sb

EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Ms N Essex **AND** **Eden Blackman (R1)**
Lime Pictures Limited (R2)

PRELIMINARY HEARING

HELD AT: **London Central** **ON: 23 & 24 April & 17 May 2019**

BEFORE: Employment Judge Brown (Sitting alone)

Representation:

For Claimant: Mr E McDonald, Counsel

For Respondents: (1) Mr B Randle, Counsel
(2) Ms T Barsam, Counsel

JUDGMENT

1. The Claimant's claims against the First Respondent were brought out of time. It is not just and equitable to extend time for their presentation. They are therefore struck out because the Tribunal does not have jurisdiction to consider them.

2. The Tribunal does not strike out the Claimant's claims against either Respondent on the grounds that they have been conducted in a scandalous, unreasonable or vexatious manner.

3. The Tribunal does not strike out the Claimant's claims against either Respondent on the grounds that they are scandalous or vexatious.

REASONS

Preliminary

1. By claim number 2205956/2018, presented on 5 September 2018, the Claimant brought complaints of sex and sex-related harassment, direct sex discrimination and victimisation against Eden Blackman, the First Respondent. By claim number 2206086/2018, presented on 17 September 2018, the Claimant brought complaints of sex and sex-related harassment, direct sex discrimination and victimisation against the Second Respondent, Lime Pictures Limited. In that second claim, the Claimant alleged, amongst other things, that Lime Pictures Limited was vicariously liable for the actions of Mr Blackman and/or that Mr Blackman was the agent for Lime Pictures as principal. In the second claim, the Claimant also brought an equal pay claim against the Second Respondent, comparing her pay with that of Mr Blackman.

2. At a Preliminary Hearing on 20 February 2019, Employment Judge Grewal ordered that the two claims should be considered together. The Claimant had presented amended particulars of claim by that date. At that Preliminary Hearing, the Claimant withdrew a large number of the paragraphs in her particulars of claim in the first claim. She agreed that she would withdraw the paragraphs with the same content in the second claim.

3. Employment Judge Grewal listed a Preliminary Hearing to determine whether the Tribunal had jurisdiction to consider the Claimant's complaints against Mr Blackman and any applications to strike out made by either of the Respondents.

4. That hearing took place before me on 23 - 24 April and 17 May 2019. It was agreed, at the Preliminary Hearing that the issues for me to determine were:

(1) Whether it was just and equitable to extend in relation to complaints made against Mr Blackman, the First Respondent, which pre-dated 2 March 2018;

(2) Whether the Claimant's complaints against the First Respondent should be struck out as vexatious and/or having been conducted by the Claimant and/or her representative in an unreasonable and vexatious manner and;

(3) Whether the claims against the Second Respondent should be struck out because they were vexatious and/or had been conducted in a unreasonable and vexatious manner.

5. The Claimant had prepared witness statements for this Preliminary Hearing. I was asked, at the start of the Hearing, to order that certain paragraphs of the Claimants' witness statements be excluded from evidence. I determined that application, first, in a Closed Preliminary hearing.

6. I excluded a number of paragraphs for reasons I gave orally at that time.

7. I then heard evidence from the Claimant. I heard evidence from the First Respondent, Mr Blackman, and from Sarah Tyekiff, Head of Non-Scripted Programming at Lime Pictures Limited.

Findings of Fact

8. In both the Claimant's claims as originally drafted, the Claimant made a number of very serious allegations against the First Respondent about his behaviour towards other women. The Claimant was not claiming any remedy against either Respondent in respect of those allegations. These paragraphs were withdrawn by the Claimant at the first Preliminary Hearing in front of Employment Judge Grewal.

9. However, the Claimant included these allegations in her draft witness statement for this Open Preliminary Hearing listed to consider jurisdiction and strike out. I ordered that those paragraphs be removed because they were not relevant to the issues to be decided. I gave reasons, orally, for making the order.

10. The Claimant's surviving claims against the First Respondent, for the purposes of this Preliminary Hearing, were as follows:

a. 14 July 2017 - First Respondent acting in an aggressive manner towards the Claimant stating, "if you think I am a bully now just wait I will F-ing destroy you". (Direct sex discrimination and harassment).

b. September 2017 - the First Respondent bragging to the Claimant that a female contestant had asked to have sex with him. (Direct sex discrimination and harassment).

c. 5 October 2017 - the First Respondent complaining about the Claimant's conduct, tweeting against her and threatening to sue her. (Direct sex discrimination and harassment).

d. 15 November 2017 - at a mediation the First Respondent repeatedly asking the Claimant why she had contacted the media without approval and why she had contacted another individual. (Direct sex discrimination, harassment and victimisation).

e. Late 2017 to early 2018 - the First Respondent being cold and distant towards the Claimant. (Direct sex discrimination, harassment and victimisation).

f. 1 March 2018 - the First Respondent "body shaming" the Claimant on Instagram by stating, " .. the celebs have done a

great job of knowing their shape and what looks good on them". (Direct sex discrimination, harassment and victimisation).

11. The allegations fall in the period 14 July 2017 to 1 March 2018.

12. The primary time limits for pursuing the claims ended between 13 October 2017 and 31 May 2018.

13. The Claimant contacted ACAS for Early Conciliation on 30 August 2018. An ACAS EC certificate was issued on 31 August 2018. The claim against the First Respondent was presented on 5 September 2018.

14. The Claimant's victimisation claim was based on the contention that the Claimant complained to the Second Respondent about Mr Blackman's conduct on 16 October 2017, paragraphs 144-160 of her original claim form. She also contended, in her original claim form, that the Second Respondent carried out an informal investigation into her allegations but that the Second Respondent had believed Mr Blackman too easily. In her original claim form, the Claimant said that the Second Respondent insisted that a mediation was set up to resolve the differences between the Claimant and the First Respondent.

15. The Claimant and Mr Blackman were engaged by the Second Respondent to work as presenters on a television reality show called "Celebs Go Dating", or "CGD". The Claimant and Mr Blackman were engaged as contributors; their contracts described them as being self-employed. It is, as yet, an unresolved issue in the case as to the true nature of the employment relationship between the Claimant and the Second Respondent.

16. CGD is a "dating" television show in which single "celebrities" seek dates with single members of the public to try to find romantic relationships. There have been a number of series of CGD.

17. From about Series 3, there was a specific clause in the presenters' contracts that they must not enter into a romantic or sexual relationship with a celebrity client, programme contributor and/or other staff. In February 2018 the Sun newspaper published an article about Mr Blackman being in relationships with two women, including one who had appeared on CGD.

18. On 2 March 2018 Mr Blackman's engagement with Lime Pictures Limited was brought to an end. The Claimant did not work with him thereafter.

19. The Second Respondent initially engaged the Claimant as a presenter/dating expert for series 5 of CGD. It did not engage Mr Blackman for series 5. Principal filming for series 5 took place between 23 July 2018 and 11 October 2018.

20. On 23 July 2018 Mr Blackman contacted Lime Pictures Limited and alleged that the Claimant had set up 4 Twitter accounts in different names,

which had been used to "troll" members of the public and to criticise Mr Blackman, amongst other things.

21. The next day, 24 July 2018, the Second Respondent met with the Claimant to discuss the allegations. The Claimant denied having set up any of the accounts and she signed a letter confirming this.

22. On 14 August 2018 Mr Blackman's solicitors wrote to the Claimant asserting that she had harassed Mr Blackman contrary to the *Protection from Harassment Act 1997*. The letter asked that the Claimant stop "trolling" Mr Blackman, that she publicly apologise to him and that she pay his legal fees to date.

23. Also on 14 August 2018 the Second Respondent received a letter from Mr Blackman's solicitors, alleging that the Claimant had pursued an unlawful campaign of harassment against him through 3 Twitter accounts. On 24 August 2018 Mr Blackman's solicitors sent the Second Responded documents, including details of 2 of the Twitter accounts which linked those accounts to the Claimant's mobile telephone number.

24. The Second Respondent investigated and uncovered further evidence linking the Claimant to 3 Twitter accounts. It is not in dispute that at least one of the accounts included a number of offensive tweets directed towards members of the public.

25. On 10 September 2018 the Claimant attended a meeting with the Second Respondent and accepted that she was behind 2 of the Twitter accounts, including one which had been used to post abusive messages to members of the public.

26. The Claimant was thereafter suspended by the Second Respondent. She resigned from her engagement with the Second Respondent on 14 September 2018.

27. In her witness statement for this Preliminary Hearing, the Claimant told the Tribunal that she believed, at all times during her engagements with the Second Respondent, until she met with solicitors on 24 August 2018, that she had no employment rights because she was engaged as an independent contractor. She also told the Tribunal that, while she had believed that the First Respondent had harassed her at work, she felt afraid to formalise her complaints.

28. The Claimant said that she had been too afraid of the First Respondent's potential retribution against her to seek legal advice on her situation before his letter before action against her forced her to do (on 14 August 2018 Mr Blackman's solicitors had written to the Claimant asserting that she had harassed Mr Blackman. The letter asked that the Claimant stop "trolling" Mr Blackman, that she publicly apologise to him and that she pay his legal fees to date). The Claimant told the Tribunal that she had been harassed into powerless inaction.

29. The Claimant gave evidence about her efforts to obtain legal advice following this letter from Mr Blackman's solicitors. There were a number of documents in the bundle showing when the Claimant had sought advice from solicitors.

30. The First Respondent, Mr Blackman, conceded in cross examination that, based on the Claimant's witness statement, she was not aware that she had employment rights until this meeting on 24 August 2018.

31. The Claimant told the Tribunal that the First Respondent had a history of retaliating against her on the CGD show. She said that, when she had raised concerns with the Second Respondent before March 2018 about the First Respondent's behaviour these had been ignored, or the Claimant had been threatened with dismissal, or told to keep quiet and a low profile.

32. With regard to the Claimant's fear of retaliation and her alleged inability to seek out advice regarding her employment rights, I did not accept the Claimant's evidence that she had been intimidated, or afraid of the First Respondent, to the extent that she was unable to seek legal advice. On the facts, the Claimant complained to the Second Respondent about the First Respondent's conduct well before August 2018 and on more than one occasion when the Claimant was still working with the First Respondent.

33. On the facts asserted in the Claimant's claim, the Claimant complained to the Second Respondent about the First Respondent on 16 October 2017, paragraphs 144-160 of her original claim form. She also contended, in her original claim form, that the Second Respondent carried out an informal investigation and insisted that a mediation was set up to resolve the differences between the Claimant and the First Respondent. On her own claim, therefore, the Second Respondent did not ignore the Claimant's allegations, but investigated them. While the Second Respondent did not uphold the Claimant's complaint, it offered the Claimant a resolution in terms of mediation.

34. Part of the 2017 mediation agreement was that either party could seek a further mediation session, pages 12-13 of the Claimant's bundle. The Claimant did not seek further mediation despite that avenue being available to her.

35. The Claimant complained to the Second Respondent about the First Respondent's conduct on 5 February 2018, bundle page 27, and in March 2018, pages 72-73.

36. The Second Respondent encouraged the Claimant to raise her concerns about the First Respondent with it in April 2018, after Mr Blackman had left the CGD show, page 30. On 12 April 2018, Colin Whitaker, Executive Producer of Celebs Go Dating, wrote to the Claimant about allegations she had made against Mr Blackman and his treatment of another woman. Mr Whitaker said, "I always want you to feel you can come to me with any kind of information no

matter how sensitive. We take all these allegations extremely seriously and it won't affect your position".

37. I concluded that the Second Respondent had not dismissed the Claimant's complaints about Mr Blackman. I did not accept that the Claimant felt unable to raise complaints about him because of the Second Respondent's inaction and/or failure to support the Claimant.

38. While I accepted the Claimant's evidence that she felt that Mr Blackman was not friendly towards her on the show, she also told me that he treated other people in a cold and distant manner. She contrasted her own supportive and warm personality with Mr Blackman's more formal, strictly professional demeanour towards people on set. I did not consider that that provided evidence that the Claimant was particularly fearful of Mr Blackman, nor that Mr Blackman singled her out for intimidating treatment which might justify her being fearful of him.

39. The Claimant contended that Mr Blackman's comments on these ET proceedings indicated his hostility towards the Claimant. The First Respondent has described the Claimant on social media as "playing the victim". He has said, "Lime Pictures suspended her and her manager fired her. Organisations like these don't make that kind of decision without reason". Bundle page 113.

40. After the Preliminary Hearing in front of Employment Judge Grewal, Mr Blackman tweeted, "A few chapters of the BS were torn out by the judge today, more to follow I am sure …". Page 103. Mr Blackman has stated that the Claimant was "utterly repugnant" and said, "she's no lady", amongst other things.

41. I did not consider that these recent Tweets were evidence that Mr Blackman had acted in a similarly hostile manner towards the Claimant before he discovered that she had set up Twitter accounts for the purposes of "trolling" him. The Claimant's conduct in that regard was undisputedly blameworthy. Her actions were hostile and unpleasant. It would not be surprising if Mr Blackman were to have a low opinion of the Claimant, having discovered her actions in this regard. It would not be surprising that Mr Blackman would express his opinions. It did not follow that Mr Blackman would have acted in the same way towards the Claimant had she not published those unpleasant and insulting tweets about him.

42. Mr Blackman was not retained by the Second Respondent to work on the 5th series of Celebs Go Dating. After March 2018, therefore, the Claimant was not working with Mr Blackman in any event. Even if she had felt uncomfortable with Mr Blackman while they were filming together, she was not working with him after 2 March 2018.

43. There was a significant delay, after March 2018 and before August 2018, in the Claimant seeking legal advice.

44. The Claimant contended that her mental health had prevented her from seeking legal advice and bringing a claim against the Respondents. She said that she had no mental health strength to seek legal advice on her situation before August 2018 and that she lacked the psychological strength to bring any claim against Mr Blackman, who she considered to be her harasser. The Claimant told the Tribunal that, at times, she was so depressed that she was unable to leave her living room "safe zone". The Claimant stated that she now takes anti-depressant medication and receives counselling, Claimant's first witness statement paragraph 22.8.

45. The Claimant also told the Tribunal that, when she learned of the First Respondent's behaviour towards other women, she felt sickened and traumatised; feeling powerless, terrified and angry, paragraph 55 Claimant's first witness statement.

46. The Claimant said that her appearances on television and her self-portrayal on social media should not be taken as representative the true state of her mental wellbeing. She said that it is well known that celebrities and presenters suffer severe mental health impacts from reality television shows. The Claimant reminded the Tribunal that there have been some tragic cases of such people taking their own lives. She also reminded the Tribunal that, in recent years, the film and television industry and has been exposed as having harboured serial abusers of women, while those women have remained silent for many years.

47. While I accepted that a person's social media profile was not likely to be entirely representative of the true state of their mental health, their relationships or their day-to-day life, I considered that it did provide some evidence of their mental well-being. If a person was truly unable to leave their house, or meet other people, then it would be very unlikely that they would be able to post on social media images of themselves on holiday, or at high profile media events.

48. On the Claimant's social media accounts there was evidence of her:
    a. Going on holiday to Barbados in March 2018, pages 143-146;
    b. Attending a music festival in the USA in April 2018, page 159;
    c. Being in Mykonos in June 2018, page 179;
    d. Exercising in the gym and outside on 7 May, 12 May, 18 May, 21 May, 24 May 2018, pages 174-179;
    e. Being on a trip to Valencia in July 2018, page 191.

49. There were also several photos of the Claimant exercising on her social media accounts, alongside posts talking about her new fitness regime and the benefits of it, page 182 on 5 June 2018, page 186 on 7 June 2018 and page 190 on 15 June 2018.

50. At the end of March 2018, the Claimant launched a new weekly column for Now magazine, giving advice on dating dilemmas, which she promoted on social media, pages 148-149.

51. The Claimant made television appearances outside Celebs Go Dating such as appearing on Good Morning Britain on 28 March 2018, page 193 and This Morning on 7 May 2018.

52. The Claimant watched tennis at the Centre Court in Wimbledon, page 192. She was photographed with the performers of Kinky Boots on 28 April 2018, page 167, and attended premieres of films on 9 and 14 August 2018 pages 194-195. The Claimant filmed Celebrity Coach Trip from 19 June to 1 July 2018.

53. I agreed with Miss Tyekiff's comment in her witness statement that the Claimant's social media account gives the impression of a confident woman, making the most of opportunities available to her and enjoying herself.

54. The evidence on the Claimant's social media accounts certainly did not support the Claimant's contention that she was ill to the extent that she was unable to go out and/or interact or communicate with people. It did not support the proposition that the Claimant was unable to seek legal advice.

55. The Claimant signed a statement of health document on 12 July 2018, saying that, to the best of her knowledge and belief, she was in good health, page 36.

56. The Second Respondent relied on a Psychologist's report on the Claimant prepared by Andrew Kinder, Chartered Occupational and Counselling Psychologist and Registered Practitioner Psychologist, following an assessment of the Claimant on 12 July 2018, page 38. Mr Kinder recorded that the assessment was a follow-up to previous contact in November 2017, when mediation had taken place between the Claimant and Mr Blackman. Mr Kinder said that the Claimant told him that the mediation had cleared the air to some extent and that, as a result, he was more amiable during the production process. She said that she had flagged up some further concerns about his apparent behaviour with contributors which the Claimant said Lime Productions were aware of and had dealt with. Mr Kinder reported that the Claimant was pleased that the situation had been resolved.

57. During Mr Kinder's assessment, the Claimant reported that she had some anxiety; Mr Kinder said that no major concerns were identified and that the Claimant presented herself positively regarding this, in terms of managing any anxious thoughts. Mr Kinder said that the Claimant was in the normal population according to the clinical questionnaires which had been administered, page 39. His report concluded, "Nadia came across as confident, warm and engaging … she is fit to film." Bundle page 39.

58. The Claimant told the Tribunal in her second witness statement that, if one is found not to be "fit to film", then the individual is viewed as being unreliable and is unlikely to be offered work again.

59. The Claimant's medical notes were in the bundle documents before me. In September 2016, she visited her GP in relation to anxiety which had been

ongoing for a while, but had recently worsened. The GP recommended a course of counselling. A referral was made to a primary care mental health team in September 2016. On 9 March 2017, the Claimant visited her GP again and it was recorded that her "moods are normal and good", page 88.

60. The Claimant attended her GP in November 2017, December 2017, July 2018 and September 2018. She did not seek any treatment for mental health issues on any of those occasions, pages 88-90.

61. On 18 October 2018 she attended her GP and gave a 6 week history of progressively worsening mood, the GP notes record, ".. multiple life stressors: unemployment, work tribunal, involvement of legal case re: .. sexual assault at work …" page 91.

62. From the medical records, therefore, between 9 March 2017 and August 2018, there was no evidence that the Claimant was suffering from any mental impairment or illness. When the Claimant did attend the GP on 18 October 2018, the reasons for her worsening mood were recorded to be unemployment and the Employment Tribunal proceedings.

63. On all the evidence, I concluded that the Claimant was not prevented from seeking legal advice by any mental health condition between March 2017 and August 2018.

64. I concluded that the Claimant had not sought legal advice previously because she had not considered that she needed legal advice. The Claimant had initially said in her witness statement that she had only sought legal advice after she received a letter from Mr Blackman's lawyer dated 14 August 2018. After further disclosure was obtained by the Second Respondent's solicitors, in her supplemental witness statement, the Claimant said that she had sought advice at an earlier stage, in late July 2018 and on 1 August 2018, when she had sought advice from Carl Robinson, a solicitor practising employment law. The Claimant told me, and I accepted, that Mr Robinson said that the case was too complex for him and that he could not give the Claimant the advice that she needed. Having received the First Respondent's letter before action on 14 August 2018, the Claimant approached Harbottles Solicitors on 21 August 2018 about Mr Blackman's claim against her but she could not afford the quoted fee. She also contacted Legal Aid Firms such as Steel and Shamash, the Claimant's second witness statement paragraphs 22-25. The Claimant told me that, as soon as she received advice, later in August 2018, that she might have an Employment Tribunal claim, she moved quickly to issue the claim.

65. I considered that the Claimant was credible regarding her efforts to obtain legal advice in July and August 2018. She gave a detailed account of her interaction with Mr Robinson. She also gave a detailed account of steps that she had taken to obtain other legal advice in August 2018. I accepted that the Claimant had not been aware that she would be able to bring a claim to the Employment Tribunal until August 2018.

66. It was clear, on the facts, that her contract described her as an independent contractor. I accepted her evidence that she believed that she did not have employment rights.

67. Nevertheless, I considered whether it was reasonable for the Claimant not to believe that she had employment rights, particularly in relation to sex discrimination or harassment. The Claimant had not sought any advice regarding this at any time until late July or August 2018, nor does it appear that she undertook internet research.

68. I accepted the Respondents' contention that, had the Claimant sought advice or undertaken any internet research, it was likely that she would have discovered that she might not be an independent contractor. There have been many high-profile cases in the national press of workers in various fields who have been found by Employment Tribunals and higher Courts to have employment rights, even when their employers have contended that they are truly independent contractors. There was nothing preventing the Claimant seeking legal advice or undertaking her own internet research.

69. In the Claimant's witness statement, she gave evidence about assaults and sexual assaults which she had suffered in earlier life. She also gave evidence about learning from third parties, including alleged ex-girlfriends of Mr Blackman, allegations that they made against him. She told me that the assaults and sexual assaults which she had experienced and the allegations that she heard both had an impact on her mental health, which led to her being unable to bring claims against Mr Blackman earlier than she did.

70. I make clear in these findings that I do not doubt in any way that the Claimant's previous experience of assault and sexual assault had a seriously detrimental effect on her at the time and thereafter. Nor do I doubt that she was shocked when she heard allegations against Mr Blackman.

71. Despite events in the Claimant's previous life, despite allegations that she heard against Mr Blackman and despite her negative view of Mr Blackman's personality and conduct towards her, the Claimant was able to undertake normal day-to-day activities, working, going out, meeting people, communicating with people, enjoying holidays, and high-profile events. All the medical evidence indicated that she was not suffering any mental ill health from at least March 2017 until August 2018.

72. On all the evidence before me I did not conclude that the Claimant was unable to seek advice, or research for her legal rights, or bring a claim, if she had wanted to, between March 2017 and August 2018.

73. I concluded, on the available evidence, that the Claimant had sought and received medical treatment following the revelations that the Claimant had set up Twitter accounts which she had used to "troll" Mr Blackman and criticise other members of the public.

Relevant Law

74. By *s123 Equality Act 2010,* complaints of discrimination in relation to employment may not be brought after the end of

a. the period of three months starting with the date of the act to which the complaint relates or

b. such other period as the Employment Tribunal thinks just and equitable.

75. By *s123(3) EqA* conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.

76. In *Commissioner of Police of the Metropolis v Hendricks [*2003] ICR 530, the Court of Appeal held that, in cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken' in order to establish a continuing act. The Claimant must show that the incidents are linked to each other, and that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The question is whether there is "an act extending over a period," as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed'.' Paragraph [52] of the judgment.

77. Where a claim has been brought out of time the Employment Tribunal can extend time for its presentation where it is just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure* Link [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse; a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

Time Limits – Discussion and Decision

78. Taking into account the facts and relevant law, I did not extend time for the presentation of the Claimant's complaints against the First Respondent. They had all been brought out of time. Even if they were to be treated as a continuing act, they were brought three months out of time.

79. Clearly the Claimant was aware of the acts when they took place.

80. I did not accept that the Claimant was prevented by ill health or by fear of retaliation by Mr Blackman, or the Second Respondent, from, either researching her rights, or bringing a claim. Insofar as the Claimant believed that she had no employment rights, her belief was not reasonable in that she had taken no steps to investigate her rights before late July/early August 2018.

81. On the facts, I concluded that the Claimant had been prompted to bring a claim by the threat of legal action against her by Mr Blackman. In reality, the reason that she had not brought a claim earlier was not her ignorance of her rights, or fear, or mental illness, but that she did not wish to bring a claim against Mr Blackman at any earlier time.

82. The delay of three months was quite a lengthy delay. A number of the Claimant's allegations related to events in 2017, around a year or more before the Claimant's claim was issued. Further, many allegations related to the First Respondent's general conduct, or comments made to her. The nature of the allegations meant that it was inherently unlikely that there would be any documentary or other contemporaneous evidence available in relation to them. Determination of those allegations would be likely to depend on oral evidence at the Employment Tribunal. Delay in those circumstances has particular risks for a fair hearing. Memories are likely to have faded; there will be forensic prejudice.

83. There was little reason, therefore, to extend time and many reasons for not extending time.

84. The Tribunal does not have jurisdiction to hear the Claimant's claims against Mr Blackman. They are dismissed.

Strike Out – Proceedings Alleged to be Vexatious or Scandalous or Conducted in a Vexatious, Scandalous or Unreasonable Manner

85. The First Respondent contends that the Claimant's claims ought to be struck out because they are vexatious and scandalous. In any event, he contends that the claims have been pursued as a form of retaliation against the First Respondent who, upon receiving confirmation that the Claimant was using anonymous Twitter accounts to "troll" him, had sent a letter before a claim for a harassment action against the Claimant on 14 August 2018, pages 43-44.

86. The Claimant contends that she did not bring her claim as a form of retaliation, but because she was prompted to seek legal advice by the First Respondent's proposed claim.

87. The First Respondent contends that it is obvious that the claim was retaliatory for the following reasons. First, the Claimant included irrelevant, but highly damaging, information to tarnish the First Respondent's reputation. Second, the Claimant's actual complaints against the First Respondent are about trivial matters.

88. In her initial claim form, the Claimant made allegations that the First Respondent had engaged in sexually inappropriate conduct with several individuals. She drew comparisons between him and well known public figures who have been accused of sexual impropriety and expressed disgust towards the First Respondent.

89. The First Respondent relied on an observation by Employment Judge Grewal at a Preliminary Hearing on 20 February 2019 that large parts of the Claimant's claim appeared to be irrelevant and to have been included to damage the First Respondent's reputation. The First Respondent relied on Employment Judge Grewal listing around 90 paragraphs of the original particulars of claim which the Claimant ought to consider withdrawing on that basis.

90. The note of the relevant Preliminary Hearing, dated 20 February 2019, records that the Claimant agreed to withdraw a large number of paragraphs of her first and second claims. The First Respondent said that, despite these allegations being irrelevant and withdrawn from the pleadings, the Claimant sought to reintroduce a number of them at this Open Preliminary Hearing. I ordered that they be removed again.

91. The First Respondent also contended that, while the application to strike out is not made in the ground that there are no reasonable prospects of success, the claims are, in fact, hopeless.

92. It compares the allegations by the Claimant against the First Respondent with the Claimant's undisputed behaviour towards the First Respondent in the tweets from the Twitter accounts that she set up. For example, on 17 February 2018, the Claimant referred to the First Respondent as a "dog" and "F-ing disgusting dog" and "dirty dog". On 13 March 2018 she said of the First Respondent, "..do you think it's appropriate to call a man who cheats on his long term girlfriend with women young enough to be his child a love guru, shame on you for giving this dog any air time".

93. On 10 and 17 April 2018 the Claimant made derogatory tweets about the First Respondent, including referring to him in the following terms "dick head Blackman … chatting shit.. giving shit advice", Bundle pages 44 - 46.

94. The First Respondent contended that the vexatious nature of the Claimant's claim was apparent from the very trivial allegations raised in

respect of other alleged conduct by the First Respondent and the Claimant's disproportionate response. The First Respondent said that in her particulars of claim, the Claimant had complained that the First Respondent had refused to go for a drink with her and did not meet up with her, despite allegedly agreeing to; the Claimant said that she was "devastated" by this "passive" subjugation. The Claimant also had alleged that the First Respondent stated that "millionaires pay a fortune" for his services and that the Claimant believed that the First Respondent had used the words of the Claimant's website and that this was humiliating.

95. Both Respondents contended that the proceedings had been conducted in a vexatious, unreasonable and scandalous manner. They contended that a fair trial was not possible in that the Claimant had continually sought to introduce irrelevant, yet prejudicial, evidence into the proceedings.

96. The Second Respondent contended that the Claimant's conduct of the proceedings suggested that the Claimant wishes improperly to use the legal process to damage Mr Blackman's reputation.

97. The Respondents both contended that there was evidence that the Claimant is using these proceedings to increase her own press and media profile. On 21 January 2019 a TV reporter from Metro contacted Mr Blackman for comments on these Employment Tribunal proceedings, Metro included quotes from the Claimant which said, "Well I am in the process of suing Eden and Lime. Yeah, so we go to court next month for the preliminary hearing, I am also speaking with a production company to make a Making a Murderer-style documentary about the court case". Bundle page 77.

98. The Second Respondent contended that, given the Claimant's claims against Mr Blackman are out of time, her only way of ensuring she retains the ability to humiliate Mr Blackman in a public forum was to bring a claim also against Lime Productions, the Second Respondent. Due to the Claimant's ongoing contractual relationship with the Second Respondent, the Claimant was able to bring claims which were in time against it.

99. The Second Respondent contended that only the sanction of striking out the Claimant's claims will stop the Claimant from resurrecting irrelevant allegations against Mr Blackman for the purposes of embarrassing him and, by association, Lime Productions.

Relevant Law – R37 Strike Out

100. By *r37(1)(a)&(b) ET Rules of Procedure 2013* the Tribunal has power to strike out all or part of a claim on the grounds that it is scandalous or vexatious or that the manner in which the proceedings have been conducted by or on behalf of the Claimant has been scandalous, unreasonable or vexatious.

101. By *r37(1)(a)&(b) ET Rules of Procedure 2013* the Tribunal has power to strike out all or part of a claim on the grounds that the Tribunal considers that

it is no longer possible to have affair hearing in respect of the claim or the part to be struck out.

102. In *Bolch v Chipman* [2004] IRLR 140 the EAT said that where there is a finding that proceedings have been conducted scandalously, unreasonably or vicariously, ordinarily a Tribunal should only strike out if a fair trial is not possible, paragraph [55]. The EAT also said that, even if a fair trial was not possible, the Tribunal must still examine what remedy is appropriate and proportionate. In that case, the EAT referred to *De Keyser Limited v Wilson* [2001] IRLR 324 and said that it was plain that there can be circumstances in which a finding can lead straight to a debarring order such as "wilful, deliberate or contumelious disobedience" of the Order of a court.

103. A vexatious claim is one which is not pursued with the expectation of success, but to harass the other side or out of some other improper motive, *E.T. Marler Limited v Robertson* [1974] ICR 72.

104. In *Bennett v London Borough of Southwark* [2002] IRLR 407, the Court of Appeal held that, if the conduct of a party's case is shown to have been scandalous, it must also be such that striking out is a proportionate response to it. Not every instance of misuse of the judicial process, albeit properly falling within the description of scandalous, frivolous or vexatious, will be sufficient to justify the premature determination of a claim. In that case, although the conduct of the applicant's representative had been improper, this was reversible and did not have, as its implicit consequence, the aborting of the entire proceedings.

Discussion and Decision – Strike Out – Scandalous or Vexatious Claim or Conduct

105. In this case, I have not decided that the proceedings themselves are scandalous or vexatious. I did find that they were prompted by Mr Blackman's letter before action. Nevertheless, there was evidence that the Claimant had previously complained about Mr Blackman's conduct towards her and about his conduct generally as a co-presenter. The Claimant and Mr Blackman underwent mediation to resolve issues between them, which included the Claimant's complaints about Mr Blackman's treatment of her. There was therefore some evidence that the Claimant genuinely considered that the First Respondent's conduct towards her was inappropriate well before he intimated legal proceedings against her.

106. The Claimant appears to have been content not to seek legal advice about these matters, or to bring a claim against Mr Blackman or the Second Respondent, until she was faced with threatened proceedings against her. That did not inevitably mean, however, that the Claimant brought her claim improperly to damage Mr Blackman's reputation, or to misuse the legal process to retaliate against him, or to vilify him.

107. I was not able to decide, at this Preliminary Hearing, that the claims were scandalous or vexatious.

108. Further, I accepted the Claimant's contention that, even if the Claimant had made irrelevant allegations against Mr Blackman, the Claimant purported to rely on them in the context of harassment claims. She did so in relation to the question of whether Mr Blackman's alleged conduct towards the Claimant had the purpose or effect of creating an intimidating, hostile, offensive or degrading environment for her. There is a subjective element to that legal test.

109. Her reliance on the withdrawn allegations also purported to go to the test for direct discrimination, namely whether the alleged less favourable treatment was because of the Claimant's sex.

110. Furthermore, the Claimant had sought to rely on them at this Open Preliminary Hearing in relation to the reason why she had delayed in bringing the claim.

111. While, ultimately, both Employment Judge Grewal and I considered that they were not relevant, I did not conclude that the Claimant had relied on the allegations solely for the purpose of embarrassing or defaming the First Respondent.

112. These things being so, I did not conclude that the Claimant's claims were, in themselves, vexatious or scandalous.

113. I also did not conclude that the Claimant had conducted the proceedings in a vexatious, scandalous or unreasonable manner, for the same reasons. Even if I had concluded that she had conducted the proceedings in that manner, I would have decided that a fair hearing was still possible in that it was always open to the Tribunal to exclude any evidence which it considered to be irrelevant, or otherwise inadmissible.

114. The Tribunal's case management powers could be used to ensure that the First Respondent had a fair hearing.

115. I therefore did not strike out the claim against the Second Respondent on the basis that it was scandalous or vexatious, or that it had been conducted in a scandalous, vexatious or unreasonable manner. I would not have struck out the claim against the First Respondent on the basis, either that it was scandalous or vexatious, or that it had been conducted in an unreasonable manner.

European Law

116. The Claimant contended that the time limit for bringing discrimination complaints to the Tribunal should be disapplied by virtue of EU Law: *Articles 47 and 52 of the Charter of Fundamental Rights of the European Union*.

117. *Charter of Fundamental Rights of the European Union C326/391 Article 47* provides, "**Right to an effective remedy and to a fair trial**. Everyone

whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law….".

118. *Article 52* provides, "**Scope and interpretation of rights and principles** 1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. 2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties… 6. Full account shall be taken of national laws and practices as specified in this Charter."

119. The *Lisbon Treaty* (C 306/1) provides, "**Article 6** The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties… The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions."

120. Treaty provisions have been held to have horizontal direct effect in the sphere of employment, *Defrenne v Sabena (No 2)* Case 43/74 [1976] IRLR 547.

121. The principle of non-discrimination is a fundamental principle of EU law and is enshrined in the Lisbon Treaty at Article 2(3).

122. The Claimant contended that, to the extent that the application of the three month time limit would deprive the Claimant of a right to an effective remedy, the three month time limit must be disapplied, given the supremacy of EU law as affirmed in *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62 at paragraph 78 per Lord Sumption.

123. The Claimant contended that she was entitled to rely on the horizontal direct effect of the *Charter* as incorporated into the *Lisbon Treaty* by *Article 6* of the *Lisbon Treaty*, given the logic expressed in *Defrenne (No 2)* and the fundamental nature of principles of non-discrimination. She contended that the three month time limit is neither necessary, it does not "genuinely meet objectives of general interest recognised by the Union", nor does it "genuinely meet … the need to protect the rights and freedoms of others".

124. The Claimant compared the time limits in employment cases to the time limits applicable to other tortious claims, where longer time limits have not been found to imperil objectives of general interest recognised by the Union or the rights and freedoms of others. She contended that the fact that a series of connected acts may be considered to be in time, despite stretching back many months before the last act complained of, demonstrated that the passage of time itself did not preclude a fair hearing of complaints about historic acts. Likewise, she argued that the hearing of historic complaints did not imperil the rights and freedoms of others, nor did it run contrary to the objectives of general interest recognised by the Union.

125. The Respondents contended that the Claimant's argument was based on an assertion that the general principles set out at *Articles 47 & 52* are infringed by the current time limits in Employment Tribunal proceedings. They contended that the time limits come within both *Articles 47 & 52*. They contended that, at paragraph 35 of the judgment in *Southwark LBC v Afolabi* [2003] ICR 800, Lord Justice Peter Gibson said, "The policy of the 1976 Act [Race Relations Act] is made clear by the brevity of the limitation period; that period of three months is in marked contrast to the limitation periods in ordinary litigation. Parliament having envisaged that complaints within the jurisdiction of the employment tribunal will be determined within a short space of time after the events complained of, it will be an extremely rare case where the employment tribunal can properly decide that there can be a fair trial so long after those events …".

126. Further, in *Mills and CPS v Marshall* [1998] ICR 518, the EAT considered time limits in Employment Tribunals in comparison with those in other claims. The EAT said, at pages 526-527, "The state has an interest in avoiding trials of actions which are so stale that justice cannot be seen to have been done. If all the evidence is so stale that it is inherently unreliable then the party's rights cannot be judicially determined. Further, the citizens of the state have an interest in not being troubled by proceedings brought long after the event. People are entitled to arrange their affairs on the basis that what happened in the past is, after a defined period over and done with, but equally citizens are to be allowed a reasonable opportunity to bring their legitimate grievances to the Court. The balancing of these competing interests may require that the limitation periods vary according to the nature of the rights being asserted. This is reflected in the many different limitation provisions which apply in English law….. Some of the discretionary powers are couched in general terms, as in the *Sex Discrimination Act 1975* , or are otherwise confined, such as claims under the Riot (Damages) Act 1886 (49 & 50 Vict., c. 38) or under the Solicitors Act 1974. …. In this legislation, the *Sex Discrimination Act 1975* , the court's power to extend time is on the basis of what is just and equitable. These words could not be wider or more general."

European Law – Discussion and Decision

127. I decided that the time limit for bringing discrimination complaints under the *Equality Act 2010* is short, at three months, compared to the time limits applicable to many other claims, including claims for personal injury.

128. Nevertheless, as the EAT said in *Mills v Marshall*, the Tribunal's power to extend time under the just and equitable formula is very wide and general.

129. The Employment Tribunal is able to take into account anything which is relevant in deciding whether to extend that short three month period. However, there are also public policy reasons for having a three month time limit in the employment sphere. As stated in *Article 47* of the *Charter*, everyone is entitled to a fair and public hearing within a reasonable time. What is a reasonable time may depend on the nature of the complaint being brought.

130. I do not consider that the *Charter* itself, or any laws of the European Union, require a longer primary limitation period. But, in any event, the limitation period under the *Equality Act* is not an absolute bar, which might have offended against the provisions of the *Charter*. The wide discretion available to Employment Tribunals is, in my view, consistent with the provisions of the Charter and other European law instruments.

131. There is no requirement for *s.123 Eq A 2010* to be disapplied so as to give effect to European law.

Telephone Preliminary Hearing

132. A Telephone Preliminary Hearing will be listed to consider listing a further Preliminary Hearing to determine the Claimant's employment status in her claims against the Second Respondent.

_____
Employment Judge Brown

Dated10th July 2019

Judgment and Reasons sent to the parties on:

10/07/2019

.....
For the Tribunal Office