents and therefore “*not technically personally legally guilty*”.
125. The Respondents resist the application on the following grounds:
- (i) No ACAS conciliation against either of them has been undertaken;
  - (ii) Both are employees of the First Respondent and will appear as witnesses,
  - (iii) The First Respondent will not be running “the statutory defence” in respect of either of them;
  - (iv) The Claimant failed to give any reason for not naming them as respondents in his Suspension Claim or the Dismissal Claim;
  - (v) He does not explain what claims he seeks to bring against Mr Gray;
  - (vi) The intended s.111 EqA claim against Ms Hayde is bad because it was Ms Hayde, who decided to suspend the Claimant and therefore could not have “instructed, caused or induced” his suspension.
  - (vii) There is no prejudice to the Claimant for not having Ms Hayde or Mr Gray as respondents, and there will be a considerable prejudice to them if they were to be added to the proceedings.
126. The key question is whether there are any issues between the Claimant and Ms Hayde and Mr Gray within the jurisdiction of the tribunal which will be in the interest of justice to have determined the proceedings.
127. Although the Claimant in his Suspension Claim makes various allegations against Ms Hayde and Mr Gray personally, he did not name either of them as respondents. I do not accept the explanation, he gave at the hearing, that he did not know he could do that. It appears he has done some legal research before lodging his Suspension Claim. Also, he would have acquired some familiarity with the tribunal procedure during his Original Tribunal Claim. In any event, by December 2020, when he lodged his Dismissal Claim naming Mr McGrath and Mr Watkeys as respondents, he would have known that he could pursue a discrimination type claim against individual respondents. He, however, did not name Mr Gray or Ms Hayde in the Dismissal Claim, nor did he apply to add them to the Suspension Claim until 20 October 2021. He could not provide any satisfactory explanation for that delay.
128. The First Respondent is not running the statutory defence with respect to Ms Hayde or Mr Gray. There is no evidence to suggest that if the Claimant’s claim succeeds, the First Respondent will not be able to meet any resulting liability. Both will be appearing as witnesses. The claimant makes no separate

claims against Mr Gray. He alluded to wishing to pursue s.111 EqA claim against Ms Hayde, but made no application to amend. Any such future application is unlikely to succeed under the **Selkent** principles (see paragraph 19), and the claim most likely be liable to be struck out as having no reasonable prospect of success.

129. The balance of prejudice clearly lies in favour of Ms Hayde and Mr Gray. If they are added to the proceedings at this late stage, they will have to defend the claims dating back to September/October 2020. On the other hand, for the reasons explained above, the Claimant will suffer no prejudice in not having them as respondents in the proceedings. The Claimant's suggestion that he would be at risk of a defamation claim if Ms Hayde and Mr Gray were not added as respondents seems to be borne out misunderstanding of the defamation laws. In any event, it is not a relevant consideration for this tribunal.

130. For these reasons, I do not see how the interests of justice will be served in having Ms Hayde or Mr Gray added as respondents to the proceedings. It follows that the Claimant's application fails and is dismissed.

### **Next steps**

131. In light of my decision on the parties' applications, the parties must liaise to agree on the final list of issues to be discussed at the case management hearing scheduled for 12 May 2022. The parties should also discuss further directions the tribunal will be asked to make at the next preliminary hearing.

**Employment Judge P Klimov**

12 March 2022

Sent to the parties on:

14<sup>th</sup> March 2022

For the Tribunal:

.....