EMPLOYMENT TRIBUNALS

Claimant: Mrs J Feltham

Respondents: 1 Feltham Management Limited
[2. B Feltham (Maintenance) Limited – former respondent]
3. David Feltham
4. Stephen Feltham
5. Martin Feltham
[6. Hazel Feltham – former respondent]

HELD AT: Manchester **ON:** 7-8 March 2018

BEFORE: Employment Judge Slater
Mrs C Linney
Mr S Chaudhary

REPRESENTATION:

Claimant: Ms R Wedderspoon, counsel
Respondent: Mr J Braier, counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of sex discrimination in relation to the withholding of salary is well founded.

2. The complaints of sex discrimination were presented in time.

REASONS

Issues

1. This case was remitted to this tribunal to consider the following points:

1.1. Whether the company and the directors were guilty of sex discrimination by reason of withholding the claimant's pay.

1.2. Whether the complaints of sex discrimination are out of time; and

1.3. Whether time should be extended for the making of those complaints.

2. The remission on the time limit points apparently referred to both of the tribunal's findings of direct sex discrimination: the withholding of pay and the discriminatory comments made by David Feltham to the claimant on 15 August 2013. Mr Braier, for the respondents, however, conceded that, if the tribunal found that the withholding of pay was an act of sex discrimination, this was a continuing act and presented in time. The time limit points, therefore, were to be considered only in relation to the discriminatory comments made on 15 August 2013.

3. No further evidence was heard. The tribunal was to make its decision on the basis of the evidence heard previously, its findings of fact recorded in the written reasons originally sent to the parties on 3 March 2016 and further submissions on behalf of the parties. The tribunal's reasons sent to the parties on 3 March 2016 were subsequently amended on reconsideration on 16 May 2016 in relation to aspects which are not relevant to the points remitted for hearing. When we refer to paragraphs in the written reasons we shall do so with the abbreviation "WR". References to the bundle of documents used at the original hearing on liability in February 2016 are made with the abbreviation "TB".

4. B Feltham (Maintenance) Limited and Hazel Feltham ceased to be respondents to these proceedings when the claims against them were dismissed at the original employment tribunal hearing.

5. The appeal against this employment tribunal's judgment had been brought by the first, third, fourth and fifth respondents. By an order of the EAT dated 26 June 2017, leave was granted for the appeal of the fourth respondent, Stephen Feltham, to be withdrawn, his appeal was dismissed by the EAT and he was discharged as a party to the appeal.

Submissions

6. The parties' representatives produced written submissions and spoke to these. We do not seek to summarise those submissions but address the principal arguments in our discussion and conclusions.

The Law

7. The legal principles to be applied were not in dispute.

8. In relation to the merits of the complaint of sex discrimination, the relevant provisions of the Equality Act 2010 (EqA) are sections 13, 39, 23 and 136.

9. Section 13(1) EqA provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". Section 4 lists protected characteristics which include sex.

10. Section 39 Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment.

11. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

12. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

13. In relation to the time limit issue, the relevant provision of the Equality Act 2010 is section 123.

14. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

15. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

16. The representatives drew our attention to a number of legal authorities of which we have taken account. Since there was no dispute as to the interpretation of any authority, we do not consider it necessary to set out the authorities in detail here. However, we apply principles taken from these authorities where applicable in our discussion and conclusions.

17. Ms Wedderspoon and Mr Braier referred us to the following authorities:

Amnesty International v Ahmed [2009] ICR 1450 EAT;
CLFIS (UK) Ltd v Dr Reynolds [2015] EWCA Civ 439 CA;
Ayodele v Citylink Ltd [2018] IRLR 114;
Sougrin v Haringey Health Authority [1992] ICR 650 CA;
Hale v Brighton and Sussex University Hospitals NHS Trust UKEAT/0342/16/LA EAT;

British Coal Corporation v Keeble [1997] IRLR 336 EAT;
Bahous v Pizza Express Restaurant Ltd UKEAT?0029/11/DA;
Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA;
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL;
Madarassy v Nomura International plc [2007] IRLR 246 CA;
Deman v Association of University Teachers and Officers at Queen's University [2009] NICA 29 CA;
Aziz v FDA [2010] EWCA Civ 304 CA;
Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13/LA EAT;
Robinson v Royal Surrey County Hospital NHS Foundation Trust and others UKEAT/0311/14/MC EAT.

18. We have also considered carefully the guidance given to us by His Honour Judge David Richardson in the EAT in this case: UKEAT/0201/16/RN.

Discussion and Conclusions

The withholding of pay

19. We must first consider whether the claimant has discharged the burden of proof on her of showing, on the basis of all the facts, that there is a prima facie case that the respondents' withholding of pay was less favourable treatment because of her sex. If the claimant discharges this burden, we will then go on to consider whether the respondents have discharged the burden of showing that the decision was not tainted by sex.

20. The claimant did not attend work after 15 August 2013. She was initially paid by the first respondent but the first respondent stopped paying her at the end of August 2013. The decision not to pay the claimant was made by David after discussion with Stephen and Martin (WR 31). Since the decision was to withhold pay was taken by David, albeit after consultation with Stephen and Martin, if the mental processes of David were consciously or unconsciously influenced by the claimant's sex, that will lead to a finding of sex discrimination. We, therefore, go on to consider the facts which might lead to a conclusion that David's decision was influenced by the claimant's sex.

21. There is no actual or statutory comparator. Wayne is not an actual comparator. However, we consider that the treatment of Wayne can assist us in drawing inferences as to how a hypothetical comparator would have been treated.

22. What would be the characteristics of a hypothetical comparator? They must be male.

23. We do not consider that whether the hypothetical comparator is sick or not is a relevant factor; David did not know whether or not the claimant was fit for work when he first decided to withhold pay and the claimant, we have found, was fit for work during some of the period when pay was withheld and too ill to work during other periods. There is no evidence which suggests to us that the claimant's state of health was relevant to her treatment and, therefore, the health of the hypothetical comparator is not relevant.

24. We consider the hypothetical comparator must be an employee of the first respondent and a member of the Feltham family. The hypothetical comparator must be absent from work because of family conflict.

25. Mr Braier set out in his submissions what characteristics he considered the hypothetical comparator must have. These included that the comparator should be a co-director brother who made accusations against Hazel and had a similarly charged argument with Hazel, Susan and David. We do not agree that the relevant circumstances would be the same with such a hypothetical comparator. Crucial to the argument the claimant had with Hazel, Susan and David was that the claimant believed, based on what she had been told by her husband, that her husband had been having an inappropriate relationship with Hazel, David's daughter. Those circumstances would not arise if the hypothetical comparator was a brother of David, without adding a new factor of sexual orientation. A more relevant hypothetical comparator would be a co-director brother who believed his wife was having an inappropriate relationship with a son of David who worked in the business (if there had been one) and then had a row with that son, Susan and David. Even then, it is likely that the nature of the row with David would be different – some of the comments he made to the claimant are self-evidently not comments that would be made to a man e.g. about the claimant not taking Wayne's surname on marriage and not respecting Wayne's position as head of the house.

26. In any event, we cannot identify all the relevant characteristics of a hypothetical comparator unless we know why David decided to withhold the claimant's pay.

27. We can only go about constructing a hypothetical comparator and assessing whether the respondents would have treated them differently to the claimant by drawing inferences from surrounding circumstances.

28. This is not a case where it is obvious whether or not the reason pay was withheld was influenced by the claimant's sex. If it had been, this would have allowed us to jump to the second stage of the process, looking at the respondent's reason for the treatment, without needing to consider whether the claimant satisfies the initial burden of proof.

29. What facts then could lead us to conclude that David's reason for withholding pay was influenced, consciously or unconsciously by the claimant's sex?

30. There are the comments made by David on 15 August 2013. David accepted, and we found, that, on 15 August 2013, he said to the claimant words to the effect that the situation was her fault because she did not take Wayne's surname on marriage and that she did not respect Wayne's position as head of the house, that the claimant undermined Wayne in front of other people and undermined his position in front of the children, and that when Wayne returned home from work he wanted to see a smiling face not a frown like the claimant had, and maybe that was why he wanted Hazel. We concluded that these comments constituted sex discrimination and that decision stands.

31. Mr Braier submits this was a one-off act, said in the heat of the moment. It may have been said in the heat of the moment, but other evidence indicates that the

comments are reflective of an attitude held by David that the man is the head of the house. David said in evidence to this tribunal that, in the Bible, the husband is head of the house. He disagreed that it was sexist to say the husband was head of the house. He referred to himself as head of his own family. In his witness statement, at paragraph 19, David said that he had decided to pay Wayne when Wayne was off work, explaining:

> "I sympathised with the fact that Wayne and the Claimant were not working and earning any money and I wanted to make sure that their family unit was not penalised. Payments to those off work are discretionary and are assessed on a case by case basis."

32. In paragraph 20, he wrote:

> "The Claimant compares herself to her husband by saying that payments were made to him but no payments were made to her. This is not right and the fact that Wayne was paid for two weeks after he approached me saying he was suffering from financial hardship has been made to be a very big issue. This was money that was paid to my sister and brother-in-law's household."

33. David did not say that he decided to pay Wayne solely because Wayne was ill. His evidence was that neither Wayne nor the claimant were working and he wanted to make sure their family unit was not penalised. David did not explain in his statement why, if he wished to ensure the claimant's family unit was not penalised, he took the very unusual step of deciding to pay a self-employed contractor who was not working, rather than paying the Claimant, an employee of the first respondent. The decision to pay Wayne, rather than the claimant, to maintain the household income appears consistent with David's expressed attitude that the man is the head of the household. It is consistent with a view that the man is the head of the household and that the man should be providing for his family. In the section of cross examination of David, the judge's notes of which were provided at the request of the EAT, David said that Wayne had a problem with not being able to provide for his family after his experience with his own father; his own father worked but thought his salary was for his own benefit and his mother had to earn for the family. David said that Wayne did not feel able to work because he was ill and David said to him not to worry, they would start paying him. David said he felt sorry for Wayne.

34. If David simply wanted to prevent the claimant's family suffering financial hardship while the claimant and Wayne were not working, the most obvious step would have been to continue to pay the claimant until she was able to return to work.

35. There was no contractual right for an employee to be paid when off work, other than statutory sick pay when the conditions for that were met. However, it is not the case that an absent employee is never paid, other than statutory sick pay when applicable. As David notes in his witness statement, payments to those off work are discretionary and are assessed on a case by case basis. He gives an example of a payment to Stephen when he was off work because of a bad back. We have no evidence about the treatment of employees who are unable to attend work for reasons other than illness, except that the company handbook provides that

temporary suspension on full pay may be necessary during a disciplinary investigation.

36. The claimant was paid for the period from 15 August 2013 for several weeks, although she did not attend work after 15 August. During this time, we found the claimant was unfit for work although she did not formally notify the first respondent about this.

37. We have found that the claimant was ill at the start of the period when David decided not to pay her. From 9 September 2013, she was fit and willing to work but prevented from doing so unless she made an apology in a form which she did not feel able to give because of her belief about what had happened. It was apparently not relevant to David's decision to withhold wages whether or not the claimant was fit to work. He decided to withhold wages at a time when she was unfit for work. He had not been notified of this formally but may have been aware of this since Stephen was seeing the claimant regularly. He maintained non-payment, regardless of whether the claimant was fit for work at other times.

38. We infer from these matters that David considered he should pay Wayne rather than the claimant so that Wayne, as the man in the family and, therefore, in the eyes of David, the head of his household, could provide for his family. Although Wayne was ill when David decided to start paying him, this was not a relevant distinction between the situations of the claimant and Wayne; it was to support the family unit, rather than simply because Wayne was ill, that David decided to pay Wayne. David decided not to pay the claimant, regardless of whether she was sick or not.

39. The attitude of David displayed in the "discriminatory rant" on 15 August 2013 and the decision to pay Wayne, but not the claimant, to support their household lead us to conclude that the claimant has established facts from which we could conclude, in the absence of a non-discriminatory explanation, that the claimant was treated less favourably because of her sex than a hypothetical male comparator in the same material circumstances would have been treated. We conclude that the claimant has discharged the initial burden of proof in establishing facts from which we could conclude, absent a non-discriminatory explanation, that the decision to withhold pay was influenced by the claimant's sex.

40. We turn, then, to the respondent's explanation for withholding pay. At the time the respondents stopped the claimant's pay, which was without warning, the respondents gave the claimant no explanation for this. Suggestions by the claimant and by Jackie and Alan Freeman that the claimant should be paid whilst matters were resolved were not met with any reasoned response as to why this should not be done. For example, David's reaction to Jackie Freeman saying that the claimant needed to be paid was to say "no chance." (WR 35). Alan Freeman wrote in his letter of 18 December 2013 (WR 40):

> "From a work perspective it is simply incorrect that Jane has had her wages stopped during her enforced absence. It would alleviate a great deal of pressure on Jane and Wayne if her wages can be reinstated, at least until the situation has been fully investigated and a decision reached on her future."

41. The response to this letter on behalf of the respondents came from Hazel, although the letter had not been addressed to her. We found that David had an input into this letter and it expressed views held by him as well as Hazel (WR44):

> "Jane has not been sacked. She has not been given her P45. She voluntarily failed to return to work in the weeks after the event. She then announced to Stephen that she would be returning without the matter being resolved. This was and still is impossible. How can she or anyone else expect things to work after the accusations she had made without her even attempting to make amends – and actually meaning it."

42. Hazel wrote further in the letter (page 222 TB):

> "Wayne has been paid regardless of whether he worked or not. Wayne is self-employed, if he was working anywhere else, he would not be paid. If Jane had been working anywhere else and had just walked out, she wouldn't have been paid either. The fact that Stephen, my Dad and Martin agreed that it would be helpful to pay Wayne shows that they are trying to support both Jane and Wayne at this very difficult time. The destruction that they both caused hasn't even been considered. They knew they needed help months before the event but chose not to seek it. Demanding that Jane should be paid too is absolutely absurd and downright cheeky. You claim that money isn't the issue - so why bring it up?"

43. The only explanation in Hazel's letter for not paying the claimant points back to David's decision to pay Wayne. It does not explain why Wayne, a self employed contractor, should be paid instead of the claimant, an employee.

44. At WR 48, we recorded that the claimant wrote to David, Stephen and Martin on 19 June 2014 as follows:

> "I was in a state of emotional turmoil and was not fit to come into work for three weeks thereafter. Further, on speaking to Stephen three weeks after that fateful day, I explained to him that I was going to come back into work and was told that I couldn't come back until the situation was 'sorted out'. The fact that I had been told not to return until the matter had been sorted out should not then mean that I am penalised in terms of my pay. I do not accept the position that I have not been paid and, therefore, I expect to be reimbursed for all of my pay since that day in August 2013 and for my pay to be reinstated moving forward."

45. This does not, we consider, point away from discharge of the initial burden of proof, as submitted on behalf of the respondent, in recognising a connection between the claimant's absence from work unless the issues were sorted out and the penalisation of the claimant vis-á-vis her pay. The claimant is saying that she should not be penalised by not being paid while she is not allowed to return until the situation was "sorted out". She is making a distinction between not being allowed to return to work and whether she is paid.

46. No response to the claimant's letter of 19 June 2014 was received until a letter, written after seeking legal advice, dated 30 October 2014. The respondents asserted in the letter that the claimant had resigned by walking out of the business on 15

August 2013 and not returning and that the claimant's employment with the first respondent ended on that date. They wrote (TB273): "There is, therefore, no entitlement for you to receive any salary from 15th August 2013 to the present time and you are not entitled to any salary going forward." This argument that the claimant had resigned by her actions on 15 August 2013 is a position the respondents maintained from that point on, and used as their primary pleaded case in relation to unfair dismissal in these proceedings until shortly before the hearing, when they adopted their secondary pleaded position that the first respondent dismissed the claimant by its letter of 30 October 2014 (WR 2).

47. In its response to the claim, the respondents denied that the claimant was entitled to any payments after 27 August 2013 (TB 38-39). No explanation was given as to why discretion was not exercised to pay the claimant whilst the claimant's employment situation was resolved. The response asserted:

> "Payments made by the Second Respondent to the Claimant's husband were borne out of the familial relationship rather than work and the decision was made by the Third Respondent with an intention to benefit the family as a whole during the Claimant's husband's period of sickness."

48. The response does not explain why the decision was taken to pay Wayne, a self-employed contractor, rather than the claimant, an employee of the first respondent.

49. We turn now to the evidence given by David in these proceedings.

50. In his witness statement at paragraph 31, David writes: "The Claimant did not receive wages after she walked out and failed to attend for work. Our business works on the fact that you are paid when you work." As we have noted above, this does not accurately reflect the full picture. As David noted in paragraph 19 of his witness statement, "payments to those off work are discretionary and are assessed on a case by case basis." Indeed, the claimant's pay did not stop immediately after 15 August 2013.

51. The question is whether the respondent has satisfied the tribunal that David's decision not to exercise discretion in favour of the claimant was not tainted by sex. We recorded in WR31:

> "David's view, from August 2013 onwards, was that this was a family dispute first and foremost and the family situation needed to be sorted out first. By this, he meant the accusation made to his daughter, Hazel. He considered that the claimant needed to retract the allegation she had made. Stephen and Martin agreed. Martin commented in evidence that it was a matter of Hazel's reputation."

52. This view held by David may explain why the claimant was not allowed to return to work. We reach no conclusion as to whether the refusal to allow the claimant to return to work was tainted by sex since the claimant did not plead her case in that way. We are considering whether the decision to exercise a discretion against paying the claimant whilst she was off work because of the family dispute was tainted by sex. We conclude that the view that the claimant could not be allowed to return to work until she retracted the allegation does not provide an adequate non-

discriminatory explanation as to why David decided that the claimant should not be paid whilst the family situation was sorted out. It does not inevitably follow from a decision by the respondents that the claimant could not attend work until matters were resolved, that the claimant could not be paid during that time. Indeed, paying the claimant during such a period would be similar to an employee receiving full pay during a suspension whilst a disciplinary investigation was undertaken. When considering whether the claimant had discharged the initial burden of proof, we inferred that David decided to pay Wayne, a self employed contractor, so that Wayne, as the man in the family and, therefore, in the eyes of David, the head of his household, could provide for his family. David's evidence was that the payment to Wayne was to ensure that the claimant's family unit was not financially penalised. The decision to provide this support by paying Wayne rather than the claimant was, we inferred, tainted by sex, influenced as it appears to have been by a notion that the man, in David's eyes the head of the household, needed to be supported to provide for his family.

53. We conclude, for these reasons, that the respondents have not satisfied us that the claimant's sex did not influence David's decision not to pay the claimant from the end of August 2013 onwards. In accordance with section 136(2) Equality Act, we must hold that the contravention occurred. We conclude that the complaint of sex discrimination in relation to the withholding of pay is well founded.

Time limits

The withholding pay complaint

54. The respondents have conceded that, if the complaint of sex discrimination in relation to withholding pay is well founded, this was a continuing act of discrimination and was presented in time.

The discriminatory comments made on 15 August 2013

55. The EAT has remitted to us a decision on whether we had jurisdiction to consider this complaint, having regard to time limits. This requires consideration of two matters:

55.1. Whether the act formed part of a continuing act of discrimination with the withholding of pay and, therefore, the complaint was presented in time; and

55.2. If not, whether it is just and equitable in all the circumstances to consider the complaint out of time.

56. We had intended WR 117 to deal with the just and equitable argument in relation to both complaints of sex discrimination as an alternative conclusion to our primary conclusion that the complaints of sex discrimination were presented in time. It appears, however, from an explanation given to us by Mr Braier, that the EAT had not understood this to be the case and had proceeded on the basis that we had not reached an alternative conclusion as to whether it was just and equitable to consider the complaint in relation to the discriminatory comments out of time. We regret the unintentional ambiguity in our reasons. We informed the parties that, in these circumstances, we would consider the just and equitable argument afresh.

57. We deal first with the issue of whether the discriminatory comments formed part of a continuing act with the withholding of pay. We have concluded that the withholding of pay was an act of unlawful sex discrimination. The 15 August 2013 comments are, therefore, capable of forming part of a continuing act of discrimination with the withholding of pay. In accordance with *Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96,* we consider whether the 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'".* Alternatively, are they *"a succession of unconnected or isolate specific acts, for which time would begin to run from the date when each specific act was committed."*

58. The same individual was involved in both discriminatory acts: David Feltham. He made the discriminatory comments on 15 August 2013; he decided to withhold pay from the claimant. This is a relevant factor, but not conclusive.

59. We conclude that the withholding of pay had close links with the discriminatory comments made on 15 August 2013. The comments on 15 August 2013 included comments about the claimant not respecting Wayne's position as head of the house. Our reasons for concluding that the withholding of pay was an act of sex discrimination included inferences drawn from David's views of the man being the head of the household. The two acts of discrimination were not unconnected or isolated specific acts; on the contrary, they are closely connected, both arising out of David's perception of the positions of men and women in the family. We, therefore, conclude that the discriminatory comments on 15 August 2013 formed part of a continuing act of discrimination with the withholding of pay. Since the complaint of withholding of pay was presented in time, the complaint about the discriminatory comments was also presented in time. The tribunal, therefore, has jurisdiction to consider the complaint about the comments made on 15 August 2013.

60. We consider, in the alternative, whether we would have found it was just and equitable to consider the complaint about the discriminatory comments out of time if we had not found it to form part of a continuing act and, therefore, presented in time.

61. There is no dispute as to the legal principles to be applied. The tribunal has a wide discretion in deciding whether it is just and equitable to consider the complaint out of time. However, exercise of the discretion is the exception rather than the rule. The burden is on the claimant to displace the statutory time limits. We must consider relevant factors, including why the primary time limit was not met and why, after expiry of the primary time limit, the claim was not brought sooner than it was. The s.33 Limitation Act 1980 factors are a useful checklist but there is no statutory requirement that these be considered.

62. The complaint is brought over 19 months after the 15 August 2013. It is substantially out of time (if not part of a continuing act). The claimant was fully aware of what had been said to her at the time. The discriminatory nature of the comments was obvious, whether or not the claimant appreciated at the time that she could potentially take legal action about them. She was receiving legal advice from April 2014 and could have taken advice earlier.

63. However, the remarks formed part of a delicate family situation as well as an employment matter. The remarks were not the only issue. Of pressing concern to the claimant was sorting out the family and business issues so that she could re-establish family relationships and return to work. She also had financial concerns when she stopped receiving pay. The claimant made attempts to sort out the situation without legal action from an early stage and continued to do so until, on receipt of the respondents' letter of 15 December 2014, it became obvious that there was no course open to the claimant other than legal action. The claimant then began early conciliation with ACAS on 25 February 2015, which finished on 20 March 2015, and presented her claim on 25 March 2015. Steps taken by the claimant to resolve matters without legal action included meeting with Hazel and giving her an apology on 3 September 2013 (although the apology then proved insufficient for the respondents to allow her to return to work) (WR 32); she kept up dialogue with Stephen (WR 30); she attended meetings in November and December 2013 with David and the vicar of the church the claimant and her brothers attended (WR 38). The claimant expressed willingness to attend a meeting facilitated by Alan, in response to a letter written by Alan on 18 December 2013, but David, Stephen and Martin were not willing to attend such a meeting (WR 41). On 19 June 2014, the claimant wrote to David, Stephen and Martin, including a suggestion of mediation. She wrote that she wished at all costs to avoid any legal claims. (WR 49). Her legal advisers tried to clarify the claimant's employment position following the respondents' letter of 30 October 2014 (WR 52).

64. It was only with the respondents' letter of 15 December 2014 that it was clear to the claimant that her employment had been terminated (WR 55). The claimant started early conciliation on 25 February 2015 and began proceedings less than a week after early conciliation ended. The claim to the tribunal included complaints of unfair dismissal and other types of discrimination as well as the complaints of sex discrimination which are the subject of this remitted hearing.

65. It is obvious from the claimant's actions that she was keen to resolve matters, if at all possible, without having to start legal proceedings. It was not inevitable from the start that family and employment relationships could not be repaired. It is clear that starting proceedings about the discriminatory remarks at an early stage would have been unlikely to assist the process of repairing family and employment relationships and would have been likely to damage them beyond repair. It is a matter of great regret to this tribunal and, no doubt, the parties, that the employment relationship was not repaired and it appears that family relationships appear still to be severely damaged.

66. No prejudice has been caused to the respondent by having to deal with this complaint so long after the primary limitation period expired (if the act was not in time by reason of being part of a continuing act). David was unlikely to have forgotten the gist of the exchanges with his sister on 15 August 2013, even if he could not remember the exact words. He was reminded of the conversation by Alan Freeman's letter of 18 December 2013 (WR 39).

67. The discriminatory remarks formed part of a series of events which led to legal action. As noted, the claimant was taking active steps to resolve matters from an early stage and until December 2014, when it became clear legal action was the only remaining option. The situation is a world away from one where a claimant sits on

their hands for 19 months after an alleged act of discrimination and then seeks to bring a claim.

68. In all the circumstances, the tribunal would have found it just and equitable to consider the complaint about the remarks on 15 August 2013 out of time, if it had not found the complaint to form part of a continuing act and, therefore, in time.

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Employment Judge Slater

Date: 20 March 2018

RESERVED JUDGMENT & REASONS