EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms O Akinleye (1) & Mr A Olumade (2)	AND	Basingstoke and Deane Borough Council

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton **ON** 19 & 20 August 2019

Before: Employment Judge Gray

Appearances
For the Claimants: both in person
For the Respondent: Mr A Hodge (Counsel)

JUDGMENT

The judgment of the tribunal is that the Claimants' complaints of discrimination made under s. 53 of the Equality Act 2010 that are before the 22 December 2017 are dismissed, not having been brought within three months as required within s. 123 of the Equality Act 2010.

JUDGMENT having been delivered orally on the 20 August 2019 and sent to the parties on the 28 August 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. This Case Management Preliminary Hearing is to consider whether the Claimants can show that they have been subjected to conduct extending over a period which is to be treated as done at the end of the period and

that the end of the period is then within the relevant time limits. If not, then whether it is just and equitable to extend time for the complaints to be presented and the basis the Claimants argue for this.

2. It was explained in the previous Case Management Preliminary Hearing (before me on the 20 May 2019) that these issues will require the Claimants to clarify and present evidence as to what connects the alleged conduct, when they say they became aware of the alleged discrimination and what, if anything, prevented them from initiating their complaints with ACAS and the Tribunal before the dates that they did. Further, if the Claimants continue to seek to amend their original claims, then to clarify what they are seeking to amend and on what basis they do so now.

3. This further Case Management Preliminary Hearing is to then consider the Respondent's application for strike out and/or deposit orders in response to the Claimants' clarification as detailed above.

BACKGROUND

4. By claim forms presented on 30 July 2018 the Claimants brought complaints of discrimination pursuant to section 53 of the Equality Act 2010, in that they say the Respondent is a Qualifications Body (responsible for taxi licences) and they as self-employed taxi drivers were treated less favourably on the grounds of race (black African) (for both Claimants) and in addition on the grounds of sex for Ms. Akinleye.

5. Ms. Akinleye presented her application for ACAS mandatory conciliation on 21 June 2018, and this ended on 25 June 2018.

6. Mr. Olumade presented his application for ACAS mandatory conciliation on 16 June 2018 and this ended on 21 June 2018.

7. There was a telephone Case Management Preliminary Hearing conducted on the 18 January 2019 by Employment Judge Salter. Various applications to amend, strike out and for deposit orders have subsequently been made by all parties. Further, the Respondent has yet to submit a full Response to the initial claims being pursued by the Claimants, the view taken by Employment Judge Salter that it would be disproportionate to require a final response until the Respondent knows what claims and allegations are before the Tribunal.

8. From the Case Management Preliminary Hearing on the 18 January 2019 the time limit calculations made by Employment Judge Salter can be seen at paragraph 14 of his case management summary. The Tribunal needs to

consider if there are any allegations by the Claimants that arise on or after 25 April 2018 for Mr. Olumade and on or after 26 April 2018 for Ms. Akinleye.

9. In advance of the last Case Management Preliminary Hearing (20 May 2019) the Claimants had produced scotch schedules in response to the order made by Employment Judge Salter and these can be seen in the agreed bundle from the 20 May 2019 hearing at pages 79 to 147 for Mr. Olumade, making 90 complaints starting from 2009; and pages 160 to 184 for Ms. Akinleye, making 28 complaints starting from 2011.

10. Since the last Case Management Preliminary Hearing (20 May 2019) the parties have complied with the orders made by myself with the Claimants each producing a document detailing their Submissions in support of their positions on these preliminary issues and the Respondent submitting a further response (effectively a submission) and a draft Response to the "Mr Draper allegations", which are those that arise from the 22 December 2017 onwards.

THIS HEARING

11. At the start of the hearing I was provided with the following to read until the 2pm start time of oral evidence and submissions:

    a. Witness statements for the Claimants and for Mrs Tatum and Mr Draper for the Respondent.

    b. First and second Skeleton arguments from the Claimants and the Respondents.

    c. A copy of the bundle from 20 May 2019 hearing running to 217 pages.

    d. A supplemental bundle of documents since 20 May 2019 running from 217 to 323 pages.

    e. A bundle of documents labelled for the 12 July 2019 hearing, when this hearing was originally due to take place, running to 217 pages.

12. On confirming that I had all I should and discussing the issues to be considered at this hearing it became apparent that I had the up to date statement for Ms Akinleye but not for Mr Olumade. This was provided and considered before Mr Olumade then gave his evidence.

13. I checked with the Claimants that the witness statements they had presented for this hearing contained all the facts that they wanted to refer to in this Case Management Preliminary Hearing. They confirmed that they did. However, after Mr Olumade's evidence including his cross examination, it was apparent that some of the factual details relevant to the preliminary

issues were included in the Claimants' continuing acts documents which were within the supplemental bundle. After representations from the Claimants and the Respondent's Counsel it was agreed that Mr Olumade would be invited to provide the facts contained in his continuing acts document as an additional statement and he was sworn in again to do this and the Respondent permitted an opportunity to cross-examine on the content of that statement.

14. On the second day of the hearing when Ms Akinleye gave her evidence she submitted both her witness statement and the facts from her continuing acts document as her evidence in chief.

15. At the conclusion of the Claimants' evidence it was expressly confirmed by them that they had presented all the evidence they wanted to do so on the preliminary issues.

16. Counsel for the Respondent confirmed that he had reflected on the relevance of calling Mrs Tatum and Mr Draper to give evidence on the preliminary issues to be determined at this hearing. Their evidence related to the "Mr Draper allegations". It was therefore noted by the parties and myself that it should be avoided for this to become a trial within a trial of the most recent discrimination allegations, when if there is jurisdiction to hear them, they should be considered by a full panel. Respondent's Counsel confirmed that he would not be submitting the statements of Mrs Tatum and Mr Draper.

17. All parties had named a number of case authorities in their skeleton arguments and submissions documents that were submitted at the start of this hearing. Before the parties made their final submissions, they were asked to consider the observations of the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA**, when considering continuing acts. The parties were reminded that the Tribunal should look at the substance of the complaints in question, as opposed to the existence of a policy or regime, and determine whether they can be said to be part of one continuing act by the employer. They were also reminded of the general principals in **Aziz v FDA 2010 EWCA Civ 304, CA** where the Court noted that in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. The parties were also asked to consider the case of **Hale -v- Brighton and Sussex University Hospitals NHS Trust**, which appeared relevant to the matters in this hearing.

18. There was then a short adjournment before the Respondent's Counsel presented his submissions on all the preliminary issues and then the

Claimants presented theirs, having heard what was being argued by the Respondent's Counsel.

FACTS

19. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

20. Mr Olumade's witness statement for this hearing, consisting of 10 pages (including a cover sheet), provides a chronology through the documents in the bundle of documents labelled for the 12 July 2019 hearing. This witness statement does not present evidence that the numerous alleged incidents of discrimination are linked to one another, nor does it present evidence of a discriminatory state of affairs.

21. There are some factual details as to continuing acts and reasons why it may be just and equitable to extend time in Mr Olumade's continuing acts document at pages 268 to 280 of the supplemental bundle. I have noted the following facts that appear relevant to the issues for this preliminary hearing (paragraphs 7 to 12 of the continuing acts document):

    a. In 2006 when he first applied for a Private Hire Drivers licence (PHD) it was granted.

    b. In October 2009 he reapplied for the PHD and he says he then had to scale "unlawful requirements". Then, because he challenged the requirements he says he became a target for discrimination.

    c. Mr Olumade then says that the Respondent has been responsible for an ongoing situation or a continuing state of affairs.

    d. He makes reference that up until May 2013 Africans were not being licenced as Hackney Carriage Drivers (HCD), and he had to ask for his test paper to be marked again. While his remarking was going on Ms Akinleye was admitted as the first black African HCD (in May 2013).

    e. Mr Olumade then says that ever since the licencing of Africans as HCDs, the Respondent has failed to promote equality and diversity, and he says that it has in fact created a hostile environment for African HCDs by its acts of favouring white taxi drivers over African, acceding to requests of white taxi drivers to investigate and have a word with or speak to the African drivers.

22. These assertions made by Mr Olumade suggest that the potential complaints of racial discrimination can only arise for both of them from 2013.

Mr Olumade provides no evidence to suggest he was at any point from 2006 without a licence and suffered loss. I have also noted that based on Mr Olumade's own evidence Ms Akinleye was licensed in 2013 to become the first back African HCD. This does not support that the Respondent was not granting HCD licences to black Africans, when the Claimants are considered together, both identifying as black African.

23. During the Claimants' oral evidence, the allegation of their immigration status being checked was raised. Mr Olumade referred to receiving a letter (allegation 38) asking for him to prove his immigration status. The Respondent says these letters were sent to all of its drivers on the back of a statutory update to complete right to work checks. Ms Akinleye said that she was aware of some drivers not getting such letters, including herself. Again, as the Claimants both identify as black African the fact that Mr Olumade says he suffered a detriment on the grounds of his race by getting such a letter, this is not supported by Ms Akinleye not getting the same letter. There does not appear to be a difference on racial grounds based on the Claimants' own evidence.

24. Ms Akinleye in her witness statement, consisting of 7 pages (including a cover sheet), deals predominantly with the "Mr Draper allegations" – so from 22 December 2017 onwards (4 pages out of the 6 pages that include factual evidence). It refers to the alleged hijacking of the Subject Access Request by Mr Draper, the alleged challenges at the formal interview on the 22 December 2017, conducted by Mr Draper and the alleged failings in relation to the PACE interviews, within the control of Mr Draper. The start of those complaints is the interview on the 22 December 2017. This is consistent with the way the matter is referred to in Mr Olumade's witness statement at paragraph 24 where he refers to the detrimental things he states happened to him at that interview.

25. The last two pages of Ms Akinleye's statement then refers to "Other Incidents- Vehicles" and "Other Issues" and refers to matters from 2011 to October 2018. As with Mr Olumade's statement it does not present evidence that these other incidents or issues are linked to one another, nor does it present evidence of a discriminatory state of affairs. I have noted two key factual assertions though. Firstly, that in relation to Ms Akinleye's claim of sex discrimination the only facts that appear to be directly referred to as to an alleged detriment on the grounds of her sex are where she says that between the 25 July 2016 to 17 January 2018 she was referred to derogatorily and inappropriately as "Olumade's wife", "her" and "wife". There is no factual assertion that this has continued beyond the 17 January 2018. Secondly, that the only apparent detriment in October 2018 to her (which is subject to the Claimants' amendment application) is that she

received a letter from the Respondent requesting a DBS disclosure, that was not due at that time.

26. Ms Akinleye's continuing act document (at pages 246 to 250 of the supplemental bundle) repeats broadly the same factual points that Mr Olumade says in his continuing acts document (see paragraphs 2 and 3 of Ms Akinleye's document).

27. As was highlighted by the answers given to the Respondent's cross examination of the Claimants and in the Respondent's submissions, the conduct about which the Claimants complain extends in the case of Mr Olumade over a period of nine years and in the case of Ms Akinleye over a period of seven years. It is alleged to have involved at least eight employees of the Respondent as well as numerous third parties (including licensed hackney carriage drivers, employees of Reading Borough Council, members of the public, and employees of Ashwood Academy) for whom the Respondent is not vicariously liable.

28. Further, as was confirmed by the Claimants during their cross examination there are also very lengthy gaps which occurred between the relevant events.

29. In the case of Mr Olumade there is a period of more than three years between complaints numbered 3 and 4, a further 11 months elapsed between complaints numbered 5 and 6, more than eighteen months elapsed between complaints number 6 and 7, a period of three months elapsed between complaints numbered 19 and 20 and a further period of four months elapsed between complaints numbered 32 and 33.

30. For Ms Akinleye there is a period of approximately eighteen months between complaints numbered 1 and 2, almost three years elapsed between complaints numbered 3 and 4, a further three months elapsed between complaints numbered 7 and 8, and a period of eight and a half months elapsed between complaints numbered 11 and 12.

31. The Claimants are both currently licensed, however they say that the investigations started against them (including the PACE interviews) with the interview on the 22 December 2017 are ongoing and this causes them to fear the loss of their licences, if they are found to not be a fit and proper person, at the conclusion of the process.

32. This does appear to factually connect what the Respondent started with the interview on the 22 December 2017 to date, but not connect what the Claimants assert happened before that. They are saying they fear the loss of their licence, not that it took more time to get it, or it was never granted, or that they are subject to taxi licence conditions which are unfair, all of

which the Claimants acknowledge they would have sought remedy for through the Magistrates appeal process.

33. It is also of significance that based on the Claimants' case and evidence as to the key alleged perpetrator of the recent alleged complaints (Mr Draper) he only started for the Respondent in November 2017.

34. As to facts in relation to the question of just and equitable, Mr Olumade refers to this at paragraph 30 of his continuing acts document (page 275), saying these issues were all revealed to him in his Subject Access Request on the 2 April 2018. This does seem to be the material reason factually why Mr Olumade argues his complaints were not submitted to the Tribunal until they were on the 30 July 2018 (having started the ACAS process on the 16 June 2018). As to the illness of himself and his son this relates to a focused period of 8 April 2018 to 29 June 2018 (page 276).

35. Ms Akinleye makes the same factual assertions in her continuing acts document (pages 248 and 249) save that she says the issues were revealed to her in her Subject Access Request on the 5 June 2018.

36. I have noted as fact that the periods of illness referred to by both Claimants are not continuous but broken into 7 periods. It is also of note that the Claimants were both able to commence the ACAS process in that time window, and neither present facts as to why the illness prevented them from lodging a claim earlier. I have also noted that a fit note for the relevant period for Mr Olumade (page 215 of the bundle labelled for the 12 July hearing) does not support he was too ill to submit his complaints. The fit note records that as of the 31 May 2018 Mr Olumade is fit for work except that he is unable to push a wheelchair.

37. It therefore appears to me that the material issue is the question of knowledge and I need to make findings of fact as to what the Claimants knew and when.

38. My findings of fact are important here and I have found from reviewing documents contemporaneous to the complaints the Claimants make and their responses to them in their oral evidence, that the Claimants do appear to have had knowledge of a right of complaint and the acts they could complain about, before their subject access request outcomes. They are as follows (as referred to from the 12 July labelled bundle):

    a. At page 5 of the bundle there is a note of a conversation that a Licencing Officer had with Mr Olumade in 2009. It is noted that Mr Olumade seemed to get agitated when the officer tried to leave and "then suddenly said he knew for a fact that this council did not give licences to black people". Mr Olumade when questioned in cross-examination said that he did not say that, however this is a consistent

comment that he repeats in his own witness statement and there is no reason I have seen evidentially to suggest that the writer of this report made it up.

b. Mr Olumade was at the interview on the 17 February 2016 (pages 13 to 16).

c. Mr Olumade received the letter at pages 19 and 20 around 9 March 2016 giving the outcome of the interview on the 17 February 2016.

d. Mr Olumade now complains about the interview on the 17 February 2016, saying he complains now because he didn't see the notes of the meeting until they were provided as part of his subject access request. However, he was at the interview and he did have the letter of outcome (pages 19 and 20 of the bundle dated 9 March 2016), which goes through all of the allegations. Clearly therefore, if Mr Olumade had issue with any of them, he would have known he had issue with them in March 2016.

e. It is noted at page 23 in an email dated 28 June 2016 that Mr Olumade sent to the Licencing Team, where he is referring to a complaint about Thomas Cliff, at the conclusion of his last paragraph he says, "I told him that he was harassing me". Again, this expresses an awareness by the Claimant as to what was going on or what he believed was happening at that time.

f. At page 24, there is a further email dated 28 June 2016 from Mr Olumade, where he concludes in the penultimate paragraph "I am considering taking legal action against the perpetrators and might call Mr Andrew Wake as a witness".

g. Then at page 39 of the bundle there is a letter to Mr Olumade dated 16 September 2016 from Mrs L. Cannon in which in the middle of it says "any allegations that relate to criminal matters such as race, violence or harassment should be reported to the police. Thank you for your cooperation" and then this is expanded upon by a subsequent letter, again I believe from Mrs Cannon, but it's not clear, at pages 40 and 41 of the bundle dated 28 September 2016 and it quotes from a previous letter saying, "I trust you have taken the letter, envelope and CCTV footage to the police and asked them to investigate as they relate to alleged harassment as opposed to licencing related matters".

h. Page 69 of the bundle was referred to in oral evidence and Mr Olumade says that this revealed to him that he had been subjected to discrimination. However, it's unclear how such a document does reveal that. What it says when it's read in its entirety is that Reading

Borough Council believed it had good grounds to investigate why Mr Olumade was parked in a licenced vehicle in the Reading Borough Council taxi area.

i. At pages 83 to 85 there is an important document. It is a corporate complaint submitted by Mr Olumade on the 23 January 2018 to the Respondent. It is a significant act to submit a corporate complaint and within that document (at page 84) he notes that it's not good practice and it forms part of the issue at stake within taxi licencing department "- Institutional Racism". Then on page 85 he says, "can the Licencing Department confirm whether they have liaised with the Race and Equality Department to discuss racial issues within the Licencing Department and amongst the Taxi Drivers."

j. At page 91 there is the outcome of that corporate complaint which was sent to Mr Olumade on the 2 March 2018. The fourth from last paragraph says "Having reviewed the evidence and the actions undertaken by the council, I cannot find any basis for your treatment or the investigations being racially biased. If you have further evidence, then we would welcome the opportunity to consider it".

k. At page 93 Mr Olumade has written an email to Councilor Laura James (dated 13 March 2018) and it makes reference to the Equality Act within that email. During cross-examination Mr Olumade confirmed that he was aware at that point of his rights to pursue complaints to the Employment Tribunal under the Equality Act.

l. I have also noted (as raised in the Respondent's skeleton submissions) that Mr Olumade did raise issues concerning DBS checks in May 2017 and this can be seen at pages 47 and 48.

m. It is also of note that Mr Olumade was present at the interviews where the alleged "insensitive to faith" comment was made.

39. I have also noted that during the oral evidence from Ms Akinleye, she referred me to a document at page 29 which she says was one disclosed to her as part of her subject access request. Ms Akinleye says this shows the Respondent were storing complaints against her. However, on reading this document in its entirety, it is clear that the handwritten notes, which were confirmed as being of the Licencing Officer, note that Ms Akinleye has done nothing wrong, nothing has been proved or investigated.

40. I have also noted that there is clear overlap between the claims of Mr Olumade and Ms Akinleye. Their joint awareness of all these matters is clear and they appear to have been involved in writing each other's documents and assisting each other with such writing. By way of example in the continuing acts document of Mr Olumade, at paragraph 11 of that at

page 270 of the supplemental bundle, he refers to himself as the "first black African female" and repeats that again at paragraph 28 on page 272. This is important because their cases are intertwined and they appear to have full knowledge of each other's claims.

41. The dates of the Claimants' knowledge about the issues they complain all arise before the period of illness as noted above. Further, the extent of illness and how it impacts on the Claimants' ability to put in a claim, is not clear. As already noted the fit-note at page 215 notes Mr Olumade is fit for work with an adjustment of not pushing wheelchairs.

42. It is also of note that the contemporaneous documents I have referred to, as well as suggesting the Claimants were aware of their rights and potential issues, do not appear to suggest a connected conduct. The 2009 document focuses on getting the licence. The interview in 2016 is with different individuals (Linda Cannon and Sheila Stevens) to those at the end of 2017 onwards. The 2016 complaints are against another driver (Thomas Cliff).

43. I have also noted that the Claimants' oral submissions focused primarily, if not entirely, upon the allegations that they have in respect of Mr Draper, Mrs Tatum and Mr Wake in respect of matters which arose as a consequence of the investigation on the 22 December 2017 and the unconcluded PACE interviews. Both Mr Olumade and Ms Akinleye state this process is a challenge to their fit and proper persons status, which could put their licences at risk. This appears to be what they are aggrieved about and why they wish to pursue the matter to the Tribunal.

44. I have not been presented any evidence by the Claimants to support their assertions that it is just and equitable to extend time because they were misled by the Respondent; or were wrongly advised by the Respondent; or that the Respondent would not be at a significant disadvantage when seeking to defend all the complaints, which extend over a number of years, with significant gaps between them, and refer to a wide array of people, not all of which are employed by the Respondent or were employed at the relevant times.

LAW

45. I have been referred to number of case authorities by name and general principals within the various written submissions and skeleton arguments of the parties. I was not provided with any copies of the authorities. I have therefore considered them, but refer in the summary of the law below to those authorities that are relevant to the issues to be determined in this preliminary hearing. I also noted that the authority highlighted by the Claimants in their oral submissions was **Anyanwu v South Bank Students' Union [2001] IRLR 305**.

CONDUCT EXTENDING OVER A PERIOD

46. Section 120 of the Equality Act 2010 confers jurisdiction on claims to employment tribunals, and section 123(1) of the Equality Act provides that the proceedings on a complaint within section 120 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. Under section 123(3)(a) of the Equality Act conduct extending over a period is to be treated as done at the end of that period.

47. In **Hendricks-v-Metropolitan Police Commissioner [2002] EWCA Civ 1686**, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. It is noted that "the burden is on [the claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a discriminatory state of affairs".

48. Conduct extending over a period is to be treated as done at the end of the period, however it is not sufficient for a claimant merely to assert that there is a continuing act or an ongoing state of affairs. There must be an arguable basis for contending that the complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs **Ma -v- Merck Sharp & Dohme Ltd [2008] EWCA Civ 1426**.

49. One relevant feature (although not conclusive) is whether or not the acts were said to have been perpetrated by the same person (**Aziz-v-FDA [2010] EWCA Civ 304**).

50. The Court of Appeal's decision in **Aziz v FDA 2010 EWCA Civ 304**, also dealt with the issue of on what basis should employment tribunals approach the question whether a claim is time-barred at a preliminary hearing under the Tribunal Rules 2013. The Court approved the approach laid down in Lyfar v Brighton and Sussex University Hospitals Trust that the test to be applied at the preliminary hearing was to consider whether the claimant had established a prima facie case, or, to put it another way, 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'.

51. In Lyfar the employment tribunal, exercising its case management powers, allowed only five of the complaints to be heard, dismissing the others as being out of time and deciding that it was not just and equitable to hear them. The Court of Appeal and the Employment Appeals Tribunal held that that the tribunal had applied the correct legal test, which was consistent with

the language of Hendricks. The Employment Appeals Tribunal had been entitled to dismiss the appeal, having found that the tribunal had made a firm finding of fact that satisfied that test.

52. A similar approach was followed in **Greco v General Physics UK Ltd EAT 0114/16**. In that case the Appeal Tribunal held that, while six of the seven acts of sex discrimination about which G complained concerned her manager in some way, the manager's involvement was not a conclusive factor and the employment tribunal had been entirely justified in finding that the seven quite specific allegations concerned different incidents that ought to be treated as individual matters. Accordingly, they were not to be considered as part of a continuing act and, in consequence, some were out of time. The tribunal had not erred in its approach to deciding that it was not just and equitable to extend the time limit for the allegations that had been presented out of time.

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

EXTENSION OF TIME

54. For this issue it is necessary to consider the factors in section 33 of the Limitation Act 1980 which are referred to in the **British Coal v Keeble [1997] IRLR 336 EAT** decision, namely:

    a. The length of and the reasons for the delay. The delay could be said to be about 9 years for Mr Olumade and 7 years for Ms Akinleye when they say matters started, although as asserted by the Claimants in their evidence, it could be looked at from 2013, which would put it as 5 years. Or, if taken from a clear date of awareness point, the corporate complaint on the 23 January 2018, it is four months.

    b. The extent to which the cogency of the evidence is likely to be affected by the delay.

    c. The extent to which the parties co-operated with any request for information.

    d. The promptness with which the Claimants acted once they knew the facts giving rise to the cause of action.

    e. The steps taken by the Claimants to obtain appropriate professional advice.

55. It is clear from the following comments of Auld LJ in **Robertson v Bexley Community Service [2003] IRLR 434 CA** that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. 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".

56. The tribunal must consider the balance of prejudice and, in so doing, have regard to the potential merits of the claims (**Rathakrishman v Pizza Express (Restaurants) Ltd [2016] IRLR 278**).

APPLICATION TO AMEND

57. The Claimants are seeking leave to amend their claims which are currently before the Tribunal, and the Respondent opposes that application.

58. The Claimants accept that the complaints they seek to include now are not in their original claim forms. These additional complaints are listed in the Supplemental Bundle at pages 250 for Ms Akinleye and pages 279 and 280 for Mr Olumade.

59. Ms Akinleye lists five amendments (new complaints) 2 pre-dating her claim form and 3 being in October 2018.

60. Mr Olumade lists eight amendments (new complaints) 6 pre-dating his claim form and 2 being in October 2018. One of the new complaints that Mr Olumade makes is for discrimination on the grounds of religion where in interviews with him on the 22 December 2017 and 23 March 2018 references are made to "an act of God" in relation to the vehicle damage complaint being raised against Mr Olumade.

61. Clearly as the Claimants are adding new complaints (and not relabelling those they have already made) the question of time limits also needs to be considered.

62. In **Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC** Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in **Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT**, which approach was also endorsed by the Court of Appeal in **Ali v Office of National Statistics [2005] IRLR 201 CA**.

63. The EAT held in **Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT**: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors include:

64. ***The nature of the proposed amendment*** – The Claimants in this case accept that they are making entirely new factual allegations which change the basis of the existing claim by pleading new causes of action; and

65. ***The applicability of time limits*** – As a new claim or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal

to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

66. ***The timing and manner of the application*** - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery.

67. ***The merits of the claim***. It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success.

STRIKE OUT AND DEPOSIT ORDERS

68. The Respondent applies to strike out the Claimants' claims on the basis of them having no reasonable prospects. This application is linked to the jurisdictional issues that arise from the question of time limits and also the argument that it is outside of the Tribunal's jurisdiction due to section 120(7) of the Equality Act 2010.

69. Section 120(7) of the Equality Act 2010 reads "Subsection (1)(a) [as to Tribunal Jurisdiction] does not apply to a contravention of section 53 in so far as the act complained of may, by virtue of an enactment, be subject to an appeal or proceedings in the nature of appeal.

70. It is accepted by all parties in this case that issues as to the granting or revocation of a taxi licence are appealable to the Magistrates Court. It is also accepted by all parties in this case that complaints in relation to data protection are appealable to the Information Commissioner. The issue to consider therefore is whether the detriments I find to be in time, are outside the Tribunals jurisdiction as a consequence of section 120(7) and/or do not have reasonable prospects of success.

71. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds that it is scandalous, or vexatious, or has no reasonable prospect of success. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule

39(2) the Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

72. As a general principle, discrimination cases should not be struck out except in the clearest circumstances. In **Anyanwu v South Bank Students' Union [2001] IRLR 305 HL**, Lord Steyn stated at para 24: "For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plain cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest". Nonetheless Anyanwu confirms that in a case where the core of facts is undisputed, or in a "plain and obvious case", the Tribunal may properly strike out a claim.

DECISION

73. The finding of facts in this preliminary hearing are relevant to all the different preliminary issues I am to consider.

74. I have found that the Claimants evidence and submissions appear to draw a connection between the detriments they allege at and from the interview on the 22 December 2017.

75. I refer again to Mr Olumade's continuing acts document where he states that white drivers are being preferred in investigations. From that the detrimental aspects of what Mr Olumade asserts seem to relate to him and Ms Akinleye being in an investigation process, since the interview on the 22 December 2017 (and the connected treatment), which if they were white taxi drivers they would not be in.

76. This causes them to fear they will lose their licences. This has not happened so it is of note that at this stage the Claimants have not suffered any financial loss. Plus, if they did lose their licences the Claimants acknowledge they would have a right of appeal to the Magistrates and it would be a matter outside of this Tribunals jurisdiction.

77. It is because of the way the Claimants have asserted their detriments as linked to the investigation hearing on 22 December 2017 that it appears to bring these within the Tribunals jurisdiction. It is the fear of losing their licences if they are found to not be fit and proper persons. The Claimants have not yet had the outcome to their PACE interviews, so remain in fear that the outcome may lead to the loss of their licences. This is therefore

similar to the position in the case of **Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16**.

78. What happens before that though does not appear to be connected detriments. The conduct about which the Claimants complain extends in the case of Mr Olumade over a period of nine years and in the case of Miss Akinleye over a period of seven years. It is alleged to have involved at least eight employees of the Respondent as well as numerous third parties (including licensed hackney carriage drivers, employees of Reading Borough Council, members of the public, and employees of Ashwood Academy) for whom the Respondent is not vicariously liable.

79. It is also of note that the contemporaneous documents I reviewed as to the state of knowledge of the Claimants do not appear to suggest a connection. The 2009 document focuses on getting the licence. The interview in 2016 is with different individuals (Linda Cannon and Sheila Stevens) to those at the end of 2017 and onwards. The 2016 complaints are against another driver (Thomas Cliff).

80. It is also of note that Mr Draper did not start with the Respondent until November 2017.

81. It is also noted that there are significant time gaps between the various allegations (see paragraphs 29 and 30 above).

82. There needs to be some factual substance to the continuing act complaints and if there are multiple parties involved and there are significant time lapses between allegations, then the burden of proof is not discharged by the Claimants simply asserting there has been a continuing act.

83. A continuing state of affairs is to be distinguished from a succession of unconnected or isolated specific acts (**Hendricks**) “the burden is on [the claimant] to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a discriminatory state of affairs”.

84. There are many different individuals with suggested involvement, over a period of many years where the time lapse between complaints is significant. The greater the time period and the gaps between the complaints the harder it will be, even for a connected alleged perpetrator, to recall evidential matters.

85. I therefore agree with the Respondents submissions that from the facts found there is no basis for inferring any coordination or collusion across such a disparate group of individuals and over such a significant period of time. Furthermore, any attempt to read into these unconnected incidents a

continuing act or state of affairs is severely undermined by the very lengthy gaps which occurred between the events.

86. For these reasons I have not found facts that establish a prima facia case or, to put it another way, that the Claimants have a reasonably arguable basis for the contention, that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs, before the interview on the 22 December 2017. However, for those from the 22 December 2017 I will accept they are in time on the basis the Claimants do appear to have a reasonably arguable basis for the contention, that the various complaints from the 22 December 2017 (which are linked to Mr Draper as well) are so linked as to be continuing acts or to constitute an ongoing state of affairs.

87. The grounds relied upon by the Claimants for suggesting that it would be just and equitable to extend the time limit are:

    a. Date of knowledge – that the allegations were revealed by the Claimants' subject access requests.

    b. The integrity of the Respondent's evidence has been preserved in its IT system and is still accessible.

    c. That the foundation members of the Respondent's licensing team have been in employment with the Respondent since 2006 (Mr Wake, Ms Hill, Ms Stevens).

    d. Being given misleading and deliberately false information by the Respondent.

    e. The Respondent never informed the Claimants of their right to go to an Employment Tribunal.

    f. The health of Mr Olumade and their son.

88. The Claimants also refer to the Respondents failure to give a PACE decision and Mr Draper's interference in the Claimant's Subject Access Requests, but these would appear relevant to the complaints from 22 December 2017 onwards, which I have already found are in time.

89. I have not found facts that support the Claimant's assertion that the complaints they now make were revealed to them by the results of their subject access request. From my consideration of the contemporaneous documents I am satisfied that the Claimants knew of their concerns at the time they occurred and could have acted then.

90. I have not been presented evidence to support the Claimants' assertion that the integrity of the Respondent's evidence has been preserved. The time period and number of individuals included in the complaints is significant with a number being outside of the Respondents control (such as individual third parties and Reading Borough Council). This in my view places the Respondent at a significant disadvantage when seeking to defend all the complaints, causing it significant prejudice.

91. I have not been presented any evidence to support the Claimants' assertion that they were deliberately supplied false and misleading information by the Respondent.

92. I do not accept that it is for the Respondent to advise the Claimants on their rights under the Equality Act. The Respondent should not mislead as to the Claimants' rights (of which there is no evidence in any event), but they do not need to advise them about them.

93. Although I have been given evidence of the illness of Mr Olumade and his son which was broken into 7 discrete periods (between 8 April 2018 to 29 June 2018), I have not been given evidence to say why it precluded the Claimants from submitting their claims before they did. The Claimants both submitted their ACAS early conciliation applications during the period and the fit note for Mr Olumade for May/June 2018 says he is fit for work apart for pushing wheelchairs.

94. Considering the **Keeble** points:

    a. The length of and the reasons for the delay. Based on the findings of fact I have made there is a significant delay from the potential complaints the Claimants appear to have been aware of and the lodging of the claims.

    b. The extent to which the cogency of the evidence is likely to be affected by the delay. This is significant in my view in that it will be adversely affected due to the time period and the number of individuals included in the complaints where a number of them are outside of the Respondents control (such as individual third parties and persons at Reading Borough Council). This would cause the Respondent significant prejudice.

    c. The extent to which the parties co-operated with any request for information. Based on the findings of fact I have made it does not appear that the Subject Access Requests are the first source of relevant information for the Claimants to have relied on, them having been aware of relevant matters and their rights long before that.

d. The promptness with which the Claimants acted once they knew the facts giving rise to the cause of action. I have not found that the Claimants have acted promptly and I have not been provided with evidence to properly explain the delay.

e. The steps taken by the Claimants to obtain appropriate professional advice. This does not appear to be a relevant factor in this case as the Claimants have not raised it as an issue. They have submitted lengthy submissions in support of their claims and have not suggested they did not know of their rights or how to pursue them, but rather they were unaware of their complaints until they received the disclosure from their Subject Access Requests.

95. I would add that those complaints that pre-date the 22 December 2017 that relate to the taxi licences of the Claimants (being granted or the conditions that apply to them) are matters for the Magistrates appeal process, so even if I am wrong in relation to the pre 22 December 2017 complaints they would appear to be outside the Tribunal's jurisdiction due to the effect of section 120(7) of the Equality Act 2010.

96. Considering the Claimants amendment application, I find as follows:

a. I have been required to consider the question of time limits as one of the preliminary issues at this hearing. My findings in that regard would apply equally to the new claims that pre-date the 22 December 2017, so they would be out of time. This leaves the new claims that are in October 2018, and the religious discrimination claim of Mr Olumade.

b. Based on the findings I have already made I do not accept that there is sufficient reason to justify the delay in lodging the claims that pre-date the claim form. This would therefore preclude Mr Olumade's religious discrimination claim. This therefore leaves the new claims that are in October 2018.

c. When considering the merits of the new claims from matters in October 2018, then apart from the specific allegation made by Ms Akinleye (that she received a letter from the Respondent requesting a DBS disclosure, that was not due at that time), the others appear to be general references to policy decisions by the Respondent and are not stated as being of specific detriment to the Claimants. For this reason, they do not appear to have merit to be added to this claim.

97. Considering the Respondent's application for strike out and/or deposit orders. In this case core facts are disputed. The Claimants highlighted in

their submissions that they would expect to cross examine Mr Draper and Mrs Tatum to challenge their evidence. This does appear to have been anticipated by Respondent's Counsel and not wanting to create a trial within a trial. The Claimants have asserted through their evidence and their submissions that there are factual differences between the Claimants' and Respondent's positions and these would need to be properly and fully considered at a final hearing before a full panel. I acknowledge the guidance in the case of **Anyanwu** and that this does not appear to be a case where the core of facts is undisputed, or it is a "plain and obvious case". Further, as the Claimants do focus on the fear of losing their licences and the process at and since the 22 December 2017 this does not appear to be a complaint or complaints that would full outside of the Tribunal's jurisdiction because of section 120(7) of the Equality Act.

98. My reasons for refusing the Respondent's Strike Out application, and that the Respondent does still have to submit a full and final response to the complaints before the Tribunal, lead me to conclude that it is not appropriate to make Deposit Orders at this stage for the complaints that proceed.

Employment Judge Gray

Dated: 16 September 2019

Judgment sent to Parties: 17 September 2019

FOR THE TRIBUNAL OFFICE