IN THE EMPLOYMENT TRIBUNALS (SCOTLAND)

Judgment of the Employment Tribunal in Case No: S/4101673/2017 Issued Following Open Preliminary Hearing Held at Edinburgh on 12th December 2018

Employment Judge: J G d'Inverno, QVRM, TD, VR, WS (Sitting Alone)

Ms Kristina Simonsen	Claimant Represented by Mr K Sinclair, Lay Representative
TNT UK Limited	Respondent Represented by Mr I Wright, of Counsel

JUDGMENT OF THE TRIBUNAL

The Judgment of the Employment Tribunal is:-

(First) The Tribunal accordingly holds that it lacks jurisdiction to consider the complaint of indirect discrimination in terms of section 19 of the Equality Act 2010 relating to the asserted protected characteristic of disability insofar as founded upon the alleged application, by the respondent to, amongst others the claimant, of a PCP described by her as "by moving me to the frontline position", on 7th July 2016, either in terms of section 123(1)(a) or 123(1)(b) of the Equality Act 2010 which claim accordingly falls to be dismissed.

(Second) The Tribunal further holds that the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider the complaint of Harassment related to the claimant's asserted protected characteristic of disability, in terms of section 26 of the Equality Act 2010, insofar as founded upon conduct of the respondent being remarks allegedly made by the respondent's Mr Brady in a conversation with the claimant on 17th August 2016 and being remarks to the effect that the claimant was not autistic, either in terms of section 123(1)(a) or section 123(1)(b) of the Equality Act 2010 which claim accordingly falls to be dismissed for want of jurisdiction.

_____
Employment Judge

_____
Date of Judgment

Entered in Register and Copied to Parties _____

REASONS

1. This case called for Open Preliminary Hearing at Edinburgh on 12th December 2018 for consideration and determination of the Preliminary Issue of Jurisdiction (by reason of asserted Time Bar). A previous Open Preliminary Hearing set down for 9th August 2018 was abandoned by the Employment Judge (Meiklejohn) in consequence of reference made by the claimant's representative in the course of his submissions to what appeared might be potentially relevant evidence not included in the claimant's witness statement which was to be taken as her evidence in chief and of a position not previously given notice of. In advance of the re-scheduled Open Preliminary Hearing of 12th December 18, the attendance of Mrs Sinclair (the ACAS employed Conciliation Officer), to conversation with whom the claimant's representative made reference, was ordered by the Tribunal.

2. Both parties enjoyed the benefit of representation, for the claimant Mr K Sinclair in the capacity of a lay representative and for the Respondent Company Mr I Wright, of Counsel.

3. By way of adjustment and in light of the claimant's autism which resulted in it being difficult for the claimant to give oral evidence, Employment Judge Macleod had ordered, in direction issued on 29th June 2018, that the claimant's evidence in chief might be received by written witness statement and that cross examination should proceed in the form of written questions submitted by the respondent's agents to the claimant and written answers provided by the claimant. These were before the Tribunal produced at pages 30 to 54 inclusive of the respondent's Bundle. In addition Mr Sinclair, the claimant's lay representative, produced a witness statement relating to his conversation with Mrs Sinclair, the Conciliation Officer, – (no relation) within which the alleged misrepresentation as to adjustment of applicable time limits was said to have been made. That witness statement, together with the email of 17th November 2017 referred to in it by Mr Sinclair, was received and incorporated into the respondent's Bundle at pages C-7 and C-8.

The Issues

4. In the course of Case Management Discussion conducted at the outset of the Hearing parties identified and the Tribunal recorded the following as the Issues requiring investigation and determination at Open Preliminary Hearing, viz;

> Whether the claimant has Title to Present and the Tribunal Jurisdiction to Consider, in terms of section 123(1)(a) which failing 123(1)(b) of the Equality Act 2010, her complaints of:-
>
> (a) Indirect discrimination relating to the asserted protected characteristic of disability in terms of section 19 of the Equality Act 2010, insofar as founded upon the alleged application by the respondent, to amongst others the claimant, of a PCP described

by her as "by moving me to the front line position" on 7th July 2016;

(b) The claimant's complaint of harassment related to the claimant's asserted protected characteristic of disability in terms of section 26 of the Equality Act 2010 insofar as founded upon conduct of the respondent being remarks allegedly made by the respondent's Mr Brady in a conversation with the claimant on 17th August 2016 (being remarks to the effect of questioning whether the claimant was autistic).

Sources of Oral Evidence

5. As already noted, by direction dated 29th June 2018 Judge Macleod had ordered that the claimant, who due to her medical condition found it difficult to give evidence orally, should give her evidence in chief by written witness statement and that cross examination of the claimant be in the form of questions submitted by the respondent's agents to the claimant and written answers provided by the claimant. The claimant's representative Mr Sinclair was also permitted to give his evidence in chief by way of written witness statement but, unlike the claimant, who was not in attendance, Mr Sinclair made himself available to answer questions in cross examination.

6. There were two witness statements of the claimant before the Tribunal, including one prepared for the initial Open Preliminary Hearing that had been abandoned following Mr Sinclair giving notice at the commencement of that Hearing, for the first time, of the line which is now subsequently pursued namely, that the Conciliation Officer with whom he had spoken in the case, Ms G Sinclair (no relation) had misrepresented to him the position regarding time limits for the making of the claimant's Application. The second witness statement was that prepared in compliance with Judge Macleod's Order.

7. Ms Simonsen's witness statements were taken as read and in addition Mr Sinclair directed the Tribunal to particular paragraphs of them which, in his consideration, were of particular relevance to the Preliminary Issue of Jurisdiction which was to be determined. Those paragraphs, in the first witness statement dated 10th July 2018, were:- paragraph 9 at page 32, paragraph 13 at page 33, paragraph 30 at page 35, paragraphs 32 and 38 at pages 36 and 37, paragraph 39 at page 37; and, paragraph 2 on page 39 and the timeline which thereafter follows at pages 39 and 40 and the anti-penultimate and last paragraphs on page 41.

8. The respondent's representative, Mr Wright, for his part and under reference to the claimant's written questions put in cross examination drew the Tribunal's particular attention to the claimant's answers; at page 50 of the Bundle under the heading 22nd 8 16 "see claimant takes advice from ACAS and CAB", at page 51 under the date 27.9.16, page 52 under the date 11.11.16, page 53 under the date 20.12.16 and at page 54 under the date 14.5.17 "see starts maternity leave" and the second reference on the same page under date 14.5.17.

9. Mr Sinclair then read into evidence in chief his witness statement dated 17th 8th 2018 which was added to the Bundle as C-7 and C-8, and thereafter answered questions put to him in cross examination by the respondent's representative together with questions put by the Tribunal.

10. The respondent lodged a Bundle of Documents extending to some 112 pages containing items R-1 to R-23 inclusive and to which documents for the claimant were added at the rear with pages numbered C-1 to C-8 inclusive. Reference was made by both parties to a number of the documents in the Bundle in the course of evidence and or submission.

Submissions for the Respondent

11. For the claimant Mr Sinclair submitted that what he required to accept was the late submission of the claimant's claims, resulted entirely from wrong advice given to him and the claimant by Mrs Gwen Sinclair, Conciliation Officer, in the course of a telephone conversation in which he invited the Tribunal to hold that the Conciliation Officer had told him and through him the claimant, that she would have a period of three months from the end of early conciliation in which to submit her claim.

12. In his submission, in the course of a conversation with an unidentified ACAS Officer earlier in his consideration of matters that Officer had told him that the claimant had to exhaust internal procedures before proceeding with a claim to the Employment Tribunal. He further submitted that the claimant had separately every right to assume and to expect that her complaints in relation to the respondents would be resolved to her satisfaction through the internal grievance. He submitted that the advice allegedly given by Mrs Gwen Sinclair, the Conciliation Officer, was wrong and should not have been given. In his submission the rules regarding time limits, which he had accessed and considered prior to his conversation with the Conciliation Officer, were not difficult to understand and in his consideration of them he had understood that an initial three month time limit from the date of the act or omission of the respondents complained of was applicable. He had also noticed that position (that is to say the correct position) within information set out on the ACAS website. He prayed that contradiction in aid of the accuracy of his recollection of the erroneous advice which he says had been given by the Conciliation Officer. He reminded the Tribunal that he had stated in evidence that he remembered thanking the Conciliation Officer because, he pointed out to her, she had given him advice which was different to that which appeared on the website and which he had already understood to be stating that the three month clock began to run from the date of the act or omission complained of. He invited the Tribunal to reject the evidence of the Conciliation Officer Mrs Sinclair on the material issue of the giving of wrong evidence, to find in fact that she had given that wrong advice to the claimant's representative, that the claimant's representative and the claimant had relied upon it in circumstances in which they were entitled to rely upon it and in consequence had delayed the commencement of proceedings before the Employment Tribunal to their prejudice. In those

circumstances he invited the Tribunal to hold that it would be just and equitable to extend the time limit and to regard the complaints of discrimination, first presented on 11th May 2017, as claims which the Tribunal should consider notwithstanding their late presentation, in terms of section 123(1)(b) of the 2010 Act.

Submissions for the Respondent

13. In relation to the material dates triggering the commencement and end of relevant time limits Mr Wright, under reference to the Further and Better Particulars lodged by the claimant and produced at page 28 of the Bundle, invited the Tribunal to hold in relation to the complaint of indirect discrimination that the relevant date was the 7th July 2016 that being the date upon which the claimant asserts the PCP of requiring her to work in a frontline position was applied to her and that that PCP, let it be assumed for the purposes of today's Hearing that it was a relevant PCP, was disapplied to the claimant with effect from 16th December 2016 when she returned to full duties.

14. In Mr Wright's submission upon a correct analysis the decision of the respondents founded upon by the claimant fell to be regarded as a single act with continuing consequences with the effect that the relevant time limit in terms of section 123(1)(a) of the Equality Act 2010, all other things being equal, commenced on 7th July and expired on 6th October 2016.

15. In the alternative, let it be assumed that the application of the PCP fell to be regarded as a continuing act which ceased on 16th December 2016, which the respondent denies, the relevant three month period in terms of section 123(1)(a) would be seen to have commenced on 16th December 16 and expired on 15th March 2017. The Early Conciliation Certificate issued by ACAS records that the claimant initiated early conciliation on 21st February 2017.

16. On the primary, and what Mr Wright submitted was its proper construction, if the act relied upon, the section 123(1)(a) three month time limit had expired before the commencement of early conciliation and accordingly the Early Conciliation

Regulations had no effect upon and did not extend the time limit which fell to be regarded as having expired on 6th October 2016.

17. On the secondary and alternative construction, the initial time limit was due to have expired after the commencement of conciliation with the effect that the time limit, in this case, was extended by the operation of the Regulations by one month measured from the end of the conciliation period and the date of issue of the Certificate on 21st March 2017; that is to 20th April 2017. In that context it could be seen on either construction, that the complaints of indirect discrimination which were first presented to the Employment Tribunal on 14th May 2017 were presented late, in the case of his primarily proposed construction some seven months after the expiry of a time limit and, on the secondary construction some three weeks after the expiry of the time.

18. In relation to the complaint of harassment, the operative date founded upon by the claimant in respect of the act said to constitute harassment was 17th August 2016. The section 123(1)(a) time limit accordingly commenced on 17th August and expired on 16th November 2016 that is on a date long before the commencement of early conciliation and thus was unaffected by the Regulations. In consequence the complaint of harassment, first presented to the Employment Tribunal on 14th May 2017, was seen to have been presented some six months after the expiry of the relevant time limit.

19. Mr Wright invited the Tribunal to hold that the claimant lacked Title to Present and the Tribunal Jurisdiction to Consider, both in terms of section 123(1)(a) of the 2010 Act, the complaints of discrimination.

Single Act

20. Mr Wright referred the Tribunal to the following authority:-

- The decision of the Court of Appeal in **Mr A Azubike Okoro Appellants and Taylor Woodrow Construction Limited and others Respondents both December 2012 Case Number A2/2011/1705**; at paragraphs 8, 10, 11, 12, 35 and 36

- The Judgment of the Court of Appeal 4th June 1992 in **Merle Sougrin v Haringay Health Authority** at page 3 letter b, page 6 letter d, page 9 letter f.

21. Under reference to the above, Mr Wright invited the Tribunal to hold that the application of the PCP relied upon by the claimant on 7th July 2016 as a one off act but with continuing consequences, the latter ceasing on the 16th of December 2016.

22. In relation to the exercise by Tribunal its discretion to extend the time in terms of section 123(1)(b) of the 2010, Act Mr Wright referred the Tribunal to and relied upon the Judgment of the English Court of Appeal in **Bexley Community Centre (trading as Leisure Link) v Francis Robertson 11th March 2003 Case Number A1/202/1759** at paragraphs 23, 24 and 25.

23. Under reference to the guidance issued by the Court of Appeal in that case and in the circumstances presented by the Findings in Fact which he invited the Tribunal to make on the evidence presented, he submitted that the burden of proof sat with the claimant to establish before the Tribunal that it was just and equitable to extend time and that the claimant had failed to discharge that burden. Further, there being no presumption in favour of an extension of time in the particular circumstances of this case the Tribunal should not be persuaded that it was just and equitable to extend time and that accordingly the claims should be dismissed for want of jurisdiction.

24. In this regard Mr Wright reminded the Tribunal that in the ten month period 7th July 2016 to 14th May 2017 and the ninth month period 17th August 2016 to 14th May

17, the claimant was at work for the majority of the period and was actively engaged with the respondents discussing work related issues including; pursuit of her grievance, in a capability review and participating in Occupational Health appointments. She had remained fully engaged up until January/February 2017 and still at work until April 2017 at which point she went on maternity leave. She had been supported and assisted by Mr Sinclair her current representative, throughout. The claimant's whole case in relation to a just and equitable extension rested upon her assertion and offer to prove that in or around October 2016 her representative Mr Sinclair had been given wrong advice by the Conciliation Officer Mrs Gwen Sinclair to the effect that the claimant would have a period of three months from the end of early conciliation i.e. from the issuing of the Conciliation Certificate within which to present her claim.

25. The burden of persuading the Tribunal that that advice was in fact given by the Conciliation Officer to the claimant's representative rested with the claimant and, in Mr Wright's submission, the claimant had failed to discharge that burden. The contemporaneous log of telephone conversations between the claimant's representative and the Conciliation Officer covering the period 22nd February 2017, the date upon which the Conciliation Officer was first allocated the case, up to and including 21st March 2017, the date of issue of the Conciliation Certificate which is copied and produced at pages 104 to 107, inclusive discloses no record of such advice being given or of any conversation which touched upon time limits.

26. Although note 14 of the log, appearing and on page 106 dated 13th of the 3rd 2017, records a note of a statement by the claimant's representative;- "*Thank you for your help, advice and assistance in this matter and I look forward to hearing from you,*" it is clear, submitted Mr Wright, from the noted terms of the conversation that that expression of thanks relates to other matters and not to any advice given regarding time limits. The claimant's representative, when pressed in cross examination as to precisely when and in what circumstances the alleged advice was tendered, was vague in his responses and could state only that it was towards the end of the conciliation process that is approximately in the second or third week of March 2017.

27. Gwen Sinclair, the Conciliation Officer, on the other hand, had given unequivocal evidence on oath to the effect that she did not give such advice to the claimant's representative. She was a Conciliation Officer of some 15 years' experience. She had explained in evidence that such advice as the claimant's representative alleged she had given would be wrong advice. She knew it to be wrong advice now. At the time at which the claimant's representative alleges she gave it she would have equally known it to be wrong advice. She, in common with other Conciliation Officers followed a practice of not advising parties regarding time limit dates beyond stating if asked in general terms that, in circumstances where a time limit would otherwise expire during the period of Early Conciliation and in which the Early Conciliation Regulations otherwise had effect, a party would expect to have a minimum of a further calendar month, measured from the date of issue of the Certificate, within which to present a claim. On occasions when such general advice by her is given it was her invariable practice to record the giving of that advice in the log. The log in the particular case showed no record of such general advice being given let alone any record of the specific advice alleged by the claimant's representative namely that the claimant would have a period of three months from the end of the conciliation period within which to present a claim to the Employment Tribunal. She, together with her fellow Conciliation Officers, regularly underwent training with a view to ensuring uniformity of approach wherever possible. Typically, she would attend such a training session every two months. The matter was not one upon which she considered she could be mistaken. Likewise, in response to the proposition that the claimant had specifically thanked her for giving advice which was contrary to that which appeared on the ACAS website the witness had been very clear that if the claimant's representative told her that any advice that she had given was different to that on the ACAS website she would have firstly made a record of that matter in the call log and secondly would have pursued the matter by checking the website to identify for the advice in question. She was confident that she had given no such advice. She considered it to be highly improbable that the contemporaneous log compiled by her and which it was accepted by the respondent's representative

accurately recorded other conversations and subject matter discussions between herself and the claimant's representative would contain such an omission.

28. In relation to discharge of the burden of proof he invited the Tribunal to prefer the evidence of the Conciliation Officer Mrs Sinclair over that of the claimant's representative Mr Sinclair, Mr Wright urged the Tribunal to weigh in the balance the fact that what was, in the context of the case now being made out on jurisdiction, a fundamental and crucial averment was one of which neither the claimant nor her representative given any notice prior to the commencement of the previous Open Preliminary Hearing. Such an important matter he submitted, let it be assumed it had occurred, would not on the balance of probabilities have been overlooked by the claimant and her representative and therefore one would reasonably expect reference to be made to it in the initiating Application ET1 or at some point prior to its first emerging indirectly in the course of the first Open Preliminary Hearing. This, he submitted, indicated that the Conciliation Officer's version of events namely that no such advice was ever given by her to the respondent's representative, was on the balance of probabilities to be preferred and accepted. Finally, under reference to the Judgment of the English Court of Appeal in **Bexley Community Centre (trading as Leisure Link) v Francis Robertson 11th March 2003 A1/2002/1759** at paragraphs 23, 24 and 25, Mr Wright reminded the Tribunal that while on the one hand the discretion to be exercised by the Tribunal in the just and equitable extension of time limits was a wide one and that the Appellate Courts should not interfere with the exercise on that discretion unless it is plainly wrong, it was equally important to note that time limits are exercised strictly in employment cases and that there is no presumption in law in favour of the granting of an extension.]

The Claimant's Reply

29. In exercising a limited right of reply the claimant's representative submitted that the Tribunal should not regard the application of the PCP as ceasing to have any continuing consequence as at the 16th of December ?? upon the claimant's return to full time duties but rather as continuing by which he meant be viewed as a

continuing act up until the date of the claimant's resignation. He did not expand upon why, in the context of the judicial guidance to which the respondent's representative had made reference the Tribunal should so hold. He reiterated that the rules regarding time limits were not complex or difficult to follow and that he had not found them so but that the Conciliation Officer had given him contradictory advice which he had opted to rely upon. He stated that the claimant was hoping that matters would be resolved internally and it would be unfair to prevent her from pursuing her present claims because those hopes had not been realised. He submitted that the claimant was a person who was rendered vulnerable by reason of her lifelong autism and was latterly pregnant and for those reasons she should be regarded as someone who was entitled to firstly seek to resolve matters internally and, in the event that that was not achieved that it would be just and equitable to extend the time limit because she had so tried to resolve matters internally.

30. Although not a matter referred to by him in his primary submission, Mr Sinclair went on to refer the Tribunal to paragraph 32 of the claimant's witness statement dated 10th July 2018, which was before the Tribunal and in which the claimant asserts in evidence that the same comments, said to have been made by Samantha Mogg (her new Team lead) to the effect that John Brady had mentioned to Samantha Mogg that the claimant was "blasé regarding her pregnancy" were repeated (by an unspecified person in the presence of Andrew Horseman on the 21st of February 2017. Mr Sinclair submitted that the remark attributed to Mr Brady on 17th of August 2016, the hearsay reference to it by Samantha Mogg on the 13th of February 2017 and the reiteration or repeating of that or a similar remark by an unspecified person on the 21st of February 2017 all formed a series of instances in a continuing act of harassment with the effect that the operative date for the commencement of the relevant three month period in relation to each was the 21st of February 2017 that being a date which coincided with the commencement of the early conciliation period which extended until the 21st of March 2017, the date of the Conciliation Certificate. The effect of the same, he submitted, was that the complaint of harassment relating to remarks that Mr Brady allegedly made on

17th August 2016, first presented to the Employment Tribunal on 14th May 17 was timeously presented in terms of section 123(1)(a) and 123(3)(a) of the 2010 Act.

31. In response, exercising a right to respond to what was a new submission on the part of the claimant's representative, Mr Wright for the respondent, pointed out that the passages of evidence identified in the claimant's witness statement and relating to remarks said to have been made/recounted on 13th and or 21st February 17 were remarks allegedly relating to the claimant's pregnancy, that the Tribunal had jurisdiction at today's Open Preliminary Hearing to deal only with the issue of jurisdiction insofar as it related to the complaints before it which, in terms of the claimant's initiating Application ET1, were complaints of alleged discrimination and harassment relating and related to the claimant's asserted possession of the protected characteristic of disability and not of pregnancy. He submitted that the proposition, latterly advanced by the claimant's representative, namely that evidence of the making of remarks in February of 2017 which allegedly relating to the claimant's pregnancy in a case where no complaint of discrimination on that ground was presented should be regarded as instances of a continuing act of discrimination relating to the protected characteristic of disability were effective for the purposes of extending the time limit in terms of section 123(3)(a) of the 2010 Act should be rejected. The same particularly when no notice of the proposition was disclosed in the initiating Application ET1 or the Further Particulars of Claim at pages 28 and 29. He invited the Tribunal to hold, in relation to the preliminary issues before it for determination at Open Preliminary Hearing that the claims, which were presented, were time barred and were so time barred in circumstances where their subsequent presentation on 14th May 2017 were not presented within such further period as the Tribunal should regard as just and equitable in the circumstances.

Findings in Fact

32. On the oral and documentary evidence presented the Tribunal makes the following essential Findings in Fact restricted to those relevant and necessary to the determination of the Preliminary Issues before it at Open Preliminary Hearing.

33. In terms of her initiating Application ET1, produced at pages 1 to 12 of the Joint Bundle, and of the Further and Better Particulars, undated but tendered some time following the Closed Preliminary Hearing (Case Management Discussion) which proceeded before Judge Macleod on 8th May 2018, the claimant gives notice of presenting;-

(a) complaints of indirect discrimination in terms of section 19 of the Equality Act 2010 relating to the protected characteristic of disability by reason of the impairment of autism;

(b) a complaint of harassment in terms of section 26 of the Equality Act 2010 related to the protected characteristic of disability; and

(c) in terms of a concession made before and recorded by Judge Meiklejohn in his Note of Output issued following the abandoned Open Preliminary Hearing of 9th August, at paragraph 4 thereof, a complaint of breach of duty to make adjustments in terms of section 20 and 21 of the Equality Act 2010 related to the claimant's protected characteristic of disability.

34. For the purposes of these proceedings, the respondent accepts that at the material times for the purposes of her complaints, the claimant was a person possessing the protected characteristic of disability in terms of section 6 of the Equality Act 2010 by reason of her impairment of autism.

35. The claimant commenced employment with the respondents as a Customer Accounts Customer Representative (Booking Centre Calls) at its Edinburgh

Contact Centre on 22nd February 2016. A restructuring of the work carried out at the respondent's Edinburgh site which, when implemented, would have the effect of combining booking activity with all frontline activity, occurred on the 27th of June 2016.

36. On the 7th of July 2016, a date asserted by the claimant and, for the purposes of the determination of the Preliminary Issues at Open Preliminary Hearing accepted by the respondents, the respondents required the claimant, on a temporary basis, to cover frontline calls on Tuesdays and Thursdays. That decision and alleged act of the respondent of 7th July 2016 is the act which the claimant asserts, for the purposes of her section 19 EqA 2010 complaint of indirect discrimination, constituted the "Provision, Criterion or Practice", which for the purposes of section 19, was applied, to amongst others, herself on that date.

37. On the 17th of August 2016 the claimant attended an Occupational Health appointment having, on the 1st of August 2016 raised concerns about her autism in the context of the proposed restructuring of duties.

38. On 23rd August 2016 an Occupational Health Report recommended that the claimant be taken off frontline work and redeployed to Booking Centre tasks.

39. On 24th of October 2016 the claimant submitted a grievance contending, amongst other matters, that the respondents had failed to act upon the Occupational Health advice of 23rd August 18 and in consequence had failed in a duty to make reasonable adjustments.

40. On the 9th of November 2016 the claimant attended a grievance meeting in respect of her grievance and a capability meeting to review tasks and activities which the claimant could carry out.

41. On the 11th of November 2016 the claimant returned to work on reduced hours (25 hours per week) to carry out temporary duties and in order for training to be provided to her in respect of new tasks.

42. On 7th of December 2016 the respondents issued to the claimant a letter confirming the findings in respect of the investigation of her grievance.

43. On the 14th of December 2016 the claimant lodged an appeal against the grievance outcome.

44. On the 16th of December 2016 the claimant returned to full duties and no longer required to carry out frontline duties. As of 16th December 2018 the asserted PCP relied upon by the claimant was no longer being applied to her.

45. On the 11th January 2017 the claimant attended a capability outcome meeting with Samantha Hall.

46. On the 12th of January 2017 the claimant attended a grievance appeal meeting.

47. On the 24th of January 2017 the respondents issued to the claimant a grievance appeal outcome letter.

48. On 21st February 2017 the claimant commenced early conciliation with ACAS (date A for the purposes of the Regulations).

49. On the 21st of March 2017 the period of early conciliation concluded with the issuing, on that date, by ACAS of a Conciliation Certificate dated 21st March 2017 (date B for the purposes of the Regulations).

50. On 14th May 2017 the claimant first presented to the Employment Tribunal Form ET1 giving notice of complaints of; indirect discrimination related to the protected characteristic of disability (section 19 of the Equality Act 2010), harassment related to the protected characteristic of disability in terms of section 26 of the EqA 2010; and, by subsequent concession on the part of the respondent's representative before Judge Meiklejohn on 9th August 2018, of discrimination by reason of failure

of duty to make adjustments in the light of the protected characteristic of disability, in terms of sections 20 and 21 of the EqA 2010.

51. On or about the 14th/15th May 2017 the claimant commenced a period of maternity leave.

52. The Respondent's act of 7th July 2016, founded upon by the claimant as the application to her of a discriminatory PCP and described by her as "moving me to the frontline position", was a single act with continuing consequences.

53. The continuing consequences of the act of 7th July 2016 ceased on the 16th of December 2016 on which date the claimant returned to full duties and was no longer required to carry out frontline duties.

54. The period of three months, during which the claimant had entitlement, in terms of section 123(1)(a) of the Equality Act 2010 to present to the Employment Tribunal a complaint of indirect discrimination said to arise from that act, commenced on 7th July 2016 and expired on 6th October 2016.

55. The remarks, attributed by the claimant to John Brady on 17th of August 2016 and to the alleged effect that the claimant was not autistic, was a single act of alleged discrimination in respect of which the three month period during which the claimant was entitled in terms of section 123(1)(a) of the Equality Act 2010 to present a complaint of harassment, commenced on 17th August 2016 and expired on 16th November 2016.

56. The Further and Better Particulars in terms of which reference is made to alleged remarks said to be made about the claimant's approach to her pregnancy on 7th and 21st February 2017 by Sam Hall and John Brady, are Further Particulars of Claim tendered by the claimant, following the Closed Preliminary Hearing which proceeded before Judge Macleod in the case on 19th September 2017.

57. As is clear from the Schedule attached to Judge Macleod's Note of Output, signed by him on 21st September 2017, the Further and Better Particulars were not tendered in response to an Order issued by the Tribunal that they be so provided but rather, on "a voluntary basis", on 18th October 2017.

58. At paragraph 22 of Judge Macleod's Note of Output dated 21st September 2017 he records the confirmation by the respondent of its stood upon position as to time bar in relation to the claimant's claims both as formulated as at that date and as potentially to be further specified by the Further and Better Particulars to be voluntarily provided.

59. At paragraph 12 of Judge Macleod's Note of Output dated 24th January 2018 issued following the subsequent Closed Preliminary Hearing that proceeded before him on 23rd January he records as follows:- "*Mr Wright raised the point that having received the claimant's Further and Better Particulars the respondent continues to maintain that the claim, or parts of it, are time barred and that they would require to be addressed at a future date*" and, at paragraph 14 of the same Note Judge Macleod records:- "*I confirmed that the issue of time bar is alive and that at the next PH the Tribunal will consider what appropriate procedure to deal with that point should be, having heard from parties. I was able to reassure Mr Sinclair that he would still have, with the claimant, the opportunity to put forward their explanation as to the timing of the claim, and that the matter is still a live one before the Tribunal.*".

60. In terms of the respondent's email written to the Tribunal in compliance with its direction on 15th May 2018 and copied to the claimant's representative and under reference to the tendered Further Particulars of Claim, the respondents give notice that they regard two of the putative incidents disclosed as potentially relied upon in those further particulars tendered for the first time on 18th October 2017, as time barred, these being the alleged discriminatory statement by John Brady on 17th August 16 that the claimant was not autistic and the alleged statements, about her attitude to her pregnancy, allegedly made by Sam Hall and John Brady on the 21st of February 2017 were time barred.

61. In their email of 15th May 2018 the respondent's representatives indicated, let it be assumed that such averments were to be formally received and form part of the claimant's case, that her complaint in respect of that allegation might be within time. The separate issue of whether those averments, first brought forward on the 18th of October 2017, can and or are to be included as part of the claimant's claim without application for leave to amend was, however, a matter which, as at the date of the Open Preliminary Hearing on 12th December 2018 had not been addressed. Neither was it, a matter before the Tribunal, *per se*, for determination at the Open Preliminary Hearing of 12th December and therefore remains a matter at large to be determined by the Tribunal, if required on a future occasion.

62. The alleged conduct of the respondent's employee John Brady said to have occurred on the 17th of August 2016 and of the respondent's employees Sam Hall and John Brady said to have occurred on the 21st of February 2017 and of which notice was first given by the claimant in terms of Further Particulars of Claim voluntarily tendered by him and intimated to the respondent's representative on 18th October 2017, were two isolated specific alleged acts of discrimination for which time for presentation of complaints to the Employment Tribunal would begin to run respectively from the 7th July, 2016, 17th August 2016 and 21st February 2017 (let it be assumed that the Further Particulars of Claim containing those averments, first intimated to the respondents and given notice of on 18th October 2017, were to be received by the Tribunal and allowed to form part of the claimant's claims.) They did not constitute a single act of discrimination extending over a period.

63. On an unspecified date occurring some time between the 19th and 23rd of October 2016 the claimant's representative telephoned ACAS and spoke to an unspecified Conciliation Officer, who was not Ms G Sinclair. The claimant's representative asserted in evidence that in the course of that conversation he had explained that the claimant was involved in an internal grievance procedure and inquired about what, if any measures could be taken (by ACAS) to assist her in resolving that issue and that he was advised by the person to whom he spoke that ACAS "could

not become involved until the internal grievance procedure with TNT had been exhausted".

64. The claimant received written confirmation of the disposal of her appeal against the outcome of the internal grievance on 24th January 2017. On 21st February 2017 the claimant, through her representative, first made contact with ACAS in respect of the early conciliation requirements. The ACAS Conciliator, Gwen Sinclair, was allocated to the case and communicated that fact to the claimant's representative by email on 22nd February 2017, arranging to speak with the claimant's representative on the 23rd of the 2nd 17.

65. At some unspecified time but prior to his first conversation with the Conciliation Officer Gwen Sinclair, the claimant's representative had himself directly looked at the relevant provisions regarding time limits, which he had found straightforward and not difficult to understand, and had separately looked at and considered the information regarding time limits which appeared on the ACAS website. From these he had understood that the general position was that the three months' time period within which a person alleging discrimination was entitled to present a complaint to the Employment Tribunal, would begin to run as at the date of the event complained of.

66. The claimant's representative had a number of telephone conversations with the Allocated Conciliation Officer Ms G Sinclair in the period 21st February to 21st March 2017 that is during the period of early conciliation. They also exchanged some emails at the beginning and end of that period.

67. In accordance with her standard practice, the Conciliation Officer maintained a contemporaneous log of the telephone calls in which she made a note of the substance of each call. Copies of those emails and of the telephone log are produced at pages 102 to 107 of the Joint Bundle.

68. An email sent by the claimant's representative to the respondent's representative on 17th of November 2017, that is some eight months after the end of the conciliation period, is copied and produced at page 108 of the Bundle.

69. The claimant's representative asserted in evidence that during the course of a telephone conversation with the Conciliation Officer Gwen Sinclair, on an unspecified date during the early conciliation period that is in the period 23rd February to 21st March 2017, the Conciliation Officer advised him that the claimant would have a period of three months from the date upon which the early conciliation period closed (i.e. 21st March 2017) within which to present her complaints relating to those incidents.

70. The claimant's representative stated in evidence that he particularly remembered the Conciliation Officer giving him that advice because he recognised the advice as being different from his own interpretation of the rules relating to and the position regarding the commencement of, the three month time limit and as different from the information provided on the ACAS website. He stated that he remembered thanking the Conciliation Officer for giving him the advice because it was different from the advice on the website and was contrary to what he had understood to be the correct position prior to her doing so.

71. He stated that despite his awareness of the fact that that advice contradicted what he understood to be the actual position. He and the claimant decided to rely upon that advice and accordingly took no steps to present the claimant's complaint until 14th of May 2017.

72. The Conciliation Officer, G Sinclair, denied in evidence that she had given such advice. She relied upon her own recollection and upon the log of telephone conversations and copy emails contemporaneously generated by her during the early conciliation period.

73. Neither the copy emails produced nor the log of telephone discussions contained any reference to the Conciliation Officer giving any advice about time limits. They

contained no reference to the Conciliation Officer giving the particular advice asserted by the claimant's representative.

74. The three months' time limits in terms of section 123(1)(a) of the Equality Act 2010 expired in relation to the complaint of indirect discrimination because of disability and of harassment related to disability which are given notice of and relied upon by the claimant, took effect, respectively, on 16th November and 6th October 2016. Both time limits expired prior to the commencement of early conciliation and thus were not extended by operation of the Early Conciliation Regulations.

75. The claimant's initiating Application ET1 was first presented to the Employment Tribunal on 14th May 2017.

76. Let it be assumed, for the purposes of determination of the Preliminary Issues of Time Bar, that the averments in relation to the alleged acts of the respondents of 7th July and 17th August 2016, first given notice of in Further Particulars tendered on 18th October 2017 were to be formally received and allowed to form part of the claimant's case, the complaint of indirect discrimination in terms of section 19 was presented some seven months after the expiry of the section 123(1)(a) time limit. The complaint of harassment in terms of section 26 was presented some 6 months after the expiry of the section 123(1)(a) time limit.

Discussion and Disposal

77. Although, in his additional submissions, the claimant's representative made reference to, and sought to rely upon, the averments set out at paragraph 5 of the Further Particulars of 18th October 2017 relating to an incident on 21st February 2017 for the purposes of arguing that complaints in relation to the 7th July act of indirect discrimination and the 17th August both 2016 act of alleged harassment were timeously presented, no Preliminary Issue as to Jurisdiction arising from the timeliness of the presentation of a complaint in respect of those alleged acts of 21st February 2017, is before the Tribunal for determination at this Open Preliminary Hearing. The challenge advanced by the respondents, confirmed by

them in their email to the Tribunal of 15th May 2018 and for the determination of which the Open Preliminary Hearing was fixed and proceeds, is a challenge to the Title of the claimant to present and to the Jurisdiction of the Tribunal to Hear, complaints in relation to the complained of actions of the respondent said to have occurred on 7th July 2016 and 17th August 2016. Notwithstanding the observation made by the respondents in that communication in relation to a claim arising out of the conduct of the respondent's employees said to have occurred on 21st February 2017 the respondent's formal position in that regard remains as noted by Judge Macleod at paragraphs 12 and 14 of his Note of 24th January 2018 namely that their position in relation to the incorporation of claims as further specified in the tendered Further Particulars is reserved and, insofar as not before the Tribunal for determination at the instant Open Preliminary Hearing, will "require to be addressed at a future date". That that sequencing of the challenge to jurisdiction by reason of time bar has emerged is not, of itself, surprising, given that the respondent's position, let it be assumed that the Further Particulars insofar as they relate to alleged incidents on the 7th of July and 17th August 2016 were to be formally received and allowed to form part of the claimant's case despite their first being given notice of only on 18th of October 2017, would still, in the respondent's assertion, be time barred and, again, on their assertion, properly require to be the subject of challenge on a prior basis at a discrete Open Preliminary Hearing.

78. At paragraph 2(b) of their communication to the Tribunal and the claimant's representative of 15th May 2018 they observed that the position in relation to a claim said to arise out of the alleged actings of Sam Hall and John Brady on 21st February 2017 might be in a different category albeit subject to other challenges.

79. The time limits of potential claims arising out of the alleged incident of 21st February 2017 is not a question before the Tribunal for determination (*per se*) at the instant Open Preliminary Hearing. The incident of 21st February 17 however has potential relevance for the purpose submitted by Mr Sinclair in his second and additional submission namely, being an allegation in respect of conduct which is said to have occurred within three months of the date of first presentation of the Form ET1, it was an instance of a single act of discrimination extending over a

period of time and of which the alleged incidents of 7th July and 17th August 2016 were also instances and thus, that the three month time limit falls to be regarded as commencing on 21st February 17. I say of potential relevance because, were I to be persuaded by that submission and, standing the fact that the timely presentation of complaints relating to those acts of 21st February 17 is not an issue before the Tribunal at the Open Preliminary Hearing on 12th December, it might have proved necessary to have formally included it as a Preliminary Issue for determination and to continue the Open Preliminary Hearing to another date upon which parties, having been given the opportunity of preparing to do so, might be heard on the point. In the event, however, I was not persuaded by Mr Sinclair's submission.

80. There is much case law which centres on whether, in any particular circumstances, there exists a continuing discrimination extending over a period of time or, in the alternative, a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed whereas, if there is continuing discrimination, time only begins to run when the last act is completed. The leading case is that of **Barclays Bank Plc v Kapur and others 1991 ICR 208 HL** in which the Judicial Committee held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period.

81. In **The Commissioner of Police of Metropolis v Hendricks 2003 ICR 530 CA** the English Court of Appeal cautioned Employment Tribunals at first instance and the Employment Appeal Tribunal against taking too literal an approach to the question of what amounts to "continuing acts by overfocusing on whether the concepts of "policy, rule, scheme, regime or practice fits the facts of a particular case. Rather, the focus should be on the substance and the question to be asked and answered was whether there was in fact a single act extending over a period as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. The test in **Hendricks** was subsequently approved by the English Court of Appeal in 2006 EWCA Civ 1548, CA in **Lyfar v Brighton and Sussex University Hospitals**

Trust and was cited with approval by the Court in **Aziz v FDA 2010 EWCA Civ 303, CA**. **Aziz** is also authority for the proposition that while whether the same or different individuals were involved in two or more incidents relied upon is one relevant factor to be considered in answering the question, it is not a conclusive factor. That proposition has subsequently been applied by the EAT in **Greco v General Physics, UK Limited EAT0114/2016**, where the Employment Tribunal held that while six of the seven acts of sex discrimination about which the claimant in that case complained concerned her Manager in some way, the Manager's involvement was not a conclusive factor and that the Employment Tribunal were free to and on the facts justified in, finding that the seven quite specific allegations concerned different incidents and ought to be treated as individual matters.

82. Turning to the instant case the allegedly indirectly discriminatory action given notice of by the respondents, namely the application to her of a PCP requiring her amongst others to undertake frontline duties in consequence of a restructuring of work the continuing consequences of which ceased on the 16th of December 2017, is a single and isolated instance of the alleged application of a PCP to the claimant, and is different in character from and is not sufficiently connected to either the remarks allegedly attributed to Mr Brady on 17th August 16 regarding whether the claimant was or was not autistic and or to the alleged remarks attributed to Mr Brady and to A N Other employee of the respondents said to have occurred on 21st February 2017 relating to the claimant's attitude to her pregnancy. The alleged acts of 17th August 16 and of 22nd February 17 are separated in time by some six months and whereas the first relates expressly to the claimant's impairment of autism (and thus expressly to her protected characteristic of disability) the second does not, albeit that the claimant alleges that it can be regarded as indirectly related to her autism by reason of it being a remark which causes her anxiety and self-doubt. The only matter truly connecting the two incidents is the fact that Mr Brady is said to have been the author of the 17th August 2016 comment and also was one of two individuals said to have been the source of the 21st February 17 remark. While that partial commonality of source is a relevant factor I do not, in the whole circumstances of the case, consider it to be conclusive or sufficient to constitute the three acts, or the last two

of them, a single continuing act of discrimination. Rather, I conclude on the evidence presented, that they are different isolated specific acts in respect of which, let it be assumed that they formally formed part of the claimant's case, time would begin to run from the date when each of the said acts was committed. At this Preliminary Hearing stage, in relation to answering that question, I have to consider whether the claimant has made out a reasonably arguable basis for the contention that the three complaints are so linked as to constitute a continuing act or, to put it another way, to constitute the same ongoing state of affairs. The fact that the claimant suffered a number of allegedly discriminatory experiences, some of which were at the hands of the same individual and some or all of which were related directly or indirectly to her protected characteristic of disability is, of itself, insufficient, in my assessment to do so. The same because the occurrence/existence of those factors are equally consistent with there having occurred a series of different specific acts of discrimination and an offer to prove only so much for Preliminary Hearing purposes, is to offer to prove only the possibility that a single continuing act of discrimination has occurred which, of itself is insufficient. In my consideration there requires to be notice of and an offer to prove something more, something which, if established can be seen to go to a sufficient connection or link between the various complaints such as to constitute one continuing act or ongoing state of affairs in contra distinction to a series of isolated specific acts of discrimination in respect of which time begins to run from the date when each specific act was committed. On the evidence presented at Open Preliminary Hearing, I do not consider that the claimant has made out a *prima facie* case of the three incidents constituting a single continuing discriminatory act.

83. I accordingly hold, in relation to the time limits of the presentation of the two complaints which are before me, that is the complaint of indirect discrimination arising out of the alleged conduct on 7th July 2016 and of harassment arising out of the alleged conduct on 17th August 2016, are each presented out of time and that the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider these complaints in terms of section 123(1)(a) of the Equality Act 2010.

84. In the alternative let it be assumed that the Tribunal lacks Jurisdiction in terms of section 123(1)(a), Mr Sinclair argues for the claimant that, in the circumstances presented, the Tribunal should consider that the claimant has established that it is just and equitable to consider the complaints nevertheless, effectively exercising its discretion to extend the time limits by some six and seven months respectively.

85. The sole basis upon which that submission is advanced on the claimant's behalf is that the claimant's representative was wrongly advised by the allocated Conciliation Officer Gwen Sinclair that the claimant would have a period of three months measured from the end of the conciliation period that is from the 21st of March 2017, within which to present her complaints and that the claimant's representative, and through him the claimant, relied upon that misrepresentation of the law and of the claimant's rights, in circumstances where they were entitled to so rely, to their prejudice in delaying during the early conciliation period to submit the claimant's complaints until 14th of May 2017.

86. As was submitted by Mr Wright, the onus of proving that that communication occurred and that that statement and misrepresentation was made by the Conciliation Officer to the claimant's representative rests squarely with the claimant. Whether the claimant has discharged that burden of proof sufficient to enable the Tribunal to make a Finding in Fact to that effect is the first matter upon which the Tribunal must be satisfied. On the evidence presented I hold that the claimant has failed to discharge that burden of proof. In this regard I preferred the evidence of Mrs Gwen Sinclair to that of Mr Sinclair. When pressed in cross examination as to when it was made Mr Sinclair was unable to be specific beyond stating that it was towards the end of the one month early conciliation period, that the statement was made to him. At one point in the course of cross examination he appeared to be in doubt as to whether the statement was one properly attributed to the allocated Conciliation Officer Gwen Sinclair as one made by her during the early conciliation period or to another unnamed member of ACAS staff in the course of a general inquiry made by him several months earlier in October 2016, if falling to be measured individually from 7th July 2016, was at a time by which the three month time limit had already expired. Later in the course of cross

examination, although Mr Sinclair reverted to his assertion that the remark was one made by Gwen Sinclair during the early conciliation period, he was unable to offer any explanation of suggestion as to explain why no reference to it appeared in the contemporaneous log or the telephone discussions created by the Conciliation Officer during the conciliation period. Nor as to why he, for his part, had not recorded it in an email particularly in circumstances where he stated in evidence that in listening to that advice he was immediately aware that it was different from the information which appeared on ACAS's website and was contradictory of what on his own examination of the relevant rules and provisions he had understood to be the actual position namely that the starting and normal position was that the three month time limit fell to be measured from the date of the alleged act. I considered his evidence to be unreliable in relation to this material matter.

87. The Conciliation Officer for her part was consistent and adamant in her evidence that she did not give and quite separately would not ever have given, such advice. She was clear that such a statement would be wrong. She knew it to be wrong as at the date of giving her evidence and she was clear that she also knew it to be wrong as at the date on which it is alleged she gave it. She was a Conciliation Officer of some 15 years' experience and in common with her fellows undertook regular training as to the consistency of approach to be taken to parties. It was ACAS's practice not to give date specific advice about time limits. Such advice as that practice might have permitted the giving of would have been restricted to a statement that in general terms if early conciliation had been commenced prior to the expiry of the three month time limit then a party might expect to have a minimum of one month following the end of early conciliation in which to present the claim. She was clear, however, that she had not given any such advice. This because had she done so it would have been her invariable practice to have recorded it in the contemporaneously prepared and maintained log of telephone conversations and or in email correspondence. She relied both upon her own recollection and upon contemporaneous log which nowhere contained any reference to her being asked by the claimant's representative to provide or to herself providing advice regarding applicable time limits in relation to the claimant's claims. Neither did any of the emails passing between the claimant's

representative and Conciliation Officer during the period of conciliation contain any such reference. It was not until some seven months later that the claimant sent the Conciliation Officer an email in which he asserted that such advice had been given by her. Knowing for her part that the assertion was unfounded in fact the Conciliation Officer did not consider that the email required a response from her and she did not make one. The position, as asserted in evidence by the claimant's representative is expressly contradicted by the evidence of the Conciliation Officer, whose evidence I considered to be both credible and reliable and which I accepted in relation to the matter. The email trail and telephone log covering the period of early conciliation does not support the claimant's representative's version of events and is consistent with the Conciliation Officer's position that she did not give any such advice.

88. I considered that the claimant has failed to discharge the onus of proof and to establish, on the balance of probabilities, that any such advice was given. The factual premise upon which the argument for extension of time under section 123(1)(b) of the Act is advanced not having been established that of itself is sufficient for the Tribunal not to be satisfied that it would be just and equitable in those circumstances to extend the time limit. For completeness sake, and although not figuring *per se* in the evidence before the Tribunal but rather made only the subject of submission on the part of the claimant's representative, I deal with the other elements of submission advanced by Mr Sinclair. These were to the effect that the claimant had expected to and was entitled to expect that her concerns and complaints would be resolved to her satisfaction through the process of the internal grievance. That had been her aspiration and in circumstances where that had not transpired she should be viewed as having been entitled to delay her presentation of complaints to the Employment Tribunal and thus that it would be unfair not to allow her complaints to be considered though late. He further prayed in aid of that proposition that the claimant fell to be regarded as a vulnerable person by reason of her autism and as a person who was latterly pregnant. These were reasons in his submission which resulted in it being just and equitable that the complaints be considered though respectively six and seven months late.

89. While I recognise that there is some force in what the claimant's representative said regarding the claimant's potential vulnerability by reason of her autism that of itself is not a sufficient reason to result in it being just and equitable to extend the time limit, particularly when the principal reason for seeking such an extension has not been established on the evidence. Neither does it flow from the fact that a person seeks to avoid the stress and conflict of litigation by pursuing an internal grievance process in the hope will resolve their complaints to their satisfaction, it is settled law that in doing so and, in delaying in consequence the raising of proceedings, they run the risk that their claims might be time barred and that they may lose the right to proceed. The proposition that such an aspiration, laudable though it may well be, results in it being unfair for a Tribunal not to extend the time limit is one which is unsubstantiated. As is made clear in the case of **Bexley Community Centre** the discretion with which the Tribunal is imbued in terms (now of section 123(1)(b) of the Equality Act 2010) is a wide discretion but it is equally the case that Parliament having proscribed primary time limits outside of which individuals will not have the right to pursue claims and the Tribunal will lack jurisdiction to consider them, that there is no presumption in favour of the granting of extension unless the Tribunal can justify a failure to exercise its discretion. As was said in **Bexley** at paragraph 25 lines 11 to 13 "*quite the reverse. A Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*" On the evidence presented and on the findings in fact made the claimant has failed to convince the Tribunal that it is just and equitable to extend time and the Tribunal declines to do so.

90. The Tribunal accordingly holds that it lacks jurisdiction to consider the complaint of indirect discrimination in terms of section 19 of the Equality Act 2010 relating to the asserted protected characteristic of disability insofar as founded upon the alleged application, by the respondent to, amongst others the claimant, of a PCP described by her as "by moving me to the frontline position", on 7th July 2016, either in terms of section 123(1)(a) or 123(1)(b) of the Equality Act 2010 which claim accordingly falls to be dismissed.

91. The Tribunal further holds that the claimant lacks Title to Present and the Tribunal Jurisdiction to Consider the complaint of Harassment related to the claimant's asserted protected characteristic of disability, in terms of section 26 of the Equality Act 2010, insofar as founded upon conduct of the respondent being remarks allegedly made by the respondent's Mr Brady in a conversation with the claimant on 17th August 2016 and being remarks to the effect that the claimant was not autistic, either in terms of section 123(1)(a) or section 123(1)(b) of the Equality Act 2010 which claim accordingly falls to be dismissed for want of jurisdiction.

92. As observed above the establishment, on the balance of probabilities, that the Conciliation Officer had made the alleged statements regarding time limits to the claimant's representative constituted the first hurdle which the claimant required to negotiate. As held, the claimant has failed on the evidence presented to discharge that burden of proof. Had she done so however, that of itself would not have been an end of the matter. In terms of Mr Sinclair's own evidence he made clear, prior to the alleged statement being made to him, let it be assumed that the Tribunal had found the same to be established, that he in his capacity as the claimant's advisor had formed a very different view as to the position both from his own research and consideration, of the relevant provisions regarding time limits and from his consideration of the information which appeared on ACAS's own website. That understanding, achieved by his own researches and considerations was in the event the correct understanding that is to say that the three month time limit falls to be measured at first instance from the date of the occurrence of the conduct founded upon. In those circumstances the Tribunal would have considered that the claimant's representative was not entitled to rely upon the erroneous advice allegedly given by the Conciliation Officer without taking further steps to confirm its accuracy either, for example, by sending an email to the Conciliation Officer asking her to confirm the same or by looking again at the relevant statutory provisions or the ACAS or Employment Tribunal websites where information about and links to other sites in which such information exists, appear.

93. The Tribunal's determination at Open Preliminary Hearing disposes of the complaints of indirect discrimination and of harassment insofar as founded upon the alleged conduct of Mr Brady on 17th August 2016. The same leaves outstanding, the complaint of harassment insofar as potentially founded upon the alleged remarks of Mr John Brady and Sam Hall, relating to the claimant's pregnancy, allegedly made on 21st February 2017 but which is advanced as a section 26 complaint of harassment relating to the claimant's protected characteristic of disability. There also remains outstanding what appears to be an accepted complaint, by reason of the respondent's representative's concession before Judges Macleod and Meiklejohn, of failure in a duty to make adjustments in terms of sections 20 and 21 of the Equality Act 2010. While it may be said that the "Additional Information" section of initiating Application ET1 contains some general notice of an offer to prove circumstances which might herald such complaints, both are the subject of additional specification. The first, that is the section 26 complaint, is the subject of specification first given notice of in the Further Particulars of Claim tendered by the claimant on a voluntary basis on 18th October 2017. In order that appropriate further procedure in respect of these apparently residual claims can be determined the respondents will require to make clear whether they do or do not take issue with those parts of the Further Particulars of Claim, of 18th October 2017, which relate to those residual claims being formally received by the Tribunal and incorporated by the claimant as part of her pleadings and, whether they maintain that the addition of such averments are subject to a requirement to make application for Leave to Amend and or remain subject to a challenge already focused by them regarding the Tribunal's Jurisdiction to Consider them by reason of Time Bar.

94. The Respondent's representative is accordingly directed to write to the Tribunal and to the claimant's representative, within 21 days of the date of promulgation of this Judgment, identifying by reference to the particular line numbers of the Further and Better Particulars of Claim tendered by the claimant's representative voluntarily on 18th October 2017;

(a) those parts, if any which standing the Tribunal's Judgment at Open Preliminary Hearing which they assert should no longer relevantly be incorporated in the claimant's pleadings.

(b) Those parts, if any, in respect of which they maintain there is a requirement for seeking and granting of Leave to Amend

(c) Those parts, if any, in respect of which they focus a challenge to the Tribunal's jurisdiction (by reason of time bar); and, those parts, if any, in respect of which they maintain no objection and consent to being formally received by the Tribunal and incorporated by the claimant as part of her pleaded case.

95. The claimant's representative is directed to write to the respondent's representative and to the Tribunal, within a further period of 21 days thereafter that is within 42 days of the date of promulgation of this Judgment, confirming whether the claimant continues to insist upon one or both of those claims in light of the respondent's representative's clarification.

96. The case is otherwise appointed to a Closed Preliminary Hearing (Case Management Discussion) to proceed before the Case Managing Judge, Judge Macleod, on a date to be afterwards fixed by date listing stencil in liaison with Judge Macleod's availability and in respect of which date listing stencils, with a return date of 28 days from the date of promulgation of this Judgment should be issued to parties' representatives forthwith.

Employment Judge: Joseph D'Inverno
Date of Judgement: 15 February 2019
Entered in register: 25 February 2019
And copied to parties