EMPLOYMENT TRIBUNALS

Claimant: **Mr F El Maarfi**

Respondent: **Verisure Services (UK) Limited**

Heard at: **London South (CVP)** **On: 15 & 16 February 2022**

Before: **Employment Judge A.M.S. Green**

Representation

Claimant: Ms S Sharp - Counsel
Respondent: Mr C Kennedy - Counsel

RESERVED JUDGMENT ON PRELIMINARY ISSUES

1. The claimant was not, at the material time, disabled for the purposes of the Equality Act 2010, section 6.

2. It is just an equitable to extend the time for the claimant to bring his claim for direct race discrimination pursuant to Equality Act 2010, section 123(1)(b).

REASONS

Introduction

1. On 14 May 2021, Employment Judge Khalil conducted a telephone private preliminary hearing to case manage the claims. In their case management summary, Employment Judge Khalil identified the following claims that they believed the claimant was making against the respondent: disability discrimination, race discrimination, unauthorised deduction from wages and breach of the Working Time Regulations. The claimant subsequently withdrew his claim under the Working Time Regulations as it was agreed that the Tribunal did not have jurisdiction to hear that claim. Employment Judge Khalil then made case management orders including:

On or before 11 June 2021, the claimant to provide further and better particulars referred to in paragraphs 6 (race) and 11 (alleged sums which were properly payable) of the substantive list of issues document.

The list of issues was before the Tribunal.

2. Employment Judge Khalil listed this public preliminary hearing to determine the Tribunal's jurisdiction (time) and recorded that it was accepted that the claim is one day out of time and also to determine whether or not the claimant was disabled within the meaning of Equality Act 2010, section 6 ("EQA").

3. On 1 June 2021, the Tribunal administration issued a Notice of Preliminary Hearing to the parties stating that the purpose of the hearing was:

   to determine the Tribunal's jurisdiction (time) in relation to the unauthorised deductions claim.

   It also noted that case management orders may be made at the end of this hearing.

4. At the beginning of this hearing, I clarified the issues that I was required to determine given what ordered by Employment Judge Khalil and was written in the Notice of Preliminary Hearing. Ms Sharp believed that the hearing was limited to determining the time bar issue in relation to the unauthorised deduction of wages claim and the question of the claimant's disability. Mr Kennedy had a different understanding. Whilst he agreed that the Tribunal was determine the question of disability, he questioned whether it could determine the time bar issue relating to what he believed was only a putative unauthorised deductions of wages claim. He argued that the claimant had not made an unauthorised deductions from wages claim and referred me to the ET1 where the claimant had ticked the box "other payments" in section 8.1. He said that other than ticking the box, the claimant had not particularised his claim for unauthorised deductions from wages in the ET1. Simply ticking the box was insufficient to instigate a claim. Furthermore, had the claimant intended to make an unauthorised deductions from wages claim, one would have expected him to have ticked the box "arrears of pay" and then to particularise the claim. Mr Kennedy then took me to the claimant's schedule of loss which expressly refers to an unauthorised deductions from wages claim amongst the other claims. However, he argued that a schedule of loss could not be treated as a pleading. Ms Sharp consequently made an application to amend the claim to include unauthorised deductions from wages. Having heard submissions from Mr Kennedy and Ms Sharp, I refused her application and I have set out my reasons for doing so in a separate case management summary and orders.

5. The matters which I must determine are as follows:

   a. Was the claimant disabled at the material time? The claimant alleges that he has suffered from social anxiety, general anxiety and depression since October 2018. He further alleges that he has been taking antidepressants namely Dapoxetine (Priligy). The material time is the duration of his employment with the respondent which started on 17 June 2019 until he was dismissed with effect from 23 March 2020.

b. Time bar where it is agreed by the parties that the claimant's claims for direct race discrimination and direct disability discrimination were filed out of time. I must decide whether it is just and equitable to extend time to allow the claims to be accepted.

6. We worked from a digital bundle. The claimant adopted two witness statements dated 30 April 2021 and 19 January 2022 and gave oral evidence. Ms Sharp and Mr Kennedy made closing oral submissions.

7. The claimant must establish that he is disabled for the purposes of EQA, section 6 and that it is just and equitable to extend time to accept his claims of direct race and direct disability discrimination pursuant to EQA, section 123.

8. In reaching my decision, I have considered the oral and documentary evidence. The fact that I have not referred to every document produced in the bundle should not be taken to mean that I have not considered it.

Findings of fact

9. The claimant is a Libyan national. He came to the United Kingdom in 2010 as a student. He was granted asylum in 2011.

10. He worked as a security consultant with the respondent from 17 June 2019 to 23 March 2020.

Disability

11. On 20 August 2018, the claimant attended an assessment with Ms Nabila Patel a Senior Psychological Therapist with iCope, a psychological therapist service. Ms Patel wrote to the claimant on 23 August 2018 confirming her discussion with the claimant and the agreed treatment plan [63]. She said, amongst other things:

> ***PRESENTING DIFFICULTIES***
>
> *You reported that you currently experience symptoms of generalised anxiety and social anxiety.*
>
> *Risk: You presented with no risk concerns. It was agreed that you would slowly reduce recreational drug use whilst waiting for therapy and will not be under the influence of any recreational drugs whilst engaged in therapy.*
>
> *…*
>
> ***GOALS FOR TREATMENT***
>
> *You reported the following goal for therapy: To manage thoughts when you meet new people and manage the worry that something bad might happen.*
>
> ***TREATMENT PLAN***

As agreed, you have been offered:

***Cognitive Behavioural Therapy** Sessions will be one-to-one with a Cognitive Behavioural Therapist. Your therapist will help you to understand and map out your difficulties, enabling you to identify the behavioural and cognitive factors that may be maintaining your problems. Treatment is usually 8-12 sessions but will be discussed on an individual basis with your therapist. CBT can work with a wide range of emotional difficulties.*

12. Under cross-examination, the claimant confirmed that this was the first time that he had seen a professional to discuss his mental health difficulties.

13. On 17 October 2018, the claimant was assessed by Ms Jane Downey, a Trainee CBT Therapist with iCope. She wrote to Dr Alessi, the claimant's GP, on 26 October 2018 to report her assessment [64]. She noted that:

Assessment

Mr El Maarfi discussed suffering from anxiety in the context of social situations. He described being preoccupied with social events before they occur and having negative expectations of others, namely that he will be seen in a negative light. Mr El Maarfi discussed engaging in thinking where he tries to predict others behaviours/responses to him and this process appeared to further increases anxiety. Mr El Maarfi reported that he experiences continuous feelings of worry even when things go well and he observes associated physical responses to anxiety.

Mr El Maarfi describes being able to manage his day to day life and maintain employment in relationships. Mr El Maarfi stated that he wanted to work in treatment to reduce his anxiety and improve his mood.

…

Mr El Maarfi discussed that his symptoms are maintained by ruminating on negative performance prior to social engagements and that this is also accompanied by a continuous feelings of worry even when things are going well.

Risk

Mr El Maarfi denied any current suicidal thoughts or plans with a PHQ 9 RQ9 score 0.

Treatment

It was agreed that Mr El Maarfi would attend 12 sessions of "one to one" Cognitive Behavioural Therapy with the emphasis on managing his social anxiety in relation to his co-morbid presentation.

14. Under cross-examination, the claimant accepted that at that time he was able to manage his day-to-day life, his employment and his relationships.

15. The claimant started CBT therapy sessions on 17 October 2018 with Ms Downey attending a total of 6 sessions before she left iCope. He then attended two sessions with Ms Mirella Genziani, a Trainee CBT Therapist before being discharged on 18 January 2019 [68].

16. In paragraph 17 of his second witness statement, the claimant states that the effect of his impairment on his ability to do day-to-day activities at the time when he alleged he was discriminated against rendered him unable to do the following:

    a. work under pressure;

    b. cope when placed in difficult situations;

    c. sleep and wake up properly;

    d. take part in social activities;

    e. socialise or talk to friends and family;

    f. process complex thoughts and engage in conversation;

    g. participate in meetings;

    h. use his telephone to speak to someone; and

    i. interact with colleagues.

17. The claimant goes on to say in paragraph 18 of his second witness statement that the effects of the impairment began after an incident at work on 13 February 2020 and stopped on or around March 2021. However, under cross-examination he suggested that this was incorrect and what he meant to say was that the effects of his impairment got worse. However, he also said under cross-examination that prior to the incident 13 February 2020, he was working well at the respondent, and he went on to say that he had been the best employee when he started working there. This inconsistency damages his credibility.

18. The claimant confirmed under cross-examination that no notes from his GP surgery had been produced to the Tribunal covering the period when he worked for the respondent. He said that he wasn't seeing his GP at the time but a private therapist. He also did not undergo any treatment between February 2019 and October 2020. When he was asked to elaborate on this under cross-examination he said "I believe I was beginning to see someone at the time. I did not have constant treatments". I found that a vague answer. I also note that the claimant claimed to be taking antidepressants but no medical evidence proving these had been prescribed to him was produced. This is prescription medication and it would have been reasonable to expect him to produce his medical record to vouch for what was prescribed, when it was first prescribed and if the claimant applied for repeat prescriptions, how

often he did so and when. The absence of this evidence detracts from the weight that I can give to his claim to have been on antidepressants.

19. The claimant was asked about his social anxiety. It was put to him that he was able to cope and to manage with day-to-day life during his employment. He did not deny that. He also accepted that there was nothing in his medical notes that had been produced to the Tribunal such as the iCope Treatment Plan [63] where any link with his anxiety and his ability to cope with day-to-day life was made. His answer to that question was disconcertingly vague: “yes probably not”. It was also put to him that there was nothing in the medical notes that pointed to him having difficulty with sleeping or suffering from panic attacks or anything like that. I find that he has not established a causal connection with his social anxiety on his day-to-day life during his employment.

20. Ms Ruthie Smith, a UKCP Registered Psychoanalytic Psychotherapist and Trauma Consultant who is also a director of the Flame Centre wrote a “to whom it may concern” letter dated 21 October 2020 [69]. In that letter she confirms that she had been seeing the claimant for weekly psychotherapy and trauma work to help with his “current mental health condition”. She goes on to say that he was diagnosed with social anxiety, general anxiety, and depression and that this is “being seriously exacerbated by his current insecure situation”. She goes on to refer to the claimant’s mental health deteriorating considerably as a result of uncertainty and instability of his current situation where he and his family are without passports or stable status which means that they are unable to travel including for work. Under cross-examination, the claimant confirmed that this letter made no reference to the impact of his social anxiety, general anxiety and depression had or might have on his day-to-day activities. He also accepted that the letter was written after he was dismissed by the respondent.

21. The claimant attended therapy sessions with Emma Rowlands, an Integrative Counsellor with Cherish Your Mind Therapy. She confirms that she had been seeing the claimant for counselling/psychotherapy since 7 October 2021 and as of 19 January 2022 their sessions were ongoing. She confirms that she was treating the claimant for stress, anxiety, and depressive episodes [79]. These sessions post date the claimant’s employment with the respondent by 1 year 6 months.

22. In paragraph 7 of his first witness statement, the claimant claims that his symptoms include but are not limited to:

    a. decreased energy and fatigue;

    b. difficulties in sleeping and waking up;

    c. persistent feelings of sadness, anxiety, and emptiness;

    d. persistent feelings of inability to cope;

    e. persistent feelings of worry which lead to nausea, sweating and panic attacks;

f. difficulty controlling worry or fear;

g. feeling tearful, frequent breakdowns and crying;

h. palpitations;

i. not wanting to socialise or talk to friends or family;

j. finding it hard to cope with everyday tasks; and

k. finding it hard to operate under pressure.

23. The medical evidence that has been provided indicates that in August 2018, he suffered symptoms of generalised anxiety and social anxiety [63]. Nothing more is said about how those symptoms manifested themselves. I accept that when he was assessed on 17 October 2018, he had anxiety in the context of social situations [64] which tallies with not wanting to socialize or talk to family and friends or feeling worried but nothing is said about the other list of symptoms that the claimant has provided in paragraph 7 of his witness statement. The letter of 21 October 2020 [69], which post dates the claimant's employment by some 8 months does not go beyond saying that he has social anxiety, general anxiety and depression and does not provide examples of the symptoms claimed by the claimant. Ms Rowlands letter of 19 January 2022 written nearly two years after the claimant was dismissed [79] simply says that the claimant was being treated for stress anxiety and depressive episodes without elaborating on his symptoms and what impact, if any, they had on his day-to-day activities. Under cross-examination, the claimant accepted that none of these symptoms were supported by medical evidence in the bundle. He said that if he had known better, he would have sought more help.

24. The periods of time when the claimant was receiving counselling/psychotherapy/CBT were as follows:

a. 17 October 2018 to 18 January 2019;

b. October 2020 – November 2020 [89]

c. 7 October 2021 onwards [89]

He was not treated during his employment.

Time limits

25. In his witness statement, the claimant states as follows:

> *4. After I was dismissed by the Respondent, there was a period of time and I was extremely distraught and depressed. I was struggling both financially and mentally. I spoke with Mr Kalilou Fadiga (Principal Solicitor at Harding Mitchell Solicitors) about my employment situation and he informed me that I have to contact ACAS and he also made me aware of the time limits to bring a claim*

in the Employment Tribunal. I sought advice from Mr Fadiga because he had advised me previously with regards to my immigration matters.

5. On 16 June 2020, I contacted ACAS to attempt conciliation with the Respondent. When this was not successful, ACAS provided me with the ACAS certificate on 13 July 2020. Unfortunately I had informed ACAS that Harding Mitchell Solicitors were my representatives although I had not signed any retainer with them at that stage. Whilst in a state of anxiety, I put Harding Mitchell Solicitors as my representative because I was panicking.

6. ACAS also provided the ACAS certificate to Mr Fadiga 13 July 2020. He informed me that he had received an ACAS certificate in relation to my case. Mr Fadiga informed me that as he was not representing me in his employment matter, I could not put Harding Mitchell Solicitors as my representatives.

7. On 14 August 2020, due to my anxiety and nervousness when I was completing the ET 1 as a litigant in person, I made the same mistake by naming Harding Mitchell Solicitors as my representative. This was the first time I had lodged unemployment claim and at the time my anxiety was very bad. It is quite clear upon reviewing the ET 1 that at the time of the filing out the ET1, I did not know how to express my claim in legal terms and I did not give a full narrative of the background or context of my situation.

8. I formally instructed Harding Mitchell Solicitors after having a meeting with Mr Mohammed Kutty (Paralegal at Harding Mitchell Solicitors) 02 February 2021. Until then, I was a litigant in person and did not know the legal time limits, that my claim was one day out of time.

9. My anxiety made it so that it was difficult to complete the ET1 by the deadline on 13 August 2020. I was under so much stress due to the situation as a result of my anxiety, I have difficulty sleeping and waking up. Subsequently, I completely lost track of time and submitted the ET 1 on 14 August 2021.

26. The claimant took outline and informal legal advice about time limits from Mr Fadiga. At that juncture there was no formal retainer for employment law advice. However, the claimant knew about time limits which he confirmed under cross-examination. He said that Mr Fadiga had given him a general idea about his claims and had mentioned a time limit of three months from the time that he was dismissed. He went on to say that he did not have much time and they would speak later. He also confirmed under cross-examination that as he had been dismissed on 23 March 2020 and he would have known that he should have filed his ET 1 on or before for 22 June 2020. Thereafter, he drafted the ET1 himself as a litigant in person although he got some help with this from a friend. He said that Mr Fadiga had said it would be all right to put his name as his representative in the ET1.

Applicable law

Disability

27. EQA defines a 'disabled person' as a person who has a 'disability' — section 6(2). A person has a disability if he or she has 'a physical or mental impairment' which has a 'substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities' — section 6(1). The burden of proof is on the claimant to show that he satisfies this definition.

28. Although the definition in section 6(1) is the starting point for establishing the meaning of 'disability', it is not the only source that must be considered. There are supplementary provisions for determining whether a person has a disability are in Part 1 of Schedule 1 EQA. Furthermore, a number of regulations were made under the Disability Discrimination Act 1995 ("DDA") to supplement the statutory provisions and the Government has indicated an intention to replace them all in due course. The relevant regulations are the Equality Act 2010 (Disability) Regulations 2010.

29. In addition, the Government has issued 'Guidance on matters to be taken into account in determining questions relating to the definition of disability' (2011) ('the Guidance') undersection 6(5) EQA. This Guidance, which came into force on 1 May 2011. The Guidance does not impose any legal obligations in itself, but courts and tribunals must take account of it where they consider it to be relevant. In **Goodwin v Patent Office 1999 ICR 302, EAT,** the EAT's then President, Mr Justice Morison, stated that tribunals should refer to any relevant parts of the Guidance they have taken into account and that it was an error of law for them not to do so. However, more recently, in **Ahmed v Metroline Travel Ltd EAT 0400/10** the EAT qualified the **Goodwin** approach, noting that the observations made in that case were now long-standing, well established and well understood by tribunals. Mrs Justice Cox said that it was especially important for the correct approach to using the Guidance to be understood in the early years of the DDA. However, it was more than 15 years since disability discrimination legislation had been introduced. In this particular case the employment judge had understood the potential relevance of the Guidance and the importance of using it correctly, and no error of law was disclosed by his failure to refer to the Guidance in more detail, particularly when his attention had been drawn to it so extensively in written submissions. Furthermore, where, as in the instant case, the lack of credibility as to the claimant's evidence of his disability was the main reason for concluding he was not disabled within the meaning of the DDA, there could be no error of law if the tribunal failed to refer to the official Guidance.

30. Finally, the Equality and Human Rights Commission (EHRC) has published the Code of Practice on Employment (2015) ('the EHRC Employment Code'), which has some bearing on the meaning of 'disability' under the EQA. Like the Guidance, the Code does not impose legal obligations, but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in proceedings.

31. The requirement to 'take account' of the Guidance or Code applies only where the Tribunal considers them relevant, and, while the Code and Guidance often provide great assistance, they must always give way to the statutory provisions if, on a proper construction, these differ. In **Elliott v Dorset County**

Council EAT 0197/20 the EAT noted that where 'consideration of the statutory provision provides a simple answer, it is erroneous to find additional complexity by considering the Code or Guidance'. In that case, the tribunal erred by, among other things, failing to give the statutory definition of 'substantial' in section 212(1) – that is, 'more than minor or trivial' – the precedence it required. The EAT noted that 'whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes," that is likely to be the end of the matter. It is hard to see how the answer could be changed from "yes" to "no" by further pondering the Code or Guidance.'

32. The time at which to assess the disability (i.e. whether there is an impairment which has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — **Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT**. This is also the material time when determining whether the impairment has a long-term effect. An employment tribunal is entitled to infer, on the basis of the evidence presented to it, that an impairment found to have existed by a medical expert at the date of a medical examination was also in existence at the time of the alleged act of discrimination — **John Grooms Housing Association v Burdett EAT 0937/03** and **McKechnie Plastic Components v Grant EAT 0284/08**.

33. In particular, where an individual is relying on an impairment that may not manifest itself consistently, a tribunal will not necessarily err if it considers evidence at around the time of the alleged discriminatory act, albeit not on the specific date in question. In **C and ors v A and anor EAT 0023/20** the EAT did not accept that it was illegitimate to examine evidence arising before and after the acts of discrimination in order to determine whether it shed light on the existence of the impairment at the material time. Given that the alleged impairment was stress, an anxiety disorder and depression, the EAT did not expect every day to offer evidence of disability. Thus, while the EAT accepted that the tribunal did not focus on the dates of the relevant acts, the tribunal's enquiry necessarily embraced them.

34. However, the Court of Appeal has now allowed an appeal against the EAT's decision in **C v A. In All Answers Ltd v W 2021 EWCA Civ 606, CA**, the Court held that the EAT was wrong to decide that the tribunal's failure to focus on the date of the alleged discriminatory act was not fatal to its conclusion that the claimants satisfied the definition of disability. The Court held that, following **McDougall v Richmond Adult Community College 2008 ICR 431, CA**, the key question is whether, as at the time of the alleged discrimination, the effect of an impairment has lasted or is likely to last at least 12 months. That is to be assessed by reference to the facts and circumstances existing at that date and so the tribunal is not entitled to have regard to events occurring subsequently. The Court held that it was clear that the tribunal did not ask the correct question and so its decision could not stand. The Court noted that the EAT had identified the tribunal's failure in this regard but had considered that this was not fatal as the tribunal had focused on the position before and after

the relevant date. That, however, was not an answer to the difficulty and the EAT was wrong to overlook the tribunal's error.

35. There is no definition of 'mental impairment' in the EQA but Appendix 1 to the Code states: 'The term "mental impairment" is intended to cover a wide range of impairments relating to mental functioning, including what are often known as learning disabilities' — para 6.

36. Mr Justice Lindsay, then President of the EAT, set out guidelines for parties seeking to establish the existence of a mental impairment under the DDA in **Morgan v Staffordshire University 2002 ICR 475, EAT**, and although this decision has less significance now in light of the changes introduced by the DDA, it still contains some useful pointers:

    a. Tribunal members cannot be expected to have anything more than rudimentary familiarity with psychiatric classification. Matters therefore need to be spelt out. Claimants should identify clearly and in good time before the hearing exactly what their impairment is and respondents should indicate whether that impairment is an issue and, if so, why. The parties will then be clear as to what has to be proved or rebutted, in medical terms, at the hearing.

    b. Tribunals are unlikely to be satisfied of the existence of a mental impairment in the absence of suitable expert evidence. However, this does not mean that a full consultant psychiatrist's report is required in every case. There will be many cases where the illness is sufficiently marked for the claimant's GP to prove it. Whoever deposes, it will be prudent for the specific requirements of the legislation to be drawn to that person's attention.

    c. If it becomes clear that, despite a GP's letter or other initially available indication, an impairment is to be disputed on technical medical grounds, then thought will need to be given to further expert evidence.

    d. There will be many cases, particularly if the failure to make adjustments is in issue, where the medical evidence will need to cover not merely a description of the mental illness but when, over what periods and how it can be expected to have manifested itself in the course of the claimant's employment.

    e. The dangers of a tribunal forming a view on mental impairment from the way the claimant gives evidence on the day cannot be overstated. Tribunal members need to remind themselves that few mental illnesses are such that the symptoms are obvious all the time and that they have no training or, as is likely, expertise in the detection of real or simulated psychiatric disorders. Furthermore, the date of the hearing itself will seldom be a date on which the presence of the impairment will need to be proved or disproved. See also 'Substantial adverse effect.

37. To amount to a disability the impairment must have a 'substantial adverse effect' on the person's ability to carry out normal day-to-day activities.

38. In **Goodwin**, the EAT said that of the four component parts to the definition of a disability, judging whether the effects of a condition are substantial is the most difficult. The EAT went on to set out its explanation of the requirement as follows:

> *What the Act is concerned with is an impairment on the person's ability to carry out activities. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. Thus, for example, a person may be able to cook, but only with the greatest difficulty. In order to constitute an adverse effect, it is not the doing of the acts which is the focus of attention but rather the ability to do (or not do) the acts. Experience shows that disabled persons often adjust their lives and circumstances to enable them to cope for themselves. Thus a person whose capacity to communicate through normal speech was obviously impaired might well choose, more or less voluntarily, to live on their own. If one asked such a person whether they managed to carry on their daily lives without undue problems, the answer might well be "yes," yet their ability to lead a "normal" life had obviously been impaired. Such a person would be unable to communicate through speech and the ability to communicate through speech is obviously a capacity which is needed for carrying out normal day-to-day activities, whether at work or at home. If asked whether they could use the telephone, or ask for directions or which bus to take, the answer would be "no." Those might be regarded as day-to-day activities contemplated by the legislation, and that person's ability to carry them out would clearly be regarded as adversely affected.*

39. This approach reflects the advice in Appendix 1 to the Code that account should be taken not only of evidence that a person is performing a particular activity less well but also of evidence that 'a person avoids doing things which, for example, cause pain, fatigue or substantial social embarrassment; or because of a loss of energy and motivation'— para 9.

40. Whether a particular impairment has a substantial effect is a matter for the employment tribunal to decide. When considering this question, the EAT in **Goodwin** advised tribunals to take into account the version of the Guidance in force at the time, which — like the current version — contained a number of examples of 'substantial' effects. The EAT's advice is echoed by para 12(1) of Schedule 1 to the EQA, which provides that a tribunal must take into account 'such guidance as it thinks is relevant'. However, in **Vicary v British Telecommunications plc 1999 IRLR 680, EAT**, the EAT concluded that the Guidance is of assistance in marginal cases only. Also, in **Leonard v Southern Derbyshire Chamber of Commerce 2001 IRLR 19, EAT**, the EAT said that the Guidance should not be used too literally. This was because the examples it gives are illustrative only and should not be used as a checklist.

41. There must be a causal link between the impairment and the substantial adverse effect, but it need not be a direct link. In **Sussex Partnership NHS Foundation Trust v Norris EAT 0031/12** N was diagnosed with selective immunoglobulin A deficiency, a defect of the immune system. Discounting the effect of her medication (as required by para 5(1), schedule 1, EQA), an employment tribunal found that the deduced effect of the impairment was an

increased susceptibility to infections, and that such infections, in turn, would result in a substantial adverse effect on N's ability to carry out day-to-day activities. Allowing an appeal against that decision, the EAT noted that in many cases the causal link between the impairment and the substantial adverse effect will be direct, but held that the EQA does not require a direct link. If, on the evidence, the impairment causes the substantial adverse effect, it is immaterial that there is an intermediate step between the two. In this case, however, the tribunal's conclusion that increased frequency of infections would have a substantial adverse effect was unsupported by the evidence.

42. Given that the focus of the tribunal's examination must be on the extent to which the impairment adversely affects the claimant's ability to carry out normal day-to-day activities, it is irrelevant if a particular claimant cannot carry out a normal day-to-day activity, such as riding a bicycle, because he or she has never learnt to do so. In **Lalli v Spirita Housing Ltd 2012 EWCA Civ 497, CA** (a non-employment case), the Court of Appeal considered it immaterial that an individual would have been unable to read (because he was illiterate) even if he had not been mentally impaired. His impairment was functional: it had a substantial adverse effect on his ability to read and so was covered by the DDA. (Nevertheless, such cases may pose evidential difficulties: if a claimant never in practice carried out a particular activity, he or she may have problems demonstrating that his or her ability to do so is substantially adversely affected.

43. Substantial is defined in section 212(1) EQA as meaning 'more than minor or trivial'. This definition did not appear in the DDA but was used in the original Guidance and in the Code of Practice issued under the DDA (the 'Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability').

44. It might be thought that the words 'minor' and 'trivial' are synonymous. This was not the opinion of the EAT in **Anwar v Tower Hamlets College EAT 0091/10,** however. It held that a tribunal had not erred when it found that the effect of an impairment was 'more than trivial' but still 'minor' as opposed to 'substantial.' In that case the claimant claimed to have a disability by reason of suffering from headaches. The employment judge found that these, while 'by no means negligible, did not give rise to a substantial adverse effect.' Referring to the Guidance, he accepted that the headaches could not be described as trivial and were undoubtedly unpleasant while they lasted but they were, in his view, 'an example of the sort of physical condition experienced by many people which has what can fairly be described as a minor effect.' On appeal, the EAT rejected the argument that the 'substantial adverse effect' requirement must necessarily be satisfied if the adverse effect in question is found to be more than trivial. In any event, the EAT in **Anwar** pointed out that the employment judge had not simply baldly asserted that the effect of the claimant's headaches was minor though more than trivial: he had recorded the number and frequency of the headaches and the effect they had based on the evidence given by the claimant. This made it impossible to say that his decision was insufficiently reasoned or was perverse.

45. The difficulty with the EAT's decision in **Anwar** is that if 'minor' means something more than 'trivial,' it is hard to see why Parliament would have bothered to use the word 'trivial' at all. Its judgment seems to imply that there is a continuum and that something that is trivial may be of even less

consequence than something that is minor. This was clearly not the view of the EAT in **Aderemi v London and South Eastern Railway Ltd 2013 ICR 591, EAT**. There, the EAT — which did not refer to **Anwar** — commented on the definition of 'substantial' in section 212(1) EQA, stating that 'the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading "trivial" or "insubstantial", it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.

46. In determining whether an adverse effect is substantial, the tribunal must compare the claimant's ability to carry out normal day-to-day activities with the ability he or she would have if not impaired. It is important to stress this because the Guidance and the Code both appear to imply that the comparison should be with what is considered to be a 'normal' range of ability in the population at large. Appendix 1 to the Code states: 'The requirement that an effect must be substantial reflects the general understanding of disability as a limitation going beyond the normal differences in ability which might exist among people' — para 8. This wording is virtually identical to that contained in para B1 of the Guidance. However, this should not be interpreted as meaning that in order to assess whether a particular effect is substantial, a comparison should be made with people of 'normal' ability — which would, in any event, be very difficult to define.

47. In **Paterson v Commissioner of Police of the Metropolis 2007 ICR 1522, EAT**, an employment tribunal decided that P — a dyslexic police officer who wanted adjustments to be made under the DDA in respect of his application for promotion to superintendent — was not disabled. It acknowledged that his dyslexia was disadvantageous to him in comparison with his rivals for the post of superintendent. However, in comparison with 'the ordinary average norm of the population as a whole,' the tribunal considered that the dyslexia had no more than a minor or trivial impact on his day-to-day activities. Allowing P's appeal, the EAT (the President of the EAT, Mr Justice Elias, as he then was, presiding) emphasised that, in assessing an impairment's effect on a claimant's ability to carry out normal day-to-day activities, a tribunal should not compare what the claimant can do with what the average person can do. Rather, the correct comparison is between what the claimant can do and what he or she could do without the impairment. The tribunal's approach had therefore been incorrect. Referring to what is now para B1 of the Guidance, Elias P observed that in order to be substantial 'the effect must fall outwith the normal range of effects that one might expect from a cross section of the population', but 'when assessing the effect, the comparison is not with the population at large… what is required is to compare the difference between the way in which the individual in fact carries out the activity in question and how he would carry it out if not impaired.'

48. The decision in **Paterson** was considered in an education case brought under the EQA in **PP and anor v Trustees of Leicester Grammar School 2014 UKUT 520, Upper Tribunal (Administrative Appeals Chamber)**. The parents of a schoolgirl argued that their child had been discriminated against because of her dyslexia, but the first-tier tribunal ruled that she was not disabled within the meaning of the Act. Hearing the parents' appeal, the Upper Tribunal confessed to finding Elias P's reasoning in **Paterson** 'rather confusing' in that at times he suggested that an effect that was more than

trivial would satisfy the definition of substantial, and at others that it would have to be outwith the normal range of effects one might expect from a cross-section of the population. In the Upper Tribunal's judgment, the statutory definition of 'substantial' in section 212(1) should be applied 'without any additional gloss'; it would be incompatible with that definition to apply a test that drew a comparison with a cross-section of the population.

49. As **Paterson** suggests, it is vital that tribunals consider, first and foremost, whether an adverse effect is 'substantial' in the light of the statutory definition: the Guidance and Code are strictly supplementary. In **Elliott v Dorset County Council EAT 0197/20** an employment judge found that E was not disabled on the basis that any adverse impact on him as a result of his autism and Asperger's Syndrome was minor. The tribunal noted that 'on occasions he may be obsessive, and he may need a routine' but that he did 'adapt his behaviour and adopt coping strategies.' However, the EAT overturned the judge's decision on the basis that it did not sufficiently identify the day-to-day activities, including work activities, that E could not do, or could only do with difficulty, to found a proper analysis. She only considered public speaking and socialising outside work but failed to focus on the core of E's claim, that he found it very difficult to deal with changes of procedure and, particularly in the context of stressful disciplinary proceedings, was not able to communicate properly with his line manager. Dealing with change at work, being flexible about procedures and communicating with managers are all day-to-day activities. She also focused excessively on coping strategies, without considering whether any coping strategies might break down in certain circumstances. Further, in considering whether the adverse effects of the impairment were 'substantial,' she relied too much on a comparison with the general population, rather properly applying the statutory definition of more than minor or trivial.

50. The cumulative effects of an impairment are also relevant. An impairment might not have a substantial adverse effect on a person in any one respect, but its effects in more than one respect taken together could result in a substantial adverse effect on the person's ability to carry out normal day-to-day activities. The Guidance gives the example of a man with depression who experiences a range of symptoms, which include a loss of energy and motivation that makes even the simplest of tasks or decisions seem quite difficult. He finds it difficult to get up in the morning, get washed and dressed, and prepare breakfast. He is forgetful and cannot plan ahead. As a result he has often run out of food before he thinks of going shopping again. Household tasks are frequently left undone or take much longer to complete than normal. Together, the effects amount to the impairment having a substantial adverse effect on carrying out normal day-to-day activities (see para B5).

51. Paragraph 5(1) of Schedule 1 to the EQA provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if measures are being taken to treat or correct it and, but for that, it would be likely to have that effect. In this regard, likely means 'could well happen' — **Boyle v SCA Packaging Ltd (Equality and Human Rights Commission intervening) 2009 ICR 1056**,). This means that in assessing whether there is a substantial adverse effect on the person's ability to carry out normal day-to-day activities, any medical treatment which reduces or extinguishes the effects of the impairment should be ignored. For example, in **Carden v Pickerings Europe**

Ltd 2005 IRLR 721, EAT, the EAT held that the equivalent provision in the DDA — para 6(1) of Schedule 1 — applied in circumstances where a plate and pins had been surgically inserted in the claimant's ankle, which meant that he required no further treatment so long as his ankle received the continuing support or assistance that the pins and plate provided.

52. When determining whether a person meets the definition of disability under the EQA the Guidance emphasises that it is important to focus on what an individual cannot do, or can only do with difficulty, rather than on the things that he or she can do (see para B9). As the EAT pointed out in **Goodwin**, even though the claimant may be able to perform a lot of activities, the impairment may still have a substantial adverse effect on other activities, with the result that the claimant is quite properly to be regarded as meeting the statutory definition of disability. Equally, where a person can carry out an act but only with great difficulty, that person's ability has been impaired.

53. Appendix 1 to the Code states that 'normal day-to-day activities' are activities that are carried out by most men or women on a fairly regular and frequent basis, and gives examples such as walking, driving, typing and forming social relationships. The Code adds: 'The term is not intended to include activities which are normal only for a particular person or group of people, such as playing a musical instrument, or participating in a sport to a professional standard, or performing a skilled or specialised task at work. However, someone who is affected in such a specialised way but is also affected in normal day-to-day activities would be covered by this part of the definition' — paras 14 and 15.

54. The Guidance emphasises that the term 'normal day-to-day activities' is not intended to include activities that are normal only for a particular person or a small group of people. Account should be taken of how far the activity is carried out by people on a daily or frequent basis. In this context, 'normal' should be given its ordinary, everyday meaning (para D4).

55. The Guidance states that it is not possible to provide an exhaustive list of day-to-day activities. However, in general, day-to-day activities are things people do on a regular or daily basis. The examples given are shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can also include general work-related activities and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern (para D3).

56. The substantial adverse effect of an impairment has to be long term to fall within the definition of 'disability' in S.6(1) EQA, whether the disability is current or a past disability under S.6(4). This requirement ensures that temporary or short-term conditions do not attract EQA's protection, even if they are severe and very disabling while they last, such as acute depression or a strained back.

57. Under para 2(1) of Schedule 1 to the EQA, the effect of an impairment is long term if it:

a. has lasted for at least 12 months;

b. is likely to last for at least 12 months; or

c. is likely to last for the rest of the life of the person affected.

58. To attract the protection from disability discrimination and disability-related harassment in the EQA, a claimant must be disabled at the time of the acts or omissions that form the basis of the complaint. Thus, the tribunal's findings as to the date when the impairment became long term can be very important. In **Tesco Stores Ltd v Tennant EAT 0167/19** an employment judge found that T's depression was a 'long-term' condition on the basis that it had lasted for the 12 months leading up to the date when she presented her claim in September 2017, and that this meant that she was suffering a disability for the whole of that period. TS Ltd appealed to the EAT. Although there was no authority directly on the point, the EAT considered that the employment judge was clearly wrong: as at any of the relevant dates – i.e. the dates of the allegedly discriminatory acts between September 2016 and September 2017 – T's impairment and its adverse effects had not yet lasted for at least 12 months and so she was not disabled at the relevant time. The EAT rejected T's submission that it was enough that the period during which the discriminatory acts occurred coincided with the period during which the impairment was producing the adverse effect. In the EAT's view, it was required to consider whether, as at the date that the acts occurred, there had been 12 months of adverse effect. It therefore held that T could only bring claims of disability discrimination on the basis of acts that occurred on or after 6 September 2017.

59. Had the tribunal found the impairment to have been likely to last for at least 12 months at an earlier stage, T would have been able to bring claims of disability discrimination in respect of acts or omissions that occurred from that stage onwards. However, T failed to cross-appeal on this basis and on the facts of the case the EAT considered that she should not be allowed to raise the point on remittal.

60. Medical evidence plays an important role in tribunal proceedings involving disability discrimination claims. Tribunals frequently have to consider medical evidence, not only in relation to the nature of the impairment suffered by the claimant but also as to its effects and, if the condition has not lasted 12 months, whether it is likely to last that long. In the absence of such evidence, they may sometimes be unable to make the findings necessary to determine whether a claimant is disabled, particularly, perhaps, in cases involving depression or similar mental impairment. This was precisely the difficulty in **Royal Bank of Scotland plc v Morris EAT 0436/10**. In that case an employment tribunal upheld M's disability discrimination claim, but the EAT (the then President of the EAT, Mr Justice Underhill, presiding) held that there was simply insufficient evidence before the tribunal for it to draw any conclusions on essential elements of the definition of disability, including the duration or likely duration of M's impairment. A psychiatric registrar's report indicated that on 19 October 2006 M had a mental impairment that substantially affected his ability to carry out normal day-to-day activities. But this evidence did not justify any finding about how long this was the case.

There was no evidence of serious continuing symptoms, and on 16 November 2006 the same doctor saw M again and reported that his condition was much improved. The EAT acknowledged that this improvement might only be as a result of the medication M was taking, so that he could rely on a 'deduced effect' (see 'Effect of medical treatment' above). However, there was no explicit evidence on this point, and the EAT considered that no safe inferences could be drawn from the fact that M was told that he should continue with the medication for six months, as this 'might only have been precautionary.' In the EAT's view, this was 'just the kind of question on which a tribunal is very unlikely to be able to make safe findings without the benefit of medical evidence.' Similarly, it would be difficult for the tribunal to assess the likelihood of the risk of recurrence, or the severity of any such recurrence, without expert evidence. The EAT observed: 'while in the case of other kinds of impairment the contemporary medical notes or reports may, even if they are not explicitly addressed to the issues arising under the [DDA], give a tribunal a sufficient evidential basis to make common-sense findings, in cases where the disability alleged takes the form of depression or a cognate mental impairment, the issues will often be too subtle to allow it to make proper findings without expert assistance'.

Time bar

61. EQA, section 123(1) provides that proceedings of this nature 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.

62. EQA, section 123 and its legislative equivalents do not specify any list of factors to which a tribunal is instructed to have regard in exercising the discretion whether to extend time for 'just and equitable' reasons. Accordingly, there has been some debate in the courts as to what factors may be relevant to consider.

63. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. Where the act complained of is a single act of discrimination, this will not usually give rise to any problems. A dismissal, for example, is considered to be a single act and the relevant date is the date on which the employee's contract of employment is terminated. Where dismissal is with notice, the EAT has held that the act of discrimination takes place when the notice expires, not when it is given (**Lupetti v Wrens Old House Ltd 1984 ICR 348, EAT**). Rejection for promotion is also usually considered a single act. In this case, the date on which another person is promoted in place of the complainant is the date on which the alleged discrimination is said to have taken place (**Amies v Inner London Education Authority 1977 ICR 308, EAT**).

64. The question of when the time limit starts to run is more difficult to determine where the complaint relates to a continuing act of discrimination, such as harassment, or to a discriminatory omission on the part of the employer, such as a failure to confer a benefit on the employee. EQA, section123(3) makes

special provision relating to the date of the act complained of in these situations. It states that:

a. conduct extending over a period is to be treated as done at the end of that period (section123(3)(a));

b. failure to do something is to be treated as occurring when the person in question decided on it (section123(3)(b)). In the absence of evidence to the contrary, a person is taken to decide on a failure to do something either when that person does an act inconsistent with doing something, or, if the person does no inconsistent act, on the expiry of the period within which he or she might reasonably have been expected to do it (section123(4)).

65. The leading case is **Barclays Bank plc v Kapur and ors 1991 ICR 208, HL,** which involved a pension scheme that allegedly discriminated against a group of Asian employees. The argument on time limits centred on whether the operation of the pension scheme was a continuing act that subsisted for as long as the employees remained in the bank's employment (in which case their complaints were presented in time) or whether it was a single act that took place when the bank decided not to credit the employees' service in Africa for the purpose of calculating pension entitlement (in which case their complaints were time-barred). The House of Lords found in favour of the employees and ruled that the right to a pension formed part of their overall remuneration and, if this could be shown to be less favourable than that of other employees, it would be a disadvantage continuing throughout the period of employment. It would not be any answer to a complaint of race discrimination that the allegedly discriminatory pension arrangements had first occurred more than three months before the complaint was lodged.

66. Crucially, their Lordships drew a distinction between a continuing act and an act that has continuing consequences. They 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. Thus in **Sougrin v Haringey Health Authority 1992 ICR 650, CA**, the Court of Appeal held that a decision not to regrade an employee was a one-off decision or act, even though it resulted in the continuing consequence of lower pay for the employee who was not regraded. There was no suggestion that the employer operated a policy whereby black nurses would not be employed on a certain grade; it was simply a question whether a particular grading decision had been taken on racial grounds. That case can, however, be contrasted with the case of **Owusu v London Fire and Civil Defence Authority 1995 IRLR 574, EAT**, in which an employee complained that he was discriminated against by his employer's refusal to award him promotion. While the EAT agreed that a specific failure to promote or shortlist was a single act — despite its continuing consequences — it drew a distinction with the situation where the act (a failure to promote) took the form of 'some policy, rule or practice, in accordance with which decisions are taken from time to time.' Accordingly, the tribunal did have jurisdiction to decide whether there was in fact such a discriminatory practice.

67. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA**, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period.' In that case the claimant, who was a female police officer, claimed, while on stress-related sick leave, that she had suffered sex and race discrimination throughout her 11 years' service with the police force. She made nearly 100 allegations of discrimination against some 50 colleagues. In determining whether she was out of time for bringing complaints in respect of these incidents, the EAT upheld an employment tribunal's ruling that no 'policy' of discrimination could be discerned and that there was, accordingly, no continuing act of discrimination. However, the Court of Appeal overturned the EAT's decision, holding that it had been sidetracked by the question whether a 'policy' could be discerned in this case. Instead, the focus should have been on the substance of the claimant's allegations that the Police Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the police force were treated less favourably. The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

68. In **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16** an employment tribunal found that the decision to commence a disciplinary investigation against H was an act of discrimination, but it was a 'one-off' act and was therefore out of time. H appealed, arguing that the tribunal had been wrong to treat the decision to instigate the disciplinary procedure as a one-off act of discrimination rather than as part of an act extending over a period ultimately leading to his dismissal. Referring to Hendricks (above), the EAT observed that the tribunal had lost sight of the substance of H's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed – suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject H to further steps under it from time to time. The EAT said that if an employee is not permitted to rely on an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. In order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage of a lengthy procedure, an employee would have to lodge a claim after each stage unless he or she could be confident that time would be extended on just and equitable grounds. However, this would impose an unnecessary burden on claimants when they could rely upon the provision covering an act extending over a period. The EAT therefore concluded that this part of H's claim was in time.

69. Previously, the EAT suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals

would be assisted by considering the factors listed in section 33(3) of the Limitation Act 1980 (**British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**). That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

70. Subsequently, however, the Court of Appeal in **Southwark London Borough Council v Afolabi 2003 ICR 800, CA**, confirmed that, while the checklist in section 33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly. In that case a claimant had brought a race discrimination claim nearly nine years after the expiry of the statutory time limit and the tribunal exercised its discretion to allow the claim as it was just and equitable to do so in all the circumstances. The Court of Appeal decided that the tribunal did not err in law by failing to consider the matters listed in section 33 when considering whether it was just and equitable to extend time, provided that it left no significant factor out of account in exercising its discretion. In other words, the checklist in section 33 should not be elevated into a legal requirement but should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

71. The Court of Appeal considered the matter again in **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA**, and emphasised that the factors referred to by the EAT in **British Coal Corporation v Keeble and ors** are a 'valuable reminder' of what may be taken into account but their relevance depends on the facts of the individual cases and tribunals do not need to consider all the factors in each and every case. In **Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA**, the Court of Appeal pointed to the fact that it was plain from the language used in EQA, section123 ('such other period as the employment tribunal thinks just and equitable') that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision or to interpret it as if it contains such a list.

72. This general guidance from the Court of Appeal was heeded by the EAT in **Hall v ADP Dealer Services Ltd EAT 0390/13** where H appealed from a tribunal's decision that it was not just and equitable to extend time to hear her age discrimination claim. She argued that the employment judge had failed to take account of relevant factors, including the balance of hardship, prejudice and the possibility of a fair trial. However, the EAT held that there is no necessity for the employment tribunal to follow a formulaic approach and set out a checklist of the variety of factors that may be relevant in any case, particularly where no reliance has been placed on any of them or other factors have been addressed in the evidence as being of greater significance. In the

instant case, these factors were either of neutral evidential value or outweighed by other, more important, factors that related to H's health and the progress of an internal grievance which were specifically raised and canvassed in evidence and in submissions before the tribunal.

73. The relevance of the factors set out in **British Coal Corporation v Keeble and ors** was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5, CA**. In that case, the Court of Appeal upheld an employment judge's refusal to extend time for a race discrimination claim presented three days late. It noted that the judge had referred to the factors set out in section 33(3) of the Limitation Act 1980, following **Keeble**. As to the first factor, the length of and reasons for the delay, the judge had been entitled to take into account that, while the three-day delay was not substantial, the alleged discriminatory acts took place long before A's employment terminated, and that he could have complained of them in their own right as soon as they occurred or immediately following his resignation. As for A's assertion that he had mistakenly believed that he could benefit from an automatic extension of time under the early conciliation rules, the judge was entitled to take the view that this did not justify the grant of an extension, given that A had left it until very near the expiry of the primary deadline to take advice and then chose not to act on that advice because he thought that the solicitors had misunderstood the position. With regard to the **Keeble** factors, the Court pointed out that the EAT in that case did no more than suggest that a comparison with section 33 might help 'illuminate' the task of the tribunal by setting out a checklist of potentially relevant factors; it certainly did not say that that list should be used as a framework for any decision. In the Court's view, it is not healthy for the **Keeble** factors to be taken as the starting point for tribunals' approach to 'just and equitable' extensions, as they regularly are. Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion, and confusion may occur where a tribunal refers to a genuinely relevant factor but uses inappropriate **Keeble**-derived language. The best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular – as Mr Justice Holland noted in **Keeble** – the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving **Keeble** a status that it does not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.

74. The Court of Appeal's approach in **Adedeji** was followed by the EAT in **Secretary of State for Justice v Johnson 2022 EAT 1**. There, an employment tribunal had concluded that J's harassment claim was issued only a few weeks out of time at the most and that it would be just and equitable to extend time. In doing so, it decided that a lengthy delay in the claim being brought to trial, which was neither party's fault, was not relevant. The delay in question was due to J's concurrent personal injury claim, which resulted in the harassment claim being stayed for several years. On appeal, the EAT held that the tribunal had erred in directing itself that it was only the period by which the complaint was out of time that was legally relevant. It was clear from **Adedeji** that tribunals should consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period. Those consequences included whether allowing the claim to proceed would require the tribunal, for whatever reason, to make determinations about matters that had occurred long before the hearing. Accordingly, in the instant

case, although it was neither party's fault that there had been a considerable delay in the claim being heard, this was nevertheless a factor that the tribunal was required to consider.

75. A debilitating illness may prevent a claimant from submitting a claim in time. However, this will usually only constitute a valid reason for extending the time limit if it is supported by medical evidence, particularly if the claimant in question has taken legal advice and was aware of the time limit. Such medical evidence must not only support the claimant's illness; it must also demonstrate that the illness prevented the claimant from submitting the claim on time. In **Schultz v Esso Petroleum Co Ltd 1999 ICR 1202, CA** the Court of Appeal accepted that illness may justify the late submission of claims. In that case, the Court found that during the last six weeks of the three-month time limit S had been too depressed to instruct solicitors and, overruling the Tribunal and the EAT, held that it was not reasonably practicable for S to have presented his claim in time. The court emphasised that the test is one of practicability, what could be done, not whether we it was reasonable not to do what could be done. In the Court's view, the Tribunal had failed to have regard to all the surrounding circumstances, which included the fact that S had been trying to avoid litigation by pursuing an appeal against his dismissal. Although it was necessary to consider what could have been done during the whole of the limitation period, attention should be focused on the closing stages rather than the earlier ones. In this case S's disabling illness took place at the end of the period in question and it was not reasonably practicable for him to have made the claimant time.

76. Mere stress, as opposed to illness or incapacity, is unlikely to be sufficient.

77. It is clear from the case law that the Tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Therefore, whereas incorrect advice by a solicitor or a wholly understandable misconception of the law is unlikely to save a late tribunal claim in an unfair dismissal case, the same is not necessarily true when the claim is one of discrimination (**Hawkins v Ball and anor 1996 IRLR 258, EAT**).

78. In **Chohan v Derby Law Centre 2004 IRLR 685, EAT**: C was employed as an adviser on employment matters and as a trainee solicitor. She was dismissed and brought a claim for sex discrimination, but her claim was presented 18 days out of time. The employment tribunal decided that it would not be just and equitable to extend the time limit, as the delay was caused by the incorrect advice of her solicitors and because C had legal experience. On appeal, the EAT reversed the tribunal decision and allowed the time limit to be extended. In respect of the incorrect legal advice, the EAT referred to a non-employment decision of the Court of Appeal in **Steeds v Peverel Management Services Ltd 2001 EWCA Civ 419, CA**, when holding that C should not be disadvantaged because of the fault of her advisers, for otherwise the defendant would be in receipt of a windfall. With regard to C's legal knowledge, the EAT said that the legal point concerning when the cause of action arose was a difficult one and C should not be blamed for getting it wrong.

79. In considering whether it is just and equitable to extend time I also must weigh up the relative prejudice that extending time would cause to the respondent.

Discussion and conclusions

Disability

80. I do not accept that the claimant has established that he was disabled at the material time for the following reasons.

81. I have the medical records in the bundle the claimant's two witness statements and what he said in oral evidence. In paragraph 18 of his second witness statement, the claimant clearly states that the effects of his mental impairment started on 13 February 2020 and ended sometime in March 2021. In other words they lasted little more than a year and mostly post-dated his dismissal. This is very clearly stated and I am not persuaded by his attempts to "row back" on the start time by suggesting, under cross-examination, that his condition was getting worse from 13 February 2020. The medical records show that he was not treated during his employment. If his conditioned had worsened, one would have expected him to have obtained professional help. There is no evidence that he did that. The claimant must have read his witness statement before he signed it because it contains a statement of truth and it is reasonable to infer that he was content with what he set out in his statement before he signed the statement of truth. His statement is his evidence in chief. Furthermore, at the beginning of his evidence, prior to being cross examined, he would have had the opportunity to correct anything in his witness statement if he felt it was necessary. That sometimes happens. He did not do that. Clearly, he was content with what he had written. His attempt to suggest that the problem had not started but only got worse damages his credibility.

82. According to the medical evidence, the claimant was discharged from having CBT on 18 January 2019. From this one can infer that any problems that he was suffering from had resolved themselves sufficiently well so that he could get on with his life. This suggests that his difficulties with generalised anxiety and social anxiety were resolved and not long-standing and certainly not serious enough to have any material impact on his day-to-day activities. This was a state of affairs that continued until 13 February 2020. He only sought professional help in October 2020 some 8 months after he was dismissed.

83. There is a paucity of medical evidence in the bundle to support the claimant's claim that he is a disabled person. The earliest medical record is the letter from Ms Patel dated 23 August 2018 [63]. This refers to the claimant experiencing symptoms of generalised anxiety and social anxiety. There is no reference whatsoever to the period of time that he had suffered from the symptoms or the impact that it has on his day-to-day activities. I cannot judge whether the condition was long term. The next letter in the bundle is from Ms Downey and is dated 26 October 2018 [64]. Once again this refers to the claimant is presenting with symptoms of social anxiety and generalised anxiety. It provides a little more detail in the section headed "Assessment." However, and crucially, it states that the claimant "describes being able to manage his day-to-day life and maintain employment relationships." This was something that the claimant confirmed himself during cross examination. It cannot be taken to point to his anxiety having a substantial impact on his day-to-day activities if he is able to manage his day-to-day life and maintain employment relationships. Consequently, at this point, the claimant was not

disabled according to the statutory definition. This was at a time that predated his employment with the respondent.

84. The respondent employed the claimant from 17 June 2019 until he was dismissed with effect from 23 March 2020. During that time, there is a lack of medical evidence in the bundle about his mental impairment. Furthermore, the claimant said in his own words under cross-examination, that he accepted that he believed that he was the best employee and whilst he talks about the effects of his mental impairment, it did not appear to impact on his employment suggesting that it was not substantial.

85. The claimant has set out a list of symptoms and given generalised examples of day-to-day activities which he says are affected by his mental impairment. This is not supported by the medical evidence and, crucially, what, if any impact it had on his day-to-day life. This leaves the witness statements which are vague as to whether he was suffering these alleged adverse impact on his day-to-day life during the material time. For example, he simply makes the generalised statement in paragraph 17 of his second witness statement that the effects of impairment on his ability to do day-to-day activities at a time he was discriminated against. I am not satisfied that he has established that his ability to perform day-to-day activities was impacted by his mental impairments during the material time.

86. There is insufficient evidence to establish that the claimant was disabled before 13 February 2020 or after until his dismissal. Furthermore, if the claimant's mental impairment arose on 13 February 2020 as he says, it would have to be substantial and long-term and have an adverse effect on his ability to carry out normal day-to-day activities from that date up and including the date of his dismissal. There is no evidence that his mental impairment was sufficiently serious to warrant having any treatment until October 2020 or to suggest that it was likely to be long term. He was getting on with his life during that time.

Time limits

87. Given that the claimant has failed to establish that he was disabled at the material time, the question as to whether his claim for direct disability discrimination should be accepted out of time on just and equitable grounds does not arise.

88. This leads me to consider whether I should exercise discretion to accept his out of time direct race discrimination claim on just and equitable grounds. There is no dispute that the claim was filed out of time. It has been suggested by the claimant that when he filed his ET 1 on 14 August 2020, he was one day late. This proceeds on the premise that the last act of discrimination that he suffered was his dismissal on 23 March 2020 with the time being extended by the period of Early Conciliation. That is only relevant when calculating time by reference to the direct disability discrimination claim. In that claim, the claimant alleged that he was dismissed on the grounds of his disability. He has not made the same allegation in respect of his direct race discrimination claim. For the reasons given below, I believe that the last act of unfavourable treatment based on race is alleged to have occurred no later than 31 January 2020. This would mean that he would had to have filed his race discrimination claim on or before 30 April 2020. In his submissions Mr Kennedy made the point that the other claims which are not related to the dismissal were

significantly out of time and is argued that these can only be brought in if they are continuing acts.

89. In the ET1, section 8.2 the claimant alleges race discrimination on the following grounds:

    Racial Discrimination

    Treated differently and less favourably to my white European colleagues. They made fun of me where in public and in front of my other colleagues. They would make

    jokes and belittle me

    Manager and team leader in their first language with their European colleagues in front of me and laughing.

90. It is noteworthy that no dates are given by the claimant as to when these alleged acts of unfavourable treatment occurred. Furthermore, he is not suggesting that his dismissal was connected to his race. Indeed in paragraph 20 of his first witness statement, the claimant states "I strongly feel that I was dismissed by the Respondent because of my disabilities". The date of his dismissal is, therefore, irrelevant for the purposes of calculating the time limit in determining whether his complaint of race discrimination was presented in time.

91. During the hearing, Ms Sharp produced a revised "Claimant's further and better particulars." In paragraph 23 she lists examples of less favourable treatment in support of his claim under EQA, section 13. She says that the claimant says that he suffered the following as a result of his race:

    a. *Less favourable treatment was shown towards him compared to his comparators by Ms Mamakouka:*

        i. *Ignoring his attempts to contribute in meetings;*

        ii. *Criticising his contributions in meetings;*

        iii. *Ignoring his requests for meetings specifically with Ms Mamakouka.*

    …

    f. *The Claimant was deprived of a promotion to "coach" level within the team despite being instructed to carry out coaching roles within his daily work and his sales ability;*

92. Paragraph 23 (f) is a substantial new allegation of fact and not further and better particulars of alleged unfavourable treatment as set out in the ET 1. As such, before it can be considered further, the claimant will need to make an application to amend.

93. In paragraph 24 Ms Sharp lists one comparator Mr Christos Apostlopoulos. She then refers to the following differences in treatment:

a. *In meetings, Ms Mamakouka treated the Claimant less favourably in that:*

    i. *She regularly afforded Mr Apostlopoulos more opportunity to contribute;*

    ii. *She did not openly criticise Mr Apostlopoulos in front of other team members in the same way she did of the Claimant*;

…

d. *Mr Apostlopoulos was promoted within 3 months of commencing as a team member to a position of "coach" and later was promoted to Team Leader. In contrast the Claimant, despite being praised by Ms Mamakouka as a leading seller, with a greater number of sales in his first 3 months than Mr Apostlopoulos, was not promoted throughout his employment.*

94. Once again, no dates have been given concerning these alleged acts of unfavourable treatment. In seeking to find dates of the alleged unfavourable treatment by Ms Mamakouka I have reviewed the claimant's witness statements. In paragraph 17 of his first witness statement he refers to Ms Mamakouka and alleges that she would ask him random questions and put him on the spot in front of others and continue to do this at almost every team meeting which took place every day. He says that she would ask him questions when he answered correctly and would make fun of him by making sounds or jokes. The claimant does not provide a date or dates for these alleged unfavourable acts. In the absence of dates, I cannot calculate the time limit for filing a claim on that particular series of complaints.

95. In paragraph 18 he states that between October 2019 and January 2020 Ms Mamakouka would diarise his work schedule to train new staff members although this was not part of his job description. He says that he had to take new staff and train them whilst doing my door-to-door residential sales. As a result of his social anxiety, he found it difficult to carry out sales whilst they were with him. He often found himself sweating, nervous and very uncomfortable. He informed Ms Mamakouka of this and "she continued to request new staff members to shadow me despite knowing that it exacerbated my social anxiety." This is not linked to his race but to his alleged disability. He links the complaint to his social anxiety. Furthermore, I do not believe it can be interpreted as fitting into any of the categories of less favourable treatment cited by the claimant in paragraph 23 (a) in the amended "Claimant's further and better particulars".

96. In paragraph 19 of his first witness statement, the claimant states that he remembered speaking to Ms Mamakouka approximately five times throughout November 2019 and January 2020 to discuss his grievances and complaints against them in the way he felt that he was being treated. Ms Mamakouka would arrange a date and time for meetings and then cancel them. He alleges that she would ignore him when she talked to her about it. This corresponds with what is said in paragraph 23 (a) (iii) of the amended "Claimant's further and better particulars". Although precise dates are not given, it is reasonable to infer that this could constitute a continuing series of acts perpetrated by Ms

Mamakouka that would have started as early as 1 November 2019 and ended no later than 31 January 2020. Taken at its highest, the latest date for filing his ET 1 would have been three months less one day from 31 January 2020 (i.e. 30 April 2020).

97. I also note that in paragraphs 29-31 there are references made to a claim for harassment. No such claim can be identified in the ET 1. Until such time as an application is made to amend the claim for harassment, there is no requirement to consider what is set out in paragraphs 29-31.

98. On the information provided, I have taken 30 April 2020 as the latest date upon which the claimant could file a complaint of direct race discrimination against the respondent. It is conceivable that the alleged acts of unfavourable treatment could have occurred after 30 April 2020, but in the absence of any dates, this is simply speculation and cannot be considered when calculating the time limit.

99. The time period that ran from 31 January 2020 and ended on 30 April 2020 could not be extended to take account of Early Conciliation as the claimant only started to engage in that process with ACAS on 16 June 2020. The claimant filed his ET1 on 14 August 2020. This was 106 days later or 15.14 weeks out of time.

100. I now turn to reasons why the claimant said he could not file his ET1 in time. I do not accept that the claimant was disabled and, consequently, it cannot be said that his disability prevented him from filing his ET 1 in time. I also do not accept that his anxiety was such that he was prevented from filing his ET 1 in time. On his own evidence, he did not resume having psychotherapy until 7 October 2020. This suggests that his mental health was not in as poor a state as he claims otherwise, he would have sought professional help earlier. Unfortunately, the more plausible reason was that he simply forgot to file his ET1 or made a mistake. If that was the only reason, then I would not be minded to exercise discretion in his favour. However, the claimant has provided other reasons to explain his delay.

101. I cannot ignore the fact that the claimant consulted a solicitor at a date that he has not specified although it must have been after Early Conciliation ended as the time limit is calculated by reference to the date of dismissal and takes account of Early Conciliation. At the time he received the advice, there was an informal relationship and no retainer. He received advice about time limits which led him to believe that the last date on which he should issue his claim was 13 August 2020. He relied on the advice regardless of it being given informally. That advice was correct as far as his disability discrimination claim was concerned given the date of dismissal and the extension of time conferred by the Early Conciliation Certificate . However, it may not have been correct as far as the race discrimination claim was concerned. I do not know what the claimant said to the solicitor about a race discrimination claim nor do I know what he was advised. If it was an informal conversation, he may not have provided details of his race discrimination claim and simply referred to the date when he was dismissed. I am prepared to give the claimant the benefit of the doubt in that he may have had a mistaken belief about time limits particularly as he was making multiple claims with different factual matrices and that the timing for all the claims could be linked to the date of his dismissal. The legal point concerning when the cause of action arose in his

various claims is a difficult one and I do not believe that he should be blamed for getting it wrong. Different time limits applied to his various claims.

102. The balance of prejudice favours the claimant. If the claim is not accepted, he will be denied a remedy. If I accept the claim, the respondent will not be prevented or inhibited from investigating the claim because of a 15.14-week delay relating to events that are said to have taken place between November 2019 and January 2020 which was not long before the expiry of the time limit of 30 April 2020.

103. Under all the circumstances I find that it would be just and equitable to accept the claimant's claim for direct race discrimination by extending the time limit.

Employment Judge Green
Date 18 February 2022