EMPLOYMENT TRIBUNALS

Claimant: Mrs F Hassanzadeh
Respondents: (1) City of Bradford Metropolitan District Council
(2) …
(3) The Governing Body of Belle Vue Boys' School

Judgment having been announced at a preliminary hearing on 19 June 2017 and sent to the parties on 29 June 2017 and the claimant having requested written reasons at the hearing, the following reasons are provided:

REASONS

Parties

1. In these reasons, references to "the respondents" should be taken as references to the first and third respondents".

The preliminary issue

2. By letter dated 26 May 2017, this case was listed for a preliminary hearing to determine a preliminary issue. Unfortunately, the parties do not agree about what that preliminary issue is. The respondent invited me to determine the question of whether the whole of the claimant's complaint of race discrimination was presented within the time limit and, if so, whether the time limit should be extended. It is the claimant's case that these questions fall outside the proper remit of the preliminary hearing. On Mr Shojaee's reading of the letter of 26 May 2017, all complaints of discrimination connected with the alleged failure to conduct a stress risk assessment are excluded from the scope of the preliminary hearing. In respect of those complaints, it is argued, no finding can be made on time limit issues until the tribunal has heard the evidence. If there is such a thing as a "pre-preliminary issue", it is this dispute. In order to resolve it, and the substantive preliminary issue (whichever it is), I must set out some of the procedural history of this case.

Procedural history

3. By a claim form presented on 19 March 2013 to the Regional Office in Leeds the claimant raised a number of complaints, including detriment on the ground of protected disclosures, disability discrimination and race discrimination.

4. The claim form itself contained a brief narrative describing the various claims. The claim against the respondents was described as follows (with original spelling and grammar, but with editing where indicated):

"

(a) Failure of the Head Teacher to follow the school policy and procedures:
(1) Managing Investigation, A Toolkit for Managers in Schools
(2) Complaints and Grievance procedures
At appropriate times when I kept raising my concerns with him regarding the unlawful conduct of the Head of Department for:
(1) bullying and harassment that I was subjected to in an orchestrated manner by the Head of Department and some other members of the department.
(2) Falsification of records in the department by the Head of the department.
(3) Falsification of records to OFSTED by the Head of the department.
(4) Class-fixing by Head of the department and one other member of the department.
(5) Discriminatory treatment with regard to class sizes and the timetable.
(6) Racial discrimination by Head of the department.

(b) Failure of the Head Teacher to follow the appropriate school policy and procedure, from March 2011 when it was clear to him beyond any shadow of the doubt that my stress was a work related stress, which are:
…
(3) School Stress Policy
(4) Risk Assessment, Guidance for Head Teachers
(5) HSE Management Standard in work related stress, which is an integral part of the School Stress Policy

(c) Failure of the Head Teacher in exercising his duty of care with his actions and omissions from march 2011 and its consequential harm on my health and recovery:
[7 numbered allegations of misleading, misrepresentation and negligence]

(d) [Allegations that Human Resources assisted the Headteacher to cover up "earlier unlawful mistakes"]

(e) Failure of the Occupational Health (EH&WS) in maintaining its impartiality after April 2012

[(1) to (3) By negligence and by making various false records and statements]

(4)… They forgot that the risk assessment is an integral part of the HSE Management Standard for work related stress. Risk assessment without accepting this fact is not a risk assessment, it is only another misrepresentation that he has been practicing to over the last two years to cover up his negligence of complying with his statutory responsibilities…

5. To the claim form were appended various attachments, including documents to which the parties have referred as "Attachment 1" and "Attachment 2". Here is how they were described in the claim form:

> "[Attachment 1] chronologically lists the series of events until September 2011.
>
> …
>
> These attachments are:
>
> 1. [Attachment 1] 'Brief account of the Events', this is a 16 page document which was produced originally at the end of January 2012 for my union representative at that time. It covers the major events since November 1993 until the end of September 2011 in chronological order. Then the last few pages outlines some events until January 2012 under the headings of "Lesson Observation Issues" and "Record Keeping".
> 2. [Attachment 2] is an e-mail to Les Hall the Head of HR, representing the School at the Pre-claim Conciliation process. This e-mail clearly explains to what extend this dispute has been progressed at the conciliation process and what are the disagreements between the school and I at this stage."

6. Attachment 1 set out a number of incidents of alleged bad treatment. The dates of the various events were not always stated. The allegations in Attachment 1 have been characterised by the respondent in their submissions as follows (with added formatting):

    6.1 The 1993/1994 allegation concerning management allowances.
    6.2 An allegation concerning non-payment of acting up allowances. The non-payment was described as less favourable treatment on the ground of sex and race. This dates back to 2003.
    6.3 The lack of risk assessment of Joan Ogley allegation – management failed to address the actions of Joan Ogley. This could go back to 2005-2006.
    6.4 The less favourable treatment from Joan Ogley compared to her treatment of teachers of Pakistani origin. This is said to have occurred for many years and it possibly goes back to 2008/2009.
    6.5 An allegation is made about the terms of a Self-Evaluation Form prepared by Joan Ogley (Head of Maths) which singled out the alleged under-performance of teachers of Iranian origin. The criticism is said to be unfounded and an act of race discrimination. This dates back to September 2011.
    6.6 The failure to provide Key Stage 4 results information requested by the Claimant. This dates to 2011 (and into January 2012).
    6.7 The 'misinformation letter' dated 14.12.2011 written by Colin Willsher, Head Teacher. The claimant considers this deliberately set out an unfavourable view of her and was an act of discrimination.

7. I have compared the respondents' summary with the contents of the claim form and attachments. In general terms, I find that the summary fairly reflects what is

set out in those documents. There are some areas, however, where the summary oversimplifies the allegations.

8. I start with the respondents' characterisation of the claim at paragraph 6.3. This appears to be taken from a passage in Attachment 1 which I call "the Risk Assessment Paragraph". The Risk Assessment Paragraph can be found under the heading "Racial Discrimination Issues", following allegations relating to the incidents in 1993/1994 and the spring term of 2003 (both of which were correctly summarised by the respondent). The narrative continued:

> "One important case that requires more comprehensive analysis to find out under which form of discrimination needs to be considered is the lack of a risk assessment and the provision of safeguards to prevent bullying towards me by [Mrs Ogley] when I was awarded a better grade in the first OFSTED inspection. Most importantly the lack of such provision for prevention of future hostility when signs of animosity of [Mrs Ogley] towards me clearly came to the surface. The most important question that comes to any reasonable person's mind is whether these conducts indicate racial victimisation. I will leave further explanation to a later date."

9. In my view, the Risk Assessment Paragraph, taken with the claim form as a whole and other material, is a more reliable guide to what the claimant was raising than the respondents' characterisation of it at paragraph 6.3 above. As to its meaning, see my Conclusions below.

10. It was clear from Attachment 1 that the school where she worked had had a number of Headteachers over the years. One of these was Mr Berry, who left in 2003. Under the heading, "Mr Berry's Headship", the claimant referred to a meeting when Mr Berry made an apology to her and a promise to be watchful to prevent harassment by Mrs Ogley. "After that there was a period of relative calm between us, although her hostile attitude towards me remained intact. However, Mr Berry left the school in 2003 and this period of relative calm came to an end." Then, under the heading, "Mr Whittaker'[s] Headship", "During the headship of the next head teacher, Mr Whittaker, although [Mrs Ogley] gave momentum to her bullying behaviour and made few attempts to discredit me in the eyes of Mr Whittaker, she failed to manipulate him due to the strength of Mr Whittaker for standing against those members of staff at management level who were abusing their authority." The claimant outlined two factors explaining a "reduction in bullying conduct" of Mrs Ogley, and described Mr Whittaker as "supportive". Unfortunately, from the claimant's point of view, Mr Whittaker left after a few years, to be replaced by Mr Willsher. It was on Mr Willsher's appointment in about 2008 that "bullying conduct of [Mrs Ogley] towards me gained new momentum and moved from strength to strength."

11. The latest date mentioned in Attachment 1 was 11 January 2012. It was alleged that, at a meeting on that date:

    11.1. Mr Willsher had "referred to lesson observations as evidence of part of a chain of inadequate lessons without even mentioning the satisfactory ones in between" and

    11.2. Mr Willsher had claimed to have sent Key Stage 4 results information, but, as at the date of Attachment 1 still had not provided that information.

12. Attachment 2 was an e-mail dated 7 February 2013 from the claimant to Mr Hall. This e-mail drew attention to the need for the school to conduct a risk assessment. It alleged that there had been a cover up of unlawful conduct of the Head of Department and Head Teacher. It contained this paragraph:

> "You know that the risk assessment is a tool for addressing a specific incidence or health problem. This risk assessment in this dispute must address my work-related stress that was initiated by the negligence and lack of duty of care by the school and HR, which has now reached the stage of disability as a result of further negligence and lack of duty of care as well as successive cover up by the school and HR."

13. Attachment 2 went on to describe "deadlock" in the risk assessment process and to make further allegations of negligence, failure to follow the school's stress policy and failure to comply with the Health and Safety Executive's Management Standard. There was nothing in Attachment 2 that suggested that there was any connection between the failure to carry out a risk assessment and the claimant's race. Still less was there any suggestion that the claimant's race had been a reason for the failure.

14. Following a preliminary hearing on 29 July 2013, Employment Judge Grazin ordered the claimant to provide detailed further information about her complaint of race discrimination. By the time of a further preliminary hearing on 27 November 2013, for whatever reason, that information had not been provided in a form that the tribunal considered satisfactory. At that hearing, REJ Lee provided the claimant with a template for what she referred to as a "Scott Schedule" and ordered the claimant to complete it. Although the use of the phrase, "Scott Schedule" can cause confusion, especially among self-represented parties, I adopt it here, because all the parties to this case referred to the document by that name.

15. The claimant duly submitted her Scott Schedule. It was divided into sections. Section 3 jointly covered the complaints under the Equality Act 2010 with regard to race and disability. With the assistance of a helpful legend, the Scott Schedule indicated whether each allegations was one of "race discrimination" or "disability discrimination".

16. Amongst the allegations set out in the Scott Schedule were (with original spelling):

    16.1. Allegation 8 – June 2008 - "Refusal of Mr Willsher to carry out an appropriate Stress Risk Assessment, when he interviewed the Claimant over the pattern of missing days." This was marked "DD", meaning "disability discrimination".

    16.2. Allegation 11 – October 2011 – "Refusal of Mrs Rendle to make a request from the Head Teacher to carry out an appropriate risk Assessment, when she was aware of the details of the Claimant[']s concerns". This was marked as a further complaint of disability discrimination.

    16.3. Allegation 13 – January 2012 – "Refusal of the Head Teacher, HR representative … to discuss the report of the Occupational Health and to carry out an appropriate Stress Risk Assessment". The appropriate column in the Scott Schedule indicated that this was alleged to be disability discrimination.

16.4. Allegation 14 – April 2012 – "Refusal of the Head Teacher, the HR representative … to discuss and appropriate Stress Risk Assessment." Again, this was said to be disability discrimination.

16.5. Allegation 16 – June 2012-September 2012 – "Deceptions and falsification of the minutes of a meeting in July, and the conduct of the Head Teacher, HR…to deviate from the School Stress Policy in carrying out an appropriate Stress Risk Assessment. This was marked with the same abbreviation for disability discrimination.

16.6. Allegation 17 – October 2012 December 2012 – "Misrepresentations, false allegations and trickery by the Head Teacher and Head of HR to avoid following the School Stress Policy in completion of an appropriate Stress Risk Assessment." This, too, was stated to be an allegation of disability discrimination.

17. In due course, the claim was listed for a further preliminary hearing before REJ Lee. At the claimant's request I did not read REJ Lee's judgment or reasons. I do know, however, that REJ Lee determined, amongst other things, that the race discrimination complaint was out of time and the time limit should not be extended. That judgment was overturned on an appeal to the Employment Appeal Tribunal. In the meantime the claim was transferred to the North West region.

18. After being stayed for a period of time to await a pending appeal to the Court of Appeal, the claim was listed for a preliminary hearing in front of Employment Judge Feeney. The preliminary hearing took place on 20 April 2017, following which Employment Judge Feeney caused a detailed written case management order and summary to be sent to the parties.

19. At paragraph 2 of her summary of the hearing, EJ Feeney noted that, amongst the "several areas where there was no agreement", was "Whether there should be a preliminary hearing to decide whether any matters were out of time…". In relation to this area of disagreement, EJ Feeney recorded at paragraph 3(3):

> "(iii) In relation to the issue of race discrimination I decided that there was a more compelling case, the respondents saying that the claimant was off sick from November 2012 and submitted her claim in March 2013, that the last act of race discrimination identified was September 2012, and that in fact there could be no further actions after the claimant went off sick in November 2012.
>
> (iv) The claimant argues that the failure to do the stress risk assessment was race discrimination and was ongoing until the claimant resigned her employment in March 2013. However, the claimant was not able to point to anything in the ET1 and the Scott Schedule which stated that this claim was a race discrimination claim rather than a disability discrimination claim, and therefore I asked the claimant to clarify her position in relation to this within 14 days…following which I would make a final decision as to whether or not the matter was suitable for a preliminary hearing."

20. The summary was followed by a series of case management orders. One of these, at paragraph 5, was for the claimant to "advise whether she has already pleaded, either in the ET1, or the Scott Schedule, any race discrimination claim continuing up to March 2013, and if so to identify where that claim is pleaded. If

the claimant accepts that it is not pleaded she can make an application to amend identifying whether she says it is a re-labelling of facts and issues already pleaded….or whether it is a new claim. If it is a new claim an application to amend should be made by 4 May which should include full particulars of the amendment sought."

21. Paragraph 11 provided for a preliminary hearing to take place on 19 June 2017. The paragraph continued:

> "The out of time issue regarding race discrimination may be added to this hearing pending the information to be supplied by the claimant referred to above."

22. Further submissions were delivered in writing. On the claimant's behalf, Mr Shojaee contended:

    22.1. That it would be misleading to decide the time limit issue by reference to the Scott Schedule. "The correct approach would be to look at the Claim Form ET1 first".

    22.2. "The complaint about the racial conducts of the respondents was pursued continuously by the claimant after September 2012 in a document called 'Stress Risk Assessment'.

    22.3. That Attachment 1 "clearly described" the complaint of racial discrimination.

    22.4. Attachment 2 was "one of many correspondences exchanged between the claimant and the respondents regarding the completion of the document "stress risk assessment", which the "Respondents were continuously blocking" by "creating various unreasonable deadlocks". "The 2nd Attachment of the ET1 was one of the attempts of the claimant to break one of the deadlocks".

    22.5. Completing the stress risk assessment meant that the respondents should address all the stress factors identified by the claimant in that document, including allegations of "the racial conduct of the head of maths department and the head teacher".

    22.6. Refusal to complete an appropriate stress risk assessment was a continuing omission lasting into March 2013 and beyond.

23. There was no attempt in Mr Shojaee's submissions to ask for an amendment to the claim. It was his case that the claim form already raised a complaint that the failure to complete a stress risk assessment was an act of race discrimination.

24. On reading the written submissions, Employment Judge Feeney caused a letter dated 26 May 2017 to be sent to the parties. The letter contained this passage:

> "The issue of whether the claimant's race discrimination claims, at least in part, are out of time will be decided at the preliminary hearing. The reasons are that the claimant relies on the stress risk assessment as a continuing thread to the end of her employment. However, many of the earlier matters relied on going back to 1993/4 are not obviously connected with this and therefore it is a legitimate enquiry as to whether they constitute a continuing state of affairs with the issues surrounding the stress risk assessment. Further, in the light of the

> overriding objective and in particular dealing with cases proportionately, a preliminary hearing to consider the point is appropriate."

25. In a subsequent letter to the parties, EJ Feeney indicated that the preliminary hearing would be used solely for the purpose of determining the time limit point. If the other matters remained in dispute, they would have to be determined at a further preliminary hearing.

The preliminary hearing on 19 June 2017

26. At the preliminary hearing I attempted to establish from Mr Shojaee what he would ask the tribunal to do in the event that the claimant's primary submissions failed and the tribunal determined that the complaint of race discrimination had been presented after the expiry of the time limit. Did the claimant seek an extension of the time limit on "just and equitable" grounds?

27. This was a recurring topic of conversation during the preliminary hearing. Here are some of the exchanges:

    27.1. At the start of the hearing, I asked Mr Shojaee the above question in an attempt to clarify the issues. I also asked whether, if it was his intention to argue for an extension of time, he anticipated that the claimant would give any oral evidence on that issue. Mr Shojaee replied that the issue of time limits had already been to the Employment Appeal Tribunal and added, "I categorically say now that if anybody suggests…it is a very serious irregularity to suggest this is the outcome."

    27.2. I explained to Mr Shojaee that I understood that his primary case was that it was inappropriate to decide the time limit issue at a preliminary hearing and that in any event he was arguing that the claim had been presented within the time limit. I explained the concept of advancing arguments in the alternative, and sought to reassure the claimant that making submissions on an extension of time would not harm her primary case. I was simply giving the claimant "another way to win". Having heard this explanation, Mr Shojaee replied, "it is a serious irregularity to decide that it is out of time. An employment judge has decided that it is in time. I am suspicious of you. You are insisting on a point that is totally irrelevant."

    27.3. I then offered to the claimant to conduct the preliminary hearing in separate stages, so that the tribunal would initially decide whether it was reasonably arguable that the claim had been presented in time. I explained the effect of such an approach. Only if the claimant lost on his main points would I even consider the question of whether the time limit should be extended. Mr Shojaee did not engage with this proposal directly. Instead he referred to the overriding objective, alleged that his rights under Article 6 of the European Convention had been denied since 2013 by the "scandalous conduct of the respondent's representatives, by lies, deception and misleading the tribunal." He added that "irregularities have all been infused into this tribunals by lies, deception and misleading arguments" in order to prolong the case. The respondent's solicitors and three barristers from the same chambers had, the claimant alleged, breached their professional codes of conduct by lying. As an example, the claimant referred to the fact that he

had not been given advance warning that Mr Smith would be representing the respondent at today's hearing.

27.4. Before submissions began, Mr Smith asked to re-visit the question of whether the tribunal would be dealing with the "just and equitable" extension of time point and, if so, whether the claimant would be giving oral evidence. This prompted a rather dysfunctional exchange. I observed that it was up to the claimant to decide whether to give evidence. Mr Shojaee interrupted by stating that the respondent knew full well that the claimant could not give evidence. I asked Mr Smith if, at the hearing before Employment Judge Feeney, there had been any discussion of the need for oral evidence in relation to this issue. After taking brief instructions, he replied that there had been no such discussion. Mr Smith stated that he was not insisting that the claimant give evidence and was merely trying to assist. At this point Mr Shojaee interrupted again, shouting, "This is scandalous!" He then started making an application to have the respondent's response struck out on the ground of allegedly scandalous conduct. I told Mr Shojaee that I would hear such an application at the conclusion of the hearing if time permitted. Mr Shojaee continued shouting, saying that the respondent had "been forcing the judges to abuse their position". He added, "It is your duty to protect the judiciary from the criminal offences of the respondent."

27.5. By the time the Mr Shojaee had made his submissions in relation to the time limit, I was concerned that he was needlessly manoeuvring the claimant into a disadvantageous position from which she might not be able to return. To re-open the door to an extension of time, I asked both parties whether, at the hearing before Regional Employment Judge Lee, there had been any oral evidence on the question of whether it had been just and equitable to extend time. Mr Shojaee asked why I wanted to know. I explained that my query was just in case it ever became necessary to consider the question of whether it was just and equitable to extend the time limit. Mr Shojaee began shouting again, saying, "Don't mention the need for an extension of time".

27.6. During the respondents' submissions, Mr Smith urged me to decide the "just and equitable" point at that hearing. He submitted that, if that point were to be decided at the next preliminary hearing, the respondent would incur additional cost. It had been the claimant's choice not to give evidence at this hearing.

27.7. On this point I initially disagreed with the respondent. Once I had given judgment on the time limit point I announced a proposed case management order. The "just and equitable" issue would be determined at the next hearing and I would make provision for the claimant to send a witness statement in advance. I explained that I would make these orders to give the claimant an opportunity to change her mind if she wished to do so. To this, Mr Shojaee said, "I am never going to change my mind. The decision is totally perverse. I am not asking the tribunal to extend the time limit." He then shouted, "Please, never mention it again".

28. One other point of note arose during the respondents' submissions. Mr Smith reminded the tribunal and the claimant that she had an opportunity to apply to amend her claim to include a complaint of race discrimination by failing to carry out a risk assessment. Mr Shojaee responded to Mr Smith's submissions, but did not make any application to amend the claim.

Relevant law

Overriding objective

29. Rule 2 of the Employment Tribunal Rules of Procedure 2013 sets out the overriding objective as follows:

> The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
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> (a) ensuring that the parties are on an equal footing;
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> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

Case management orders

30. Rule 29 of the 2013 Rules gives tribunals the power to make case management orders, which may vary, suspend, or set aside an earlier case management order where necessary in the interests of justice.

31. In *Serco Ltd v. Wells* UKEAT/0330/15, HHJ Hand QC ruled that the power to vary an earlier order is not untrammelled. Where an employment judge makes an order, another employment judge of equivalent jurisdiction may not vary or revoke that order unless (a) there has been a material change of circumstances since the order was made or (b) the order has been based on either a misstatement (of fact or law) an omission to state relevant fact or (c) there is some other occasion making revocation necessary in the interests of justice – occasions falling into this latter category will be rare and out of the ordinary.

Adjudicating on claims

32. A tribunal must not adjudicate on a claim that is not before it: *Chapman v. Simon* [1993] EWCA Civ 37.

33. In *Chandhok v. Tirkey* UKEAT0190/14, Langstaff P observed:

> 17. ….Care must be taken to avoid such undue formalism as prevents a Tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to

> ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. ...
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an Employment Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.

34. In *Ali v. Office for National Statistics* [2005] IRLR 201 the Court of Appeal emphasised that, in deciding whether a particular complaint has been raised in a claim form, the tribunal should examine the document as a whole. Merely ticking a box alleging discrimination by reference to a protected characteristic may not be sufficient to raise a complaint of such discrimination if the underlying facts cannot be ascertained from the narrative.

35. In *Amin v Wincanton Group Ltd* UKEAT/0508/10/DA, HHJ Serota QC distinguished between a claim that is "pleaded but poorly particularised" and a *Chapman v. Simon* case, where the complaint is not pleaded at all. In the former case, the claimant is not required to amend the claim. The lack of proper particulars does not affect the tribunal's jurisdiction. The remedy in an appropriate case would be to strike out the relevant part of the claim. It is, HHJ Serota observed, "clearly undesirable that important issues in Employment Tribunal proceedings should be determined by pleading points".

36. In *Amin,* HHJ Serota QC also had this to say about the function of further particulars of a claim:

> "The function of Particulars is to limit and define issues to be tried, and to inform the other side of the case it has to meet, and avoid surprises. Particulars will limit the generality of a pleading."

37. In my view, *Amin* is authority for saying that further particulars can be used as an indication of whether or not a claim form raises a particular issue. The starting point is always the claim form, but the further particulars may limit its scope. Take, for example, a claim form that makes a general assertion that an act or omission amounts to discrimination, without specifying which form of discrimination is alleged.

Later, in a formal document, the claimant clarifies that that act or omission amounts to discrimination based on an identified protected characteristic (such as disability discrimination). It seems to me, as a matter of principle, open to the tribunal to conclude in the light of that document that the form of discrimination alleged in the original claim form was based on that protected characteristic and not a different protected characteristic (such as race).

Time limits

38. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> > (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> >
> > (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> > (a) conduct extending over a period is to be treated as done at the end of the period;
> >
> > (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> > (a) when P does an act inconsistent with doing it, or
> >
> > (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

39. In Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”. I shall read out the

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an ‘act extending over a period’…
>
> 52. ... The question is whether that is ‘an act extending over a period’ as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

40. In considering whether separate incidents form part of "an act extending over a period”, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA

& UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

41. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority [1992] IRLR 416*, *[1992] ICR 650, CA.*

42. Claims of discrimination are notoriously fact-sensitive. It is well established, for example, that it is inappropriate to strike out claims – and discrimination claims in particular – where there are central disputes of fact: *Anyanwu & another v South Bank Students Union* [2001] ICR 391. It will only be in an exceptional case that such a claim will be struck out as having no reasonable prospect of success where the central facts are in dispute: *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126, CA. Tribunals must remind themselves that discrimination is seldom admitted and the discriminator may not even be aware that it is happening. The tribunal should consider all of the evidence to see whether appropriate inferences can be drawn. Ordinarily, therefore, the question of whether an act extends over a period should be determined by the tribunal at the final hearing having heard the evidence.

43. Where time limits fall to be determined at a preliminary hearing, the tribunal should ask itself whether it is reasonably arguable that the act of discrimination in question formed part of an act extending over a period. If it is reasonably arguable, the matter should not be decided until the final hearing: *Aziz* (cited above).

44. Where it is clear, on a fair and reasonable reading of the ET1 as a whole, that a claimant is alleging continuing discrimination and that the final specific allegation in that context is at a time within the primary time limit, that may be sufficient to determine that a claimant's case is potentially timeous (*Charles v Tesco Stores Ltd* [2012] EWCA Civ 1663, Mummery LJ paras 18, 22 and 24). The relevant question is "what the claim form meant to a reasonable reader": para 24.

45. It is not enough for a claimant to make a bare assertion that an act extends over a period. The assertion needs to be reasonably arguable: *Ma v Merck Sharp and Dohme* [2008] EWCA Civ 1426. It is sufficient that the claimant has asserted the nature of the overarching act of the respondents and supported that assertion with adequate specification of the acts of the individual employees that are said to form the basis upon which a continuing act may be established: *City of Edinburgh Council v. Kaur* [2013] CSIH 32.

46. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. It is for the claimant to persuade the tribunal to exercise its discretion in his favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298.

47. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

    47.1. the length of and reasons for the delay;

    47.2. the effect of the delay on the cogency of the evidence;

47.3. the steps which the claimant took to obtain legal advice;

47.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

47.5. the extent to which the respondent has complied with requests for further information.

Conclusions

The issue for determination

48. I address first of all the dispute over the remit of the preliminary hearing. I do not consider myself bound by Employment Judge Feeney to hold that any part of the race discrimination claim is, even arguably, in time. I accept that the 26 May 2017 letter, read as a whole, gave the impression that Employment Judge Feeney had some sympathy for the claimant's position in relation to some of the allegations of race discrimination. Had Employment Judge Feeney conducted the preliminary hearing herself, it would not have been a surprising conclusion if she had allowed some of the complaints to go forward on the basis that they were connected to the allegation of failure to carry out a risk assessment. That is not the same, however, as saying that Employment Judge Feeney was attempting to circumscribe the decision for another employment judge and prevent that judge from finding that the whole of the race discrimination claim was presented too late. I reach this conclusion for the following reasons:

48.1. It seems to me that by using the words "**at least** in part" (with my emphasis), Employment Judge Feeney was leaving open the possibility that the whole of the race discrimination might be found at the preliminary hearing to have been presented out of time. Otherwise, the words, "at least" would have been redundant.

48.2. EJ Feeney was not, in my view, expressing a concluded opinion that the omission to carry out a stress risk assessment was actually a "continuing thread to the end of her employment". Nor was she expressing a conclusion as to whether that was an assertion that was reasonably arguable. She was characterising the claimant's argument as she understood it.

48.3. The quoted passage appears to be EJ Feeney's reasons for considering *some* time limit issues at a preliminary hearing. It was the claimant's position that a preliminary hearing was completely inappropriate for any time limit issues at all. EJ Feeney therefore needed to explain why time limits were on the agenda. The language of the letter is entirely appropriate for that purpose. It is not, however, nearly precise enough to be a demarcation of those complaints that would safely proceed and those complaints that were at risk of dismissal at the preliminary hearing stage. The phrase, "continuing state of affairs with the issues surrounding the Stress risk assessment" does not lend itself to precise interpretation. I doubt very much whether EJ Feeney intended it to be subject to scrutiny in this way. But its precise meaning would have to be ascertained had she wished it to be a fetter on the discretion of another employment judge.

48.4. If the claimant's interpretation is correct, EJ Feeney must have decided on the papers that certain complaints of race discrimination should go forward to the final hearing regardless of any arguments made at the preliminary hearing. Yet, shortly after supposedly making that decision, she

allocated an entire day of hearing time to decide which if any complaints should be allowed to proceed. It seems to me more likely that EJ Feeney would have left the entire time limit issue to the employment judge conducting the preliminary hearing.

49. I therefore consider that it is open to me to find that the whole of the race discrimination complaint was presented after the time limit expired. Needless to say, I must not take such a course if the claimant manages to cross the low threshold required of her at a preliminary hearing.

Interpreting the claim form

50. In my view, the claim form and attachments cannot reasonably be understood as containing an overarching complaint of race discrimination by failure to carry out a stress risk assessment. I have read the claim form as a whole together with Attachments 1 and 2. A reasonable reader of these documents would not understand the claimant to have been complaining that the respondents' failure to carry out a risk assessment was an act of race discrimination. Here are my reasons:

    50.1. The claim form itself made a specific allegation of "Racial discrimination by Head of the department". It did not make any allegation of race discrimination by failing to carry out a stress risk assessment.

    50.2. There was nothing in the descriptions of Attachment 1 or Attachment 2 to suggest that those documents contained any allegation that the failure to conduct a risk assessment was an act of race discrimination. In fact, the description of Attachment 1 suggests the contrary. A reader of that description would think that the claimant had included it to explain the roots of her work related stress and how she had acquired the protected characteristic of disability.

    50.3. In my view, the Risk Assessment Paragraph in Attachment 1 does not significantly alter the analysis. At first sight it lends some support to the claimant's argument. If one looked at the first sentence in isolation, it could be construed as meaning that the claimant reserved her right to contend that the failure to carry out a risk assessment was itself some act of discrimination although, at that stage, she did not know what kind of discrimination it was. In my view, however, such an interpretation does not fit easily with the rest of the paragraph. To my mind, the true meaning of the paragraph is clear from the sentence, "The most important question that comes to any reasonable person's mind is whether these conducts indicate racial victimisation." The phrase, "these conducts" is a reference to actual behaviour, rather than a failure to do something. A reasonable reader would understand the claimant to be referring to the conduct of Mrs Ogley.

    50.4. My view is reinforced by Attachment 2. It referred to the claimant being disabled. It made many allegations of breach of legal duty in connection with the failure to carry out a risk assessment. Race discrimination was not one of them. It is clear from the description of Attachment 2 that Mr Shojaee sent this e-mail as part of a conciliation process, where one would expect him to articulate a complaint of race discrimination if he thought it was ongoing.

    50.5. I also think that my interpretation is consistent with the Scott Schedule. The numerous allegations related to the stress risk assessment were all stated to be complaints of disability discrimination, not race discrimination.

This express categorisation in a formal document limited the scope of the claim by relying on one protected characteristic to the exclusion of another. The claimant's considered position in the Scott Schedule should be given particular weight because the Scott Schedule was the first occasion in which the claimant unreservedly stated that she was alleging a particular form of discrimination with regard to the stress risk assessment. The final sentence of the Risk Assessment Paragraph indicated that the claimant would clarify her case at a later date. The Scott Schedule was her means of doing that.

50.6. The Scott Schedule also fits into the broad theme that the risk assessment was necessary to protect the claimant's health from the alleged racially discriminatory acts of Mrs Ogley.

50.7. In my opinion, what the claim form and its Attachments were saying was that, had a stress risk assessment been properly carried out at the appropriate time, the risk assessment would have revealed that acts of race discrimination had taken place and would have protected the claimant against possible future discriminatory acts. That is not the same as saying that the failure to carry out a risk assessment was an act of race discrimination.

51. Despite being clearly prompted to do so by both EJ Feeney and counsel for the respondents, the claimant did not make any application to amend her claim to include an allegation of race discrimination by failing to carry out a risk assessment.

Principal conclusion – whole race discrimination complaint out of time

52. The claim form was presented on 19 March 2013. The time limit is three months. Unless one of the acts of discrimination can be said to have been part of an act extending over a period ending on or after 20 December 2012, the claimant will need an extension of time.

53. Having decided that the claim form did not allege that the ongoing failure to conduct a stress risk assessment was race discrimination, I now turn to the complaints of race discrimination that the claim form actually did raise. In my view, the last act of race discrimination mentioned in the claim form and Attachments was stated to have occurred in January 2012. This date comes from the description of Attachment 1 and from the dates of two incidents set out in Attachment 1 itself. The claimant must make out a reasonably arguable case that this, or an earlier alleged act of race discrimination, formed part of an act extending over a period.

54. I have considered the latest two allegations in time. These are the alleged failure to provide Key Stage 4 results information (ongoing as at January 2012) and the making of a remark about the standard of lessons at a meeting on 11 January 2012. In my view, the time limit for Key Stage 4 allegation would run from the expiry of a reasonable period for providing that information. It was clear from Attachment 1 that, by January 2012, the claimant's case was a reasonable period had already expired. As for the remark on 11 January 2012, this appears to have been an act done on that day.

55. The claimant relies on the respondent's continuing omission to carry out a stress risk assessment, which lasted beyond January 2012 and about which the claimant was clearly complaining in her claim form. Mr Shojaee makes the case that the failure to conduct such an assessment had the effect of making

the January 2012 acts of alleged race discrimination, and the acts that went before them, into an act extending over a period. This is, Mr Shojaee says, an "overarching factor" linking the acts together and making them last until the presentation of the claim. I have to decide whether that case is reasonably arguable.

56. Before expressing my view on this point, I make a number of assumptions for the purpose of this hearing. I assume that the claimant will establish:

    56.1. that the respondents' written policies required them respondent to carry out a stress risk assessment;

    56.2. that requirement was a continuing obligation lasting until the end of the claimant's employment;

    56.3. that the causes of the claimant's stress did in fact include acts of race discrimination as set out in the claim form and Attachment 1;

    56.4. that, had a stress risk assessment been done properly, it would have prompted an investigation into the claimant's allegations of race discrimination, which would have been upheld; and

    56.5. that, following a properly-completed stress risk assessment, the claimant would not have been subjected to any further acts of race discrimination.

57. The claimant will **not** establish that the failure to conduct a stress risk assessment was itself racially discriminatory.

58. What all this means is that there was a period of time lasting beyond December 2012 in which historic acts of discrimination remained wrongly unacknowledged. But that does not mean that any of those earlier acts of discrimination occurred any later than they actually did. Such a contention would not, in my view, be even reasonably arguable.

59. It might be said that the respondent's failure to address previous acts of discrimination had ongoing consequences for the claimant's state of health. That is not the same as an act extending over a period – see *Sougrin.*

60. It is not reasonably arguable that the risk of future acts of discrimination transformed the past incidents into an act extending over a period. The position might conceivably been different had a further act of race discrimination occurred shortly before presentation of the claim form. The claimant might have argued that the further act, and the January 2012 acts, were part of the same continuing state of affairs perpetuated by the lack of proper investigation. (I would not wish it to be thought that I would have allowed the earlier complaints to proceed to a final hearing on this basis. As will be seen under my alternative conclusions, I also think that the link is too tenuous.) But that was not the case here. Nothing is alleged to have happened after January 2012.

61. For those reasons I find that there is not even a reasonably arguable case that any part of the race discrimination complaint formed part of an act extending over a period that ended on or after 19 December 2012. The whole complaint is out of time. Without an extension on "just and equitable" grounds, the tribunal has no jurisdiction to hear it.

<u>Alternative conclusions</u>

62. I am acutely conscious that this claim has already suffered from long delays. There has already been one decision on time limits that has been overturned by the Employment Appeal Tribunal. A final hearing has been listed to begin in February 2018. It is of vital importance that that hearing should proceed. Nobody wants a further preliminary hearing on time limit issues and such a hearing (which itself might be subject to appeal) would endanger the final hearing date. I have therefore attempted to make provision for the possibility that my judgment might be appealed and be found to be wrong. It may assist in avoiding delay if I record here (as I also announced to the parties) what my conclusions would have been had I not found the whole race discrimination complaint to be out of time.

63. For these purposes, I assume for a moment that I am wrong in my interpretation of EJ Feeney's letter of 26 May 2017. What if I was constrained to allow all allegations to proceed to the final hearing, provided that they "constitute a continuing state of affairs with the issues surrounding the Stress risk assessment?"

64. I have considered whether it is reasonably arguable that the alleged discrimination ending with the two incidents in January 2012 is connected to an overarching factor of failure to carry out a stress risk assessment. In my view it is not even reasonably arguable. Failure to carry out a stress risk assessment is of a completely different character to the kind of bullying outlined in Attachment 1. The fact that Mr Willsher is implicated in other allegations is relevant, but that factor is not determinative. The only common factor, taking the claimant's case at its highest, is that the incidents should have been investigated under the risk assessment process, but were not. That does not, in my view, even arguably make the incidents any less isolated than they were.

65. The next hypothetical scenario I have imagined is that I was wrong in my interpretation of the claim form. I suppose for a moment that the correct analysis is that the claim form could properly be understood as bringing a claim that the failure to conduct a stress risk assessment was discriminatory. In that case I would reach a slightly different conclusion. I would hold that it is reasonably arguable that there was a series of refusals, as opposed to one failure (that must be treated as having been "done" on the expiry of a reasonable period), and that that series formed part of a continuing state of affairs lasting beyond 19 December 2012. The claim in respect of that allegation would therefore have been in time.

66. For the reasons already given, I would not have found it even reasonably arguable that the other acts of discrimination ending on 11 January 2012 formed part of the same state of affairs. An extension of time would have been required.

67. In case I am wrong about that conclusion, I would hold that any reasonably arguable continuing state of affairs went back as far as the beginning of Mr Willsher's appointment as Headteacher. It is clear from the claim form that, under Mr Berry and Mr Whittaker, there were periods where Mrs Ogley was unable to bully the claimant because the Headteacher was standing up to her. Any tribunal, in my view, will find that these periods of calm broke the connection between one discriminatory state of affairs and the next. It is not reasonably arguable to contend otherwise.

<u>Extension of time</u>

68. There is, in my view, a short answer to this point. It is for the claimant to persuade the tribunal to exercise its discretion to extend the time limit. The claimant refused even to try. These were not loose words in the heat of the moment. As my summary of the hearing shows, Mr Shojaee was given every opportunity to engage with this question. Attempts to secure his effective participation on this issue included more than one explanation of the importance of an extension of time, reassurance that he could argue for an extension of time without harming his case on whether an extension was needed in the first place, a further hearing to enable more effective preparation and a proposed case management order for a witness statement in case he changed his mind. The latter two steps were done in the face of objection by the respondent. Still Mr Shojaee refused. There is therefore no argument from the claimant that could persuade me to extend the time limit and I must therefore refuse the extension.

69. I have pondered whether I should consider an extension of time on my own initiative, even if such a course would be against the claimant's wishes. My conclusion is that it would not be appropriate take this course. In case I am wrong on this point, however, it may be of assistance for readers of this judgment to know how I would have decided the "just and equitable" question on basis of the material before me. I would not have considered it just and equitable to extend the time limit. My reasons are:

    69.1. There has been a 13-month delay from the latest alleged act of race discrimination (11 January 2012) to the presentation of the claim on 19 March 2013. The delay from the earliest act of alleged discrimination is approximately 20 years.

    69.2. The claimant has not provided any explanation for the delay.

    69.3. The acts of race discrimination are set out in a document prepared in January 2012. The claimant therefore knew about them at the time that document was prepared.

    69.4. A complaint of race discrimination introduces a considerable new area of factual enquiry, namely whether teachers of Iranian origin were treated less favourably than teachers of Pakistani origin. This will involve examination of how an Iranian colleague of the claimant's was treated and how the Pakistani teachers were treated. Evidence about the relative treatment of these groups is likely to be far less cogent now than it would have been had the claim been presented on time.

    69.5. It will be necessary to examine the mental processes of the respondents' witnesses in relation to decisions taken years before the claim was presented. In the case of events pre-dating Mr Willsher's appointment, witnesses would have to be called from other schools or even from retirement. This will put the respondent at a considerable disadvantage.

70. For these reasons it is my conclusion that the tribunal has no jurisdiction to consider any of the complaint of race discrimination.

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Employment Judge Horne

4 July 2017

JUDGMENT SENT TO THE PARTIES ON

6 July 2017

FOR THE TRIBUNAL OFFICE