EMPLOYMENT TRIBUNALS

Claimant: Miss K Coyne

Respondent: South West Yorkshire Partnership NHS Foundation Trust

Heard at: Leeds **On:** 27 September 2019

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person
Respondent: Mr S Hick, Solicitor

PUBLIC PRELIMINARY HEARING
JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of harassment contrary to section 26(1) and/or (2) of the Equality Act 2010 is struck out because it was not presented within the period of three months less one day from the last act or omission complained of and I do not find it would be just and equitable to extend the time limit.

REASONS

Background

1. The claimant made a number of claims in an ET1 that was presented on 18 February 2019, including a claim of harassment contrary to section 26(1) and/or (2) of the Equality Act 2010. This claim related to a single incident on 17 July 2018. She made no other claims of sex discrimination.

2. At a Preliminary Hearing on 23 April 2019, Employment Judge (EJ) Davies made discussed the claims at length with the parties, defined the claims that the

claimant is making, made a number of case management orders and listed the harassment claim for today's Public Preliminary Hearing (PH) to determine if:

2.1. Whether to claim of harassment was brought within three months less one day of the incident complained of;

2.2. If not, was it just and equitable to extend the time for bringing that complaint;

2.3. Should the complaint of harassment be struck out as having no reasonable prospect of success;

2.4. Should the claimant be ordered to pay a deposit as a condition of being allowed to continue with the complaint of harassment because it has little reasonable prospect of success, and;

2.5. If so, how much should she be ordered to pay?

3. It was conceded by the respondent that the claimant is a disabled person because of learning disability. EJ Davies made orders that reasonable adjustments be made for the claimant to give evidence at the PH.

Housekeeping

4. The claimant has been assisted and represented throughout by her son, Jonathan Leonard. He lives in Sweden. On 26 September 2019 at 12:38pm, he sent an email to the tribunal that was not copied to the respondent's representatives, saying that the claimant would be representing herself at the PH and that she would be relying on a statement that was attached to the email. No application for adjournment was made.

5. The statement also said that Mr Leonard had sent a request to the respondent's representatives on 14 June 2019 asking for the following documents to be disclosed in the bundle for today's hearing:

5.1. A full independent diagnostic of the laptop used by the alleged harasser " as it may hold key information" to the claim;

5.2. A copy of the claimant's employment contract, and;

5.3. The minutes of the disciplinary hearing on 12 December 2018.

6. I considered that none of these documents were required to determine the issues upon which I had to make a decision today. We have not yet had disclosure for the full hearing and I assume that the second and third items listed above will be disclosed at that time. I am not prepared to make an order for disclosure of the first item on the list, as I cannot see how it is proportionate to require a full independent diagnostic of a laptop that "may" hold key information. There is no indication of what that information might be or how it would assist the matter to be determined at this hearing, or the final hearing of the claim.

7. The respondent had prepared a bundle of 69 pages.

Hearing and Evidence

8. Before hearing, I noted the email from the claimant's son and representative, Jonny Leonard, of 26 September, which stated that the claimant would be representing herself at the hearing. It gave no explanation for Mr Leonard's inability to attend, but the attached witness statement said he had family commitments in Sweden.

9. My first concern was whether the claimant would be able to participate in a meaningful way in the PH, given her disability, and whether, if not, I should adjourn the hearing. I explained to the claimant that the tribunal has a duty to produce a fair and just hearing and that I was concerned as to whether she could represent herself and whether it would be a fair hearing. I had no medical evidence before me, but knew that the respondent had conceded that the claimant is a disabled person.

10. I found that the claimant understood the reason for the hearing and was keen to proceed. The email from her son had a statement attached. I found the statement and the representations that it contained were full and referred to the legal principles that I had to engage with in the hearing. I asked Miss Coyne if she had read the witness statement. She said she had not, so I read it to her. Miss Coyne confirmed that the statement was accurate. I was mindful that, given her disability, she might be tempted to say she understood things when, in actuality, she did not, so I tried to reassure her that it was OK for her to say that she did not understand something. I found that she seemed to genuinely understand evidence and questions when they arose and gave honest answers. It sometimes required me to explain the questions that were being asked in straightforward language and to read documents that were referred to. I have not always recorded those instances in this decision, but I am satisfied that the claimant understood what was being asked of her and answered appropriately.

11. I made a full note of the discussions, evidence and submissions and have only reproduced those parts of the evidence and hearing that are relevant to my judgment in these reasons.

12. The claimant gave evidence from the statement that had been prepared for her. Her evidence in chief was that the incident of harassment happened on 17 July 2018. She informed her son, Mr Leonard, about the incident on 18 July 2018. He rang ACAS on the same day and was advised to submit a grievance. If the grievance did not go the way they wanted, they could then take it further. The statement says that they were not advised by ACAS during the call that whilst the grievance was ongoing, they could make a claim to the Employment Tribunal.

13. Her son called the police about the incident on 28 July 2018. The police officer advised that the claimant should submit a grievance. Her son also called the NHS Whistleblowers' Hotline. He was again advised to submit a grievance. The claimant says that after much consideration, she decided to submit a grievance, which she did on 27 August 2018. She accepts that it was sent to the wrong email address.

14. The grievance was sent to the correct address on 7 September 2018. The claimant attended a first investigatory meeting on 14 September 2018. Her son was not allowed to accompany her. He rang ACAS and the claimant complains that he was not told that she could apply to the Tribunal whilst the grievance was ongoing.

15. The claimant accepted that in answer to question 88 of the investigation meeting on 14 September 2018 that she said she was going to take her case to a Tribunal. She says that this meant that she would be taking the case to a Tribunal when the grievance had finished. She says they relied on the advice they were receiving from ACAS.

16. After the final hearing on 12 December 2018, the claimant says she was upset and distressed at how she had been treated. She decided to take some time to process what had happened as Christmas was approaching and she wanted to feel "somewhat normal".

17. She applied to the Tribunal on 22 February 2019, but her online application was not accepted. It was finally accepted on 6 March 2019. The claimant accepts that there are time limits, but was just following advice, which was to submit a grievance first. Had she known she could have submitted a claim, she would have done so.

18. Before she was cross-examined, I told the claimant that I was happy to read to her any documents that she was referred to. In answer to cross-examination questions, the claimant confirmed she was supported by her son from early in the process. She agreed that her answer to question 63 in the investigatory meeting on 14 September was that her son was the first person she told about the incident. There was then a series of questions and answers from which it was established that 18 July 2018 was a Wednesday and that the claimant had told her son about the incident over the weekend following the incident (21 or 22 July).

19. She confirmed that her son had written the grievance email dated 27 August 2018 [23-24] (which it was agreed was identical to the document at pages 26 to 27 – the original email to the wrong address) to Owen Williams at the Trust. She was taken to page 23, where it was stated that "This ordeal of sexual harassment was demeaning, distressing, humiliating and traumatic". She said that she considered the incident on 17 July as being sexual harassment. Her manger was not a doctor or nurse.

20. She also confirmed that the statement in the email on page 23 that she had already made enquiries of the NHS Whistleblowing Service, the police and ACS was true, although it had been her son that had made the calls. She knew that the incident on 17 July could have been an act of sexual harassment. That is why her son called the police.

21. The claimant said that her son had written all the emails. She was taken to the email sent in her name dated 12 September 2018 [47] to Jacqueline Howgate of the respondent. The email referred to the ACAS guidelines on allowing family members to attend meetings. The claimant said that her son had spoken to

ACAS. She was taken to the fourth paragraph of the email that said, in relation to her son's request to accompany the claimant to future meetings:

> *"I feel that if this is not allowed, as it is my grievance meeting, I will have no option to apply to the employment tribunal without a grievance meeting."*

She accepted that these words were written, but not that she knew she could apply. She then said that she hadn't said those words. She had mentioned an Employment Tribunal at the meeting [on 14 September 2018] and that was the only time she had mentioned a Tribunal.

22. It was put to the claimant that her son had said in the email sent in her name on 12 September 2018 [47] that the claimant knew she could apply for a Tribunal. She agreed that the email said that. She accepted that the investigation meeting took place on 14 September 2018 [52].

23. She was then taken to page 67, which was the end of the 14 September meeting, and agreed with the note that said she had said she was going to "take this further to a Tribunal".

24. The claimant was asked about the letter sent on her behalf on 21 May 2019 [10] in response to a request from the Tribunal for reasons why the sexual harassment claim should be allowed to proceed. In the third paragraph, the letter stated:

> *"During this time, it was still not known that we could have made an employment tribunal claim. Furthermore, no ACAS guidance we received had informed us that we could or should due to time limits."*

It was put that if "during this time" meant the period between 27 August 2018 (when the grievance had first been submitted to the wrong address) and 12 December 2018 (when the final hearing had taken place), this was not correct. The reason it was not correct was because her son had already said she could issue a claim and she herself had indicated that she was going to issue a claim in the meeting on 14 September 2018. I had some concerns about the complexity of the question, but was satisfied that the claimant had understood it when she replied "Yes, I think I did."

25. She was asked whether she accepted that she knew well in advance of her ability to make a claim – by 14 September 2018 at the latest. She relied that her son had mentioned it.

26. The claimant was asked questions about the annex to the order of EJ Davies [8-9]. Before the questions, I read both pages to her, pausing from time to time to ask if she understood what was written. She confirmed that she did.

27. Mr Hick asked the claimant about paragraphs 3 and 4 of the annex, which dealt with her claim that the Trust had failed to make reasonable adjustments when dealing with her grievance. I explained to the claimant in plain English what was meant by "reasonable adjustments". Mr Hick's question was whether the claimant agreed that paragraphs 3 and 4 related to the process of her grievance. I explained that this meant that she was complaining about the way that the

grievance was handled, rather than what had been done to her. She agreed that it was about the process.

28. The claimant also agreed that paragraph 5 of the annex [8] was about something that was done to her that was unfavourable to her because of something that arose as a consequence of her disability. She agreed and added that the claim was about her having to go to the office to repeat everything she had said. She had felt interrogated. I asked if the claimant agreed that paragraphs 2 to 5 of the annex were about how the Trust dealt with the investigation of her complaint.

29. Paragraph 6 was about the protected act that the claimant did when she complained about how her colleagues treated her after she had complained about her manager's sexual harassment of her. The claimant said that her four named colleagues had treated her differently and badly.

30. I then read back paragraphs 7 and 8 of the annex [8-9] to the claimant. Paragraph 7 set out the four things that led her to resign, which were:

    30.1. After 12 December 2018, her 4 named colleagues ganged up on her, ignored her and stopped having chats and cigarette breaks with her;

    30.2. She believes that someone told her 4 colleagues about the claimant's grievance about Ms Asquith and Ms Green;

    30.3. She was made to feel that everyone was against her and did not believe her, and;

    30.4. She was not provided with a safe place of work. Ms Asquith was still her line manager and may behave in the same way again. She did not feel safe.

31. The claimant agreed that the four issues above was why she ended up resigning. She also agreed with the comment at paragraph 8 of the annex that she was not complaining about the outcome of the grievance or the way that it was dealt with in relation to her constructive dismissal claim. It was about the relationship change after 12 December 2018.

32. The claimant was asked if she agreed that the sexual harassment claim was separate. She rejected this and said it was to do with all of it. If Ms Asquith had not done what she did, none of it would have happened. The claimant had loved her job, the staff and doctors all respected her. She couldn't go on working and going around crying. Everything had changed.

33. The claimant became distressed at this point. I asked her if she wished to continue. She said she did.

34. The claimant agreed that the hospital has to control infection and that the Trust had a duty to the claimant to ensure that she was fit and capable for work. She was asked if the answer that was recorded as hers in answer to question 11 of the investigatory meeting on 14 September 2018 was accurate, after I read it out to her (it was a description of the harassment incident on 18 July 2018). The

claimant said that Ms Asquith did not put her hand around her thigh. She had asked the claimant to pull her trousers down. Ms Green had said that they should close the blinds. Ms Asquith touched the top of her thigh, not around her thigh. That was exactly what happened. Ms Asquith had not made any sexual references. The claimant had just wondered why she was having to do this.

35. Ms Asquith had asked the claimant to take her trousers down to look at the injury. She had the doctor's note. She wanted to see if the injury had healed. She also asked to look at the claimant's stomach. It was not sexual in nature. She agreed that in answer to question 43 of the 14 September interview, which had asked what the tone of the conversation with Ms Asquith and Ms Green had been like, the claimant had said "They were alright".

36. She had not told Ms Asquith that being asked to take her trousers down made her feel uncomfortable. It was put to the claimant that because of the need to control infection, any employee would have been asked to do what the claimant had been asked to do. The claimant thought for a while and said that she just thought Ms Asquith had been out of order by telling her to take her trousers down like that and then to come round and touch her thigh.

37. Mr Hick suggested that there was nothing sexual about the incident. The claimant said it was the touching of her thigh with her hands. She agreed that she was told that the reason for the instruction was to inspect the claimant's wounds.

38. In answer to questions from me, the claimant said that Ms Asquith was not wearing surgical gloves and was not a doctor or nurse. At the end of the evidence, the claimant said that she was happy that she had said enough. We then took a break.

Closing Submissions - Respondent

39. On the resumption, I advised the claimant that I would take the written comments from her son as her closing submissions.

40. For the respondent, Mr Hick reminded me that the purpose of the PH was to determine if the harassment claim should be struck out as out of time, or struck out because it had no reasonable prospect of success, or whether a deposit order should be made if the harassment case had little prospect of success.

41. Section 123(1) of the EqA requires a claim to be submitted within the period of three months of the act to which the claim relates or such additional period as is just and equitable. The respondent submits that the claim was submitted out of time. The incident happened on 17 July 2018, so the last date that the case could be referred to ACAS for early conciliation was 16 October 2018. The claimant started early conciliation on 8 December 2018, some 53 days after primary limitation. She obtained an early conciliation certificate on 18 January 2019.

42. The claimant had been reliant on her son to litigate this matter. In his letter of 25 May 2019, in answer to a request from the Tribunal for information as to why the harassment claim should not be struck out as out of time, he had initially relied on the provisions of The Employment Act 2002 Regulations 2004 as being authority

for an extension of time that would have brought the harassment claim within the time limits. That argument had now been abandoned.

43. The principles on extensions of time on a just and equitable basis are best set out in **Robertson v Bexley Community Centre [2003] EWCA Civ 576**. In paragraph 25, in the judgment of Auld LJ, it was stated that:

    25. *"It is also of importance to note that the 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. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a Tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the Tribunal below plainly wrong in this respect."*

44. In respect of the evidence, Mr Hick submitted that it is clear that the claim was presented seven and a half weeks out of time. The claimant had taken advice from ACAS, the police and the NHS Whistleblower service. She had presented her grievance on 27 August 2018; significantly before she began ACAS early conciliation on 8 December 2018.

45. She had been supported by her son throughout.

46. It was submitted that the issues on the harassment allegation are easily separable from the matters that are already proceeding to a final hearing. The claimant has not said that the alleged act of harassment led to her resignation: I should note the comments of EJ Davies in paragraph 7 of her annex to the order of 23 April 2019.

47. It may be necessary to call Ms Asquith and Ms Green.

48. It was submitted that the adequacy of advice that the claimant's son received from ACAS was not relevant to my decision. The claim was out of time and it was not just and equitable to extend.

49. On the second issue; of whether the claim has reasonable prospects, Mr Hick reminded me that the statutory principle is that if the claim had no reasonable prospects and was bound to fail, it should be struck out.

50. The claim of harassment was put in the alternative of being either related to the protected characteristic of sex (section 26(1) EqA) or being unwanted conduct of a sexual nature (section 26(2) EqA). The claimant has the burden of showing a case, that on the face of it, and in the absence of any explanation was on the grounds set out in section 26(1) or (2). It was submitted that she had not cleared that hurdle.

51. The claimant says that the environment was unpleasant, but has not said that there was anything sexual about it. She accepted that infection control and safety were legitimate issues for the respondent to be concerned about. It was accepted by the claimant that the placing on a hand on her thigh was not sexual and that no sexual language was used: Ms Asquith wanted to see the claimant's wounds. I was invited to dismiss the claim of harassment as having no reasonable prospect of success.

Closing Submissions – Claimant

52. The claimant did not have anything to add to her son's comments in his email of 25 May 2019 [10] and his email to the Tribunal, that I have summarised in paragraph 56 below.

Decision

53. I delivered an extempore decision on the day of the hearing in which I set out the reasons that I had made the decision to strike out the claim of harassment. My decision was concise and phrased in language that I hoped the claimant was able to understand. I explained that I would give a decision that used legal language and referred to statute and case law, so that the claimant's son and any adviser that was appointed would be able to understand the full reasons for my decision. This judgment and reasons is far more extensive than the extempore decision that I gave on the day of the PH.

54. I did not have a dictation machine with me, so I advised the parties the written reasons would be somewhat different to the extempore decision.

55. The purpose of the public preliminary hearing was only to determine whether the claimant's claim of harassment had been made on time and, if it had not, whether I would exercise the discretion given to me by section 123(1) EqA to extend time.

56. I make the following findings of fact from the evidence of the clamant and the documents produced on the basis that they are not in any dispute:

    56.1. The claimant has learning difficulties;

    56.2. The claimant makes a single allegation of harassment pleaded in the alternative as being either related to the protected characteristic of sex (section 26(1) EqA) or being unwanted conduct of a sexual nature (section 26(2) EqA);

    56.3. The single act complained of happened on 17 July 2018;

    56.4. The claimant told her son about the incident by Sunday 22 July 2018 at the very latest;

    56.5. He has advised and represented her throughout the process with the Trust and before the Tribunal up to his non-appearance today;

56.6. The claimant's son has made all the telephone calls and written all the letters and emails in the grievance process and in these proceedings;

56.7. He rang ACAS on the same day he was told about the incident and was advised to submit a grievance;

56.8. The claimant's son called the police about the incident on 28 July 2018. He also called the NHS Whistleblowers' Hotline. Both the police and the Hotline advised to submit a grievance;

56.9. The claimant decided to submit a grievance, which she did on 27 August 2018. She accepts that it was sent to the wrong email address;

56.10. The grievance was sent to the correct address on 7 September 2018;

56.11. The claimant's email of 12 September 2018 threatened Tribunal proceedings;

56.12. The claimant attended a first investigatory meeting on 14 September 2018;

56.13. The claimant accepted that in answer to question 88 of the investigation meeting on 14 September 2018, she said she was going to take her case to a Tribunal;

56.14. The grievance was treated as a disciplinary matter against Ms Asquith, who was alleged to have committed the act of harassment. After the final hearing on 12 December 2018, the claimant says she was upset and distressed at how she had been treated. She decided to take some time to process what had happened, as Christmas was approaching and she wanted to feel "somewhat normal";

56.15. She started early conciliation with ACAS on 8 December 2019 and was issued with an early conciliation certificate on 18 January 2019;

56.16. At the private preliminary hearing before EJ Davies, the claimant's position on her claim of constructive dismissal was that it was only the conduct of her colleagues after the disciplinary hearing against Ms Asquith on 12 December 2018 that contributed to her decision to resign, and;

56.17. The claim was presented out of time.

57. The first issue, therefore, is whether I should exercise discretion to extend the time for presenting the claim on a just and equitable basis after looking at all the circumstances of the case.

58. The discretion to grant an extension of time under the 'just and equitable' formula has been held to be as wide as that given to the civil courts by section 33 of the Limitation Act 1980 to determine whether to extend time in personal injury actions. Under that section, the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, in particular: (*a*) the length of and reasons for the delay; (*b*) the extent to which the cogency of the evidence is likely to be affected by the delay; (*c*) the extent to which the party sued had co-operated with any requests for information; (*d*) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

59. I find that delay was 53 days, and was for the following reasons put forward by Mr Leonard and, to a lesser extent, the claimant herself:

    59.1. The claimant was depressed [Letter 25 May 2019, page 10];

    59.2. The grievance was submitted to the wrong department on 27 August 2018 and took some weeks to get to the right department on 7 September 2018 [10];

    59.3. The grievance process took until 12 December 2018 to get to the final hearing [10];

    59.4. During the period of the grievance investigation to 12 December 2018, it was not known that the claimant could have made a Tribunal claim [10];

    59.5. The ACAS guidance received had not informed the claimant that there were time limits [10];

    59.6. If the claimant had received advice that the claim was subject to time limits, she would have followed that advice and submitted one [10];

    59.7. The harassment claim relies on the other claims and vice versa [10];

    59.8. The claimant's son was not advised by ACAS on his first call to them that whilst a grievance was ongoing, she could make a claim to the Tribunal [claimant's evidence], and;

    59.9. The claimant decided to take some time to process what had happened, as Christmas was approaching and she wanted to feel "somewhat normal" [claimant's evidence].

60. After considering the findings of fact I have made above and the submissions of the parties, I make the following findings:

    60.1. The claimant was entirely dependent on her son to progress the grievance and make this claim. The fact that she was depressed has little weight in my consideration of whether it is just and equitable to extend time;

60.2. The fact that the grievance was submitted to the wrong department on 27 August 2018 and took some weeks to get to the right department has no weight in my consideration of whether it is just and equitable to extend time, as when the grievance eventually arrived at the correct address, the claimant still had over a month before primary limitation;

60.3. The fact that grievance process took until 12 December 2018 to conclude is not conduct on the part of the respondent that is culpable. There was no suggestion that the respondent had deliberately delayed the process or made any representations to the claimant that her right to claim was being preserved or extended during the process;

60.4. I do not find that it is plausible or credible for Mr Leonard to state that it was not known (i.e. to him) that the claimant could have made a Tribunal claim whilst the grievance process was ongoing. He had been aware of the allegation of harassment within a maximum of five days of it happening. His letter on behalf of the claimant dated 27 August 2018 [23] makes a specific allegation of sexual harassment and indicated that enquires had been made of ACAS, the police and the NHS Hotline. His email on behalf of the claimant on 12 September 2018 [47] threatened Tribunal proceedings and the claimant herself threatened proceedings in the meeting on 14 September 2018, when her claim was still in date;

60.5. The fact that the claimant says that ACAS had not informed her that there were time limits is not a good reason for her failure to start early conciliation within three months of the act of harassment. I find that there is no duty on ACAS to advise a caller of the time limits applicable to a claim. The information is readily available to anyone with a computer or smart device and an internet connection, which Mr Leonard clearly had at all times;

60.6. I find that the submission that if the claimant had received advice that the claim was subject to time limits, she would have followed that advice and submitted one carries little weight because it presupposes that there is a duty on ACAS to advise on time limits;

60.7. The evidence clearly shows that the harassment claim is entirely distinct and discreet from the other claims. The claimant has stated that the constructive dismissal claim arises from the conduct of her colleagues after 12 December 2018;

60.8. I find the claimant's evidence that she decided to take some time to process what had happened at the disciplinary hearing for Ms Asquith on 12 December to be irrelevant, as she had already started early conciliation on 8 December, and;

60.9. The commencement of early conciliation on 8 December undermines the submission that the claimant was not aware that she could start early conciliation whilst the grievance was ongoing.

61. I find that the delay in issuing proceedings is unlikely to affect the cogency of the evidence. The claimant has tried to provide all information requested of her. She did not act with great promptness once she knew of the facts giving rise to the cause of action; she said that she wanted to issue the proceedings as early as 27 August 2018. She made no effort whatsoever to obtain appropriate professional advice or even the free advice available from ACAS or the government website on the time limits applicable to her claims.

62. Were I to exercise my discretion, the respondent would face the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence.

63. The same principles apply in the just and equitable arena to those in the reasonably practicable arena in respect of the claimant's ignorance of the law. I find that ignorance of the time limits is not a reasonable or plausible excuse for the claimant's son.

64. When considering whether to grant an extension of time under the 'just and equitable' principles, the fault of the claimant is a relevant factor to be taken into account.

65. It is necessary for me, when exercising my discretion, to identify the cause of the claimant's failure to bring the claim in time. In **Accurist Watches Ltd v Wadher UKEAT/0102/09/MAA**, Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents (para 16). What a tribunal is not entitled to do, however, is to make assumptions in the claimant's favour on contentious factual matters that are relevant to the exercise of the discretion; as the burden is on the claimant to show that it would be just and equitable to extend time, where a contentious matter is relied on there must be some evidential basis for it. In this case, the claimant brought no evidence of the effect of her disability had on her ability to bring a claim in time.

66. When balancing the factors for and against the exercise of my discretion in the claimant's favour, I find the fact of the delay and the reasons put forward for the delay together with her failure to properly and conscientiously ascertain the correct limitation date tip the balance in favour of the respondent and I therefore decline to extend time, as I do not find it just and equitable to do so. The Tribunal therefore does not have jurisdiction to hear the claimant's claim of harassment contrary to section 26 EqA and that claim is struck out.

67. I do not need to go on to consider the question of whether the harassment claim had no reasonable prospect of success or whether a deposit order should be made. I would comment, however, that if I had been required to make such a determination, I would have found that the harassment claim had no prospect of success because I could not see how the claimant would show that the conduct related to her sex or was unwanted conduct of a sexual nature. I have no doubt that the claimant was being truthful when she said that she found the incident on 17 July 2018 distressing, but on her evidence at its very highest, she would fail to make out the factual nexus of a harassment claim.

Employment Judge S A Shore

Date 14 October 2019