**Case Number: 1306691/2019**

# EMPLOYMENT TRIBUNALS

Claimant Respondent

**Mr A Rehman** -v- **DHL Services Limited**

# PRELIMINARY HEARING

Heard at: **Centre City Tower, Birmingham**

On: **14 October 2020**

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

**Appearances**
For the Claimant: **in person**
For the Respondent: **Ms V Brown (counsel)**

# JUDGMENT

1 The claimant was not a person with a disability within the meaning of section 6 Equality Act 2010 at the material time.

2 The claimant's application to amend his claim is refused.

3 The claim is listed for a telephone case management discussion at 2:00 pm on 17 February 2021 before any judge sitting alone to identify any issues that remain to be determined and if so, the means by which they shall be addressed.

A notice of hearing shall follow.

# REASONS

*These reasons are in 16-point font by virtue of the claimant's request for documents to be prepared in large point fonts.*

*References in square brackets below are to the page of the bundle and those in semi-circular brackets to the paragraph of these reasons.*

4 This hearing arises from an order of Employment Judge Meichen made at a case management hearing conducted on 15 July 2020 at which the claimant and Ms Brown were both in attendance. It was listed to address:-

> *'A. Was the claimant a disabled person within the meaning of s.6 Equality Act 2010 (EqA) at all material times for the purpose of his claim.*
>
> *B. Does the claimant require permission to amend to proceed with any of his claims, and if so, should permission be granted.*
>
> *C. Case management including listing a final hearing.'*

5 As to 'A' the impairments relied upon are

5.1 (bi-lateral) keratoconus (an eye condition),

5.2 chronic jaw pain (although the claimant states this is actually a temporo-mandibular joint disfunction ('TMJ')), and

5.3 mental health conditions (stress/anxiety/depression).

6 The respondent accepts they are impairments but not that they had a substantial (that is a non-trivial) adverse effect on the claimant's ability to carry out normal day-to-day activities and even if that was so that any substantial adverse effect was not long term which requires:-

> *"(a) it has lasted for at least 12 months,*
>
> *(b) it is likely to last for at least 12 months, or*

*(c) it is likely to last for the rest of the life of the person affected."* [1]

7 The time at which to assess whether there is a substantial adverse long-term effect on normal day-to-day activities is the date of the alleged discriminatory act [2].

8 As to the meaning of *"likely"* Appendix 1 of the Code follows the ratio of the pre Equality Act 2010 (EqA) authority in *SCA Packaging Ltd v Boyle [2009] ICR 1056* where the House of Lords unanimously approved the meaning of *'likely'* in this context was "*could well happen"* in preference to *"probable"* or *"more likely than not"*

9 As to substantial this is defined in s. 212(1) EqA as than minor or trivial. Section B of the Guidance refers (as do paragraphs 8-10, of Appendix 1 of the Code). In particular paragraph 10 reminds us an impairment may not prevent someone from undertaking a task, but they may suffer pain in so doing, cause greater fatigue or prevent the task being repeated.

10 The EAT in *Aderemi v London and South Eastern Railway Ltd UKEAT 0316/12* [14] Langstaff P presiding, approved decisions of different divisions in *Paterson v Metropolitan Police Commissioner [2007] IRLR 763,* and *in Chief Constable of Dumfries & Galloway Constabulary v Adams [2009] IRLR 612,* and in so doing gave guidance on the meaning of substantial adverse effect in the definition in s. 6(1)(b) of the Equality Act 2010:-

10.1 the Tribunal has to consider whether there is an adverse effect upon his or her *ability* to carrying out normal day-to-day activities;

[1] Paragraph 2 Schedule 1 EqA
[2] *Cruickshank v VAW Motorcast Ltd [2002] ICR 729*

10.2 in doing so a Tribunal must necessarily focus upon that which a Claimant maintains he or she cannot do as a result of his or her physical or mental impairment. That is because section 6 refers to the effect being adverse.

11 Ms Brown reminded me (and I explained and took the claimant to) the following points:-

11.1 In considering substantial adverse effect, medical treatment which reduces or extinguishes the effects of the impairment and but for that treatment it would be likely [3] to have that effect the impairment is to be treated as having a substantial adverse effect unless in the case of a person's sight the impairment can be corrected by the use of spectacles, contact lenses or in other ways as may be prescribed [4].

11.2 Account should be taken of the degree to which a person can reasonably be expected to behave in such a way that the impairment ceases to have a substantial avoidance strategy and thus overestimating their ability [5] - 'B7 … *In some instances, a coping or avoidance strategy might alter the effects of the impairment to the extent that they are no longer substantial and the person would no longer meet the definition of disability. In other instances, even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities'.*

12 The Code of Practice issued by the Equality and Human Rights Commission ("the EHRC Code") provides:

> *"2.18. [Sch. 1, para. 6] Cancer, HIV infection, and multiple sclerosis are deemed disabilities under the Act from the*

[3] In this context that is to be read as may well happen
[4] para. 5, Sch. 1 EqA
[5] paras B7 and B9 of the Guidance

*point of diagnosis. In some circumstances, people who have a sight impairment are automatically treated under the Act as being disabled."*

13 Whilst the claimant forwarded a factsheet from the RNIB [75-78] essentially that refers to certification. The forms of sight impairment deemed to fall within the definition of disability include persons who are certified as blind, severely sight impaired, slight impaired or partially sighted by a consultant ophthalmologist are deemed to have a disability [6]. The claimant was not able to take me to any such certification. Nor has he applied for and been granted any form of disability benefits because of his sight impairment or other disabilities.

14 Those deeming provisions aside the issue whether there is or was a disability as defined is one for the tribunal rather than for doctors [7] and the onus is on the claimant to prove that, in the relevant period, he was disabled for the purposes of the Act.

15 Whilst the claimant alleges that the material times for his complaints was between December 2018 or January 2019 and April 2019 Ms Brown commendably accepts that the material time is for a longer period extending until the claimant's engagement was terminated on 27 August 2019. That being so I treated the material time as between the longest extent of those dates namely December 2018 and August 2019.

16 As to 'B' a potential application to amend to bring a claim under the agency worker's regulations identified Employment Judge Meichen not having been pursued, the respondent was ordered to identify which of the complaints it argued the

[6] Equality Act 2010 (Disability) Regulations 2010 SI 2010/2128 (re-enacting the Disability Discrimination (Blind and Partially Sighted Persons) Regulations 2003)
[7] *Abadeh v British Telecom plc [2001] IRLR 23.*

claimant required permission to amend. They were confirmed before me and I list them below at [74].

## *Background*

17 The claimant suffered an accident in 2014 as a result of which he had a plate inserted in his jaw. The plate and screws was removed via an operation in 27 June 2018 (see (0)). On 17 September 2018 [117] the claimant was involved in another road traffic accident (the RTA) that gave rise to the claimant suffering a head injury.

## *The Evidence*

18 The claimant was cross examined on the contents of two impact statements were provided by him dated March and August 2020 [81-82] and [83-197] respectively.

19 I was also referred to various medical reports and letters (some of which appear to have been prepared for a civil claim arising out of the RTA):-

19.1 A letter from Mr P McDonnell Consultant Ophthalmic Surgeon addressed to whom it may concern dated 02/05/2012 [88]

19.2 A letter from Suaad Alasow, an Optometrist at Birmingham Midland Eye Centre dated 03.06.20 [89]

19.3 A report from Mr Bernard Speculand an Oral and Maxillofacial Surgeon 12/07/17 [91-100 and attachments 101-113] and a follow up report dated 1/10/19 [114-125 plus attachments thereafter]

19.4 Letter Mr Kevin Macmillan Oral and Maxillofacial consultant 20/05/19 [139-140]

19.5 A report from Dr Marc Whittington an independent consultant psychiatrist dated 10/02/20 [145-168]

19.6 An undated Birmingham Healthy Minds Patient self-assessment form (GAD7 Anxiety Test/PHQ7 Depression/IAPT Phobia/work and social adjustment scales) [169-170]

19.7 A report from Dr K Misra, a chartered clinical psychologist dated 28/04/20 [171-195 plus appendices]

19.8 The claimant's GP records [205-214] and

19.9 Additional documents added by the claimant to bundle shortly before the hearing that were not objected to by the respondent 215-218

## *The Disability Issue(s)*

*Keratoconus*

20 The respondent argues is no substantial adverse effect on day-to-day activities as the claimant does not purport to experience any particular adverse effects when wearing contact lenses [8].

21 The claimant told me he has suffered from bilateral keratoconus for more than 10 years and it is a lifelong condition. He has been offered a corneal transplant but has not taken up that offer because of the risk of post infection.

22 He told me he wears a contact lens in only one (the left) eye because of scarring in the other (right) eye and can only wear that for approximately 10 hours a day. At another point the claimant told me he ***struggled*** to wear a lens in right eye. That second statement is a different to an assertion that there was no medical benefit in him wearing a contact lens in his right eye or that that was medically impractical or ineffective due to the scarring for him to wear one.

[8] Schedule 1 paragraph 5(3)(a) Equality Act 2010

23 As to the length of time he could wear the contact lenses for he did not tell me that he could not wear them for longer than 10 hours because his eye needed to breathe (again he took me to no medical evidence suggesting he had been advised not to do that) and at another point that the eyes became sore wearing the lens for longer than 10 hours.

24 He told me that because his lenses have previously fallen out he does not ride a bike or play football and because of the risk of infection does not shower or sleep in them (and he orally told me he did not swim or indeed iron clothes either). He told me he is liable to eye infections if water gets in his eye(s).

25 In contrast he told me it was difficult to iron even with his contact lens(es) in and similarly to do things such as make tea.

26 He told me he has difficulties with his vision at night and uses a magnifier to read and did so before me, although as Ms Brown pointed out, it appeared he could read the document without the same. He did not seek to dispute that.

27 He also told me he does not use public transport and his car has parking sensors/a camera for reversing and bigger mirrors which can enlarge. He took me to no supporting evidence that suggests those revisions have been recommended by a medical practitioner. I say that because he told me his ophthalmologist has advised him not to drive at night if he is not confident. That is very different to him not being advised not to drive at night at all.

28 I remind myself of the point made in paragraph 5(3)(a), Sch. 1 EqA that something more was required other than the need to wear contact lenses alone and the fear of them falling out and absence of any medical evidence concerning a prohibition on swimming and ironing.

29 I asked the claimant to take me to any medical evidence that supported those being recommendations made by medical or other professionals rather than matters that stemmed from choices he made. He could not. Given that many sportspeople wear contact lenses and that includes participants in very physical sports such as rugby that reinforces the point made in paragraph 5(3)(a).

30 A wider point however the respondent makes concerns the claimant's credibility and the weight I should give to his evidence. The minor differences in his account that I highlight above aside, within his impact statement the claimant states he finds it hard to drive at night. Despite it being in the claimant's interests to give full account of the effects of any impairment in the various medical reports (given they were obtained to support a claim following the RTA) no mention of that is made in any despite his sight being discussed at length in those reports and indeed Dr Misra indicates the opposite (see (54)).

31 I return to the other inconsistency and credibility issues the respondent raises below.

*The TMJ/jaw pain*

32 The claimant asserts that whilst this dates back to the initial accident in 2014 since his operation in 2018 (which had been recommended because the claimant was experiencing referred discomfort from the plate and screws) the claimant alleges he was not able to eat properly [207] and as a result stated he did not go to restaurants because he could chew and drink from cups, people laughed at him when he was eating and had lost sensation and experienced a burning feeling on the left side of his face.

33 Dr Speculand in October 2019 describes the way the claimant relayed the effects to him. In addition to the matters the

claimant told me about above Dr Speculand indicated the claimant told him that he had difficulties with his speech and voice. Dr Speculand detected no effect on the claimant's speech in October 2019 [121]. Whilst that is not a medical diagnosis (for the reasons Dr Speculand gives) I can take that into account as a contemporaneous record of fact.

34 The loss of sensation the claimant describes to me and Dr Speculand (60%) was broadly consistent with Dr Speculand's own subjective rating of 50-60% [120] and Dr Speculand records that the claimant described loss of sensation as a numbness that was intermittent and when present was like a pins and needles feeling [119-121].

35 Dr Speculand also recorded the fractures had healed "extremely well" and there was "no evidence of any arthritis or degenerative change at either TMJ" [120] and joint clicks, locking and potential for pain [122] is minor or trivial.

36 That latter point is reinforced by Dr Speculand's assessment using the standard scoring system for TMJ as 2 on a scale of (0 to) 5 (being the most severe) [122 point 9].

37 Yet the claimant described the pain as chronic and that was also the way it was recorded by Drs Misra (28/04/2020) [188] and Macmillan (20/05/19) [117] (who also described it as long term), a GP (8 May 2019) [210] and a pharmacist at his GP surgery in his GP notes (30 October 2019) [212].

38 I remind myself that some but not all of those notes recording chronic pain fall within the material time.

39 Whilst Dr McMillan [139] and Dr Speculand also supported the claimant's assertion that his ability to open his mouth was reduced [121 point 8] Dr Speculand indicated that the cause appeared to be poor dental hygiene (that something that was

also highlighted prior to the second operation in June 2018) and advised if dental hygiene was maintained, there was a 66-75% prospect of permanent cure [122]. If that was unsuccessful, he indicated a non-surgical treatment, namely use of a soft mouth guard for 3-6 months which would in turn have a 75% chance of resolving the problem. Dr Speculand thus characterised the problem as chronic gingivitis [120] and likened the TMJ to a sprained jaw joint [121].

40 The respondent argues the claimant can reasonably be expected to maintain good dental hygiene in order to alleviate those symptoms.

41 In my judgment whilst some of the symptoms the claimant reports are supported by what the claimant told the various medical practitioners several I find are exaggerated (the effect on his speech, the characterisation of the pain as chronic when it was characterised as 2 on a scale of 1 to 5, the potential for pain as being assessed as minor or trivial and that the way the claimant described the pain was like pins and needles when present but that it came and went). That is supported by Dr Misra [183 9.3] who identified a probable link between the claimant's pain tolerance, level of behavioural activity and mood variability and they may contribute to ***'unconscious magnification of symptoms'***.

42 I return to Dr Misra's assessment below.

*The mental health impairments*

43 The respondent alleges there is no evidence led of the effects of the mental health impairments upon the claimant's ability to undertake normal day-to-day activities; no medication has been prescribed specifically for that condition (the medical records indicate it was instead prescribed for the jaw pain –

see (47)) or other evidence that might support the continuation being substantial or long-term.

44 The claimant told me in his impact statement that he is always in a low mood because he feels hopeless and struggles to eat and socialise with people as he thinks they are reading his thoughts and that his low mood is aggravated by chronic jaw pain and he has self-harmed [142]. He also told me he found it difficult getting out of bed and also the reverse, difficulties with sleeping [143].

45 The claimant's medical records show he was referred to Birmingham Healthy Minds at the latest by April 2019 (GP records [210] and Dr McMillan [140]) and the report of Dr Whittington also refers to the claimant's post June 2018 operative jaw problems led to an aggravation of underlying mental symptoms [148] and thus they were historic.

46 Although medication was prescribed by Dr McMillan that was originally in May 2019 (Amitripine 10mg in May and November 2019) [159], contrary to what the claimant alleged [142] that was for his jaw [139]. Whilst the claimant refers to the dose having increased recently no evidence was provided of that or the reason for it.

47 The claimant told me his low mood and struggle to eat and socialise stemmed from the jaw pain. That is supported by Dr Whittington who in February 2020 concluded that the mental symptoms the claimant exhibited were symptomatic of a psychiatric disorder known as Mixed Anxiety and Depressive Disorder and the mental symptoms had led to psychological distress and an impairment of the quality of the claimant's life. He stated the claimant's mental health symptoms were secondary to his persistent physical symptoms following the operation in June 2018 [149].

48 Dr Whittington concluded the claimant did not require any formal psychiatric treatment arising from the 2014 road traffic accident upon which he had been asked to advise and they had resolved 12-18 months after the operation in June 2018 and any other symptoms arose from his underlying constitutional disorder or other factors [149].

49 That in turn was supported by Dr Misra [174 A: 2.1(d)] whose report of 28 April 2020 [171] recommended CBT and/or EMDR for 3-6 months, or 8-10 sessions and diagnosed that the claimant was clinically depressed.

50 Dr Whittington referred to symptoms arising from an accident lasting in some form until between June 2018 and December 2019 [150] but he too gives no detail of what those symptoms were, how long they lasted or their impact on the claimant's day-to-day life.

51 Given Dr Whittington reported in February 2020 the respondent argues it is clear by then they had concluded because if not he would have said otherwise. The respondent argues those matters being so, it is implicit any symptoms had ceased by December 2019 [150] and there is a lack of evidence to show they had a substantial adverse effect before that.

52 Of the various Mood Disturbance features Dr Misra indicated had been relayed to him by the claimant when he reported in April 2020 [179-9 7.2] variable low mood reactive to pain, sleep disturbance, worthlessness/low self-esteem, reduced appetite/weight loss, lethargy and reduced motivation, loss of interest activities irritability exacerbated by physical discomfort he made no mention of the effects on socialisation and indeed did not say he found it difficult to eat but instead

that he had a loss of appetite. No mention was made of self-harm.

53 Dr Misra thus recommended CBT and as result of which advised the clinical depression should improve over 6 months, that the claimant increase his levels of activity (both generally and exercise wise) and social relationships.

54 As I state above whilst Dr Misra went on to refer to travel and pedestrian anxiety Dr Misra indicated there was no significant avoidance of driving [180 - 5.4.2].

55 Thus, again doubt is cast as to the claimant's account generally on matters. It was in the claimant's interest to relay the existence of adverse effects to the providers of the medical reports in the context of his personal injury claim.

56 Dr Misra stated that she had no reason to doubt the claimant's veracity and his account was consistent verbally and the symptoms and psychological problems were highly consistent and thus an honest report of his difficulties and there was no evidence of conscious exaggeration or other consistency factors [186 paragraph 13]. However, no GP or hospital records were provided to Dr Misra and the only other medical report she had was that of Dr Whittington [185 Section E]. I should also record that Dr Misra's assessment was undertaken by videoconference. She thus did not have the other reports and claimant's impact statements, nor has she heard the claimant's account before me.

57 For the reasons I give above there are inconsistencies in those accounts and I also note Dr Misra acknowledged (see (41)) an ***'unconscious magnification of symptoms'*** by the claimant.

58 That consistency and credibility point is reinforced by another issue the respondent refers me to, namely that one of

the principal adverse effects the claimant gives concerning his mental health impairments was the effect that has had on him socialising. In contrast Dr Misra indicated there was no significant disruption to the claimant's life and socialisation was not affected [181 - 5.4.3].

59 Those matters collectively call into question the account the claimant has given to different practitioners and the Tribunal over time, concerning matters that go to the core of his complaints here, whether there was a substantial adverse effect on his ability to undertake day to day activities.

60 They spread across the depth and breadth of his account and combined with the credibility points I refer to above lead me to conclude notwithstanding the assessment Dr Misra made as to the veracity of the claimant's account (see (56)) that I should place no weight on the claimant's account (unless supported elsewhere) and that includes that given to the various practitioners and thus the conclusions they reach as a result.

*My conclusions on the disability issue*

61 As to Keratoconus I find there is no medical evidence to suggest that the adverse effects the claimant describes are firstly matters that cannot be corrected by wearing contact lenses (paragraph 5(3)(a)), secondly (albeit unconsciously) his account of the effects is to be given little weight by virtue of the other inconsistency and credibility points I make above (including but not limited to (60)) and are for the reasons I give (30) (as supported by Dr Misra, see (41)) unconsciously exaggerated.

62 I conclude that the claimant has therefore not shown, the burden being upon him to do so, that at the material time there was a substantial (non-trivial) adverse effect on his

ability to undertake day to activities by virtue of the Keratoconus.

63 As to the jaw/TMJ for the reasons I give above the way the claimant categorised his pain (and speech) was at odds with the characterisation by the medical practitioners and the same credibility and exaggeration issues arise as I identify above. Whilst medication was prescribed within the material time, doubt is cast on the basis for that in my judgment for the reasons I give above concerning exaggeration and the medical opinions being based on the claimant's account, to which little weight should be given. Further Dr Speculand indicated that any ongoing issue appeared to be as a result of poor dental hygiene. That in my judgement would appear to be a reasonable coping strategy in that the claimant was to be expected to do something he should have been undertaking in any event.

64 For those reasons again I conclude that the claimant has therefore not shown, the burden being upon him to do so, substantial (non-trivial) adverse effect on his ability to undertake day to activities at the material time by virtue of his jaw/TMJ impairment.

65 As to the Mental Health impairment in February 2020 Dr Whittington concluded that the mental symptoms the claimant exhibited were symptomatic of a psychiatric disorder known as Mixed Anxiety and Depressive Disorder whereas in April 2020 Dr Misra diagnosed that the claimant was clinically depressed.

66 Thus, the experts coming to contrasting views albeit both diagnosing a mental health condition and neither of those assessments took place at the material time, December 2018 to August 2019. However, as I state above the claimant was referred to the claimant's medical records show he was referred to Birmingham Healthy Minds at the latest by April

2019, that is within the material time and Dr Whittington identified underlying mental symptoms that were historic.

67 For the same reasons I give above and notwithstanding the assessment of veracity undertaken by Dr Misra little weight has to be given to the claimant's account to the medical practitioners and thus the conclusions they came to. Similarly, in relation to his account as to the alleged adverse effects.

68 Again, I conclude that the claimant has not shown, the burden being upon him to do so, his mental health impairments had a substantial (non-trivial) adverse effect on his ability to undertake day to activities at the material time.

69 Some of the medical practitioners identified that some of the alleged impairments have impacted on others. As a result I have considered if viewed collectively the impairments mean the s.6 threshold is met. For the same reasons I give above (see for instance (67)) it is not.

70 Accordingly, I conclude the claimant did not satisfy the definition of disability within the meaning set out in s. 6 Equality Act 2010 at the material time.

## *Disposal*

71 My findings above are not necessarily determinative in relation to the claim as a whole because it is pursued on the basis of victimisation (for which the claimant does not necessarily have to satisfy s.6). Accordingly, I have listed a Telephone Case Management Hearing to address how the claim should be addressed going forward.

72 For completeness I also intend to address the amendment issue:-

## *Amendment*

73 Of the issues identified by Employment Judge Meichen those that the respondent takes issue with as not being raised in the claim form essentially are as follows:-

74 Of the issues identified by Employment Judge Meichen those that the respondent takes issue with as not being raised in the claim form essentially are as follows:-

> ***'EQA, section 15: discrimination arising from disability***
>
> *(vi) Did the following things arise in consequence of the claimant's disability:*
>
> *…*
>
> *b. The claimant's outbursts and mood swings. The claimant says these occurred as a result of his mental health conditions and they happened frequently while he was working for the respondent.*
>
> ***EQA, section 19: indirect disability discrimination***
>
> *(xi) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:*
>
> *a. A practice of expecting candidates who were sitting the ability test for permanent positions to cope with distractions during the test.*
>
> *The Claimant's case is that during his re-sit of the ability test the mobile phone of the invigilating manager (Assam Khan) rang and also Eimante Miseviciute came into the room and spoke. When he raised that he had been distracted by those matters with Ian Guest he was told that he had provided*

*further evidence that he was not suitable for a permanent position.*

***Reasonable adjustments: EQA, sections 20 & 21***

*(xviii) A "PCP" is a provision, criterion or practice. Did the respondent have the following PCPs:*

*a. Warehouse operatives were expected to use a handheld scanner which involved reading a scanned product number on the scanner's display.*

*b. Warehouse Operatives were only permitted one break of 30 minutes per shift.*

*c. Warehouse operatives were expected to achieve a pick rate of 500 per shift.*

*(xix) Did any such PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that:*

*a. The claimant's eye condition made it difficult for him to read the product number on the scanner.*

*b. The claimant's mental health condition caused him to have outbursts and mood swings which meant he needed the opportunity to take a short break in order to calm down and compose himself.*

*c. The claimant's mental health condition made it difficult for him to concentrate and achieve the expected pick rate.'*

75 As to amendments in ***Selkent*** [9] Mummery J as he then was said this

[9] Selkent Bus Co. Ltd v Moore *[1996] ICR 836 (EAT)*

***"(4) … the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it."*** and of the factors to be considered ***"(5) …It is impossible and undesirable to attempt to list them exhaustively [10], but the following are certainly relevant: …"*** and include the nature of the amendment [11], whether the claim is out of time and if so, whether time should be extended under the applicable statutory provision; and the extent of any delay and the reasons for it [12].

76 In *Selkent* Mummery J made clear that a ***"relabelling"*** did not include a ***"new complaint or cause of action"*** ([843H to 844A]). That is reinforced in *Cocking* [13] where Sir John Donaldson when setting out the procedure to be adopted by tribunals where an amendment of the claim form was sought made it clear that applied whether the application related to adding/substituting respondents or by changing the basis of the claim.

77 Of them the claimant confirmed that only the s.15 discrimination because of something arising from disability head was argued in the claim form [13] the section he referred me to was the first paragraph of that page specifically ***"… when I told them about my health problem they would run their mouth at me …".***

78 When placed in the context of the unfavourable treatment complained about at (vii)

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[10] A point repeated by Underhill LJ in Abercrombie v Aga Rangemaster Ltd *[2014] ICR 209 (CA)* at [47], adding that neither should they be approached in a tick-box fashion.

[11] an amendment which changed the basis of an existing claim will be more difficult to justify than an amendment which essentially places a new label on already pleaded facts and the greater the difference between the factual and legal issues raised by the new claim and by the old the less likely it is that it will be permitted, but that will be a discretionary consideration and not a rule of law (see Safeway at [13])

[12] Approved in Kuznetsov v The Royal Bank of Scotland Plc *[2017] EWCA Civ 43*

[13] Cocking v Sandhurst *[1974] ICR 650 NIRC*

*"a. Not offering the claimant a permanent contract. The claimant says this occurred in around April 2019 and the people responsible were Chris Askew and Anna Polenska."*

79 The amendment sought at (vi)(b) in my judgment is of a fundamentally different complexion to that. The complaint at [13] essentially relates to the claimant essentially alleging that he was harassed when he described his problems to his employer whereas the complaint he seeks to bring at (vi)(b) is that he was not offered a permanent contract because of his mood swings and they in turn arose out of his disability.

80 That cannot in my judgment be said to be a relabelling.

81 As to timing, any issues concerning just and equitable extensions aside the claims having been presented on 21 & 13 August 2019 and the claimant's engagement having lasted from 9 June 2018 to 27 august 2019 (albeit he did not attend site from mid May 2019) given the application was not made until 15 July 2020 it is notionally out of time.

82 Following *Galilee* if I allow the addition of the proposed second respondent that does not mean that I am determining any timing point [14].

83 Not least because that was not an issue identified for today by Employment Judge Meichen it is not for me to determine any out of time issue now, I record in what follows below I am not making such a determination. I am required to consider whether the amendment is out of time as part of my consideration of the amendment application and any reference I make to timing or delay below is to my consideration of the matters I need to take into account.

84 The claimant told me the reason he did not bring those complains now in issue at the time his claims were presented

[14] Galilee v The Commissioner of Police of The Metropolis *[2017] UKEAT 0207/16* approved in Reuters Ltd v Cole *[2018] UKEAT/0258/17*

was because of his mental health problems and the reason he did not seek to amend earlier was because he did not know he needed to or the time limits for doing so.

85 The claimant has shown from the cases and principles he has referred me to he is very able to research detailed points of law. Prior to his claim he raised a grievance and understood he needed to conciliate via ACAS, he had the wherewithal to discover how to bring a claim and did so (twice). He referred in his claim to complaints the general public might not be aware of (discrimination because of something arising from disability) and told me he obtained advice from the CAB. He has also sought and obtained advice from the RNIB and has instructed solicitors to bring his PI claim. In my judgment he is able to locate means by which he can familiarise himself with the law and its requirements.

86 The context for this application is that the claimant raised a grievance about not being offered a permanent contract. The grievance outcome was received by him on 12 July 2019. Whilst I accept his engagement continued until 27 August 2019 the complaints he seeks to include in those applications are essentially matters that he should have been aware of prior to him presenting the claims as they relate to the work he did throughout his engagement or the test adopted for permanent contracts.

87 Whilst he tells me it was his mental health impairments that prevented him bringing those other complaints I asked him to explain how he was able to bring the complaints he did raise including the discrimination because of something arising from disability complaint but not the others. He was not able to provide a cogent reason.

88 If I refuse the amendment application the claimant will be prevented from pursuing a claim. If I allow it the respondent will be put to the costs of revising its pleading and defending

additional complaints. The trial will be longer and also take up more tribunal time and resources. The claim is not yet listed for trial and given the longer time estimate it is highly likely to listed at a later date. That leads on to another issue.

89 The respondent will in my judgment be prejudiced in that the new matters may substantially affect the cogency of evidence. By way of examples of this some of the complaints concern pick rates and by implication the claimant's pick rate. The claimant was an agency worker and thus the respondent was unable to indicate whether the claimant's pick rates etc would still be available now just over a year after his engagement ceased and almost 18 months after he last worked on site. Those records could clearly have been destroyed in the twelve months after his engagement terminated before he sought to bring the amendment application. They may be highly relevant. The same applies to the individuals the respondent complains about. Even if they remain engaged by it –more than twelve months have gone by and those matters not having been raised the respondent will not have been able to take statements from them on the new points whilst those matters were fresh in their minds.

90 They are merely examples of the effects the delay will have on the cogency of evidence.

91 For the reasons I give above this application gives rise to new complaints and not re-labellings (or anything approaching that). The application is notionally out of time. When considering the circumstances as a whole the claimant not having provided what in my judgment is a cogent explanation for the delay (noting that it is not for me to determine timing points) and when set in the balance against the cogency issues and the effect on the length of trial, the balance falls overwhelmingly in favour of refusing the amendment application.

signed electronically by me

**Employment Judge Perry**

Dated: 12 November 2020