EMPLOYMENT TRIBUNALS

Claimant:	**Mrs C King**	
Respondent:	**South Western Ambulance Service NHS Foundation Trust**	
Heard at:	**In Chambers**	**On: Wednesday 12 August 2020**
Before:	**Employment Judge Matthews**	
Members:	**Mr J Howard & Mr I Ley**	
Representation:		
Claimant:	**Ms A Hart of Counsel**	
Respondent:	**Ms S Omeri of Counsel**	

RESERVED UNANIMOUS JUDGMENT

1. Mrs King's claim that she was victimised by reference to section 27 of the Equality Act 2010 was presented to an employment tribunal before the end of the period specified in section 123 of the Equality Act 2010. The employment tribunals have jurisdiction to hear that complaint.

2. The Respondent is ordered to pay to Mrs King £8,000 as compensation in respect of the victimisation of Mrs King by reference to section 27 of the Equality Act 2010 together with interest on that sum of £2,197.04.

REASONS

INTRODUCTION

1. In a Reserved Unanimous Judgment sent to the parties on 17 October 2018 (the "ET Judgment") this Tribunal upheld Mrs Carolyn

King's claims of victimisation by reference to section 27 of the Equality Act 2010 (the "EA") in part, whilst dismissing other victimisation claims and a claim of unfair constructive dismissal. At the request of the parties, the ET Judgment (and the hearing leading to it) dealt with liability only.

2. Essential to the success of Mrs King's claim of victimisation was either that the act in question was part of *"conduct extending over a period"* within the meaning of section 123(3)(a) of the EA or that time was extended under the provisions of section 123(1)(b) of the EA on the *"just and equitable"* ground. It is common ground between the parties that both points were before this Tribunal. The Tribunal decided that the act of victimisation in question was part of conduct extending over a period but made no alternative finding on the just and equitable issue.

3. The Respondent Trust appealed against the decision that the act of victimisation was part of a course of conduct extending over a period. In a Judgment promulgated on 28 November 2019 (the "EAT Judgment") the Employment Appeal Tribunal (UKEAT/0056/19/OO - HHJ Choudhury (President) sitting alone) allowed the Trust's appeal and ordered that there be substituted for this Tribunal's decision a decision that there was no conduct extending over a period. The case was remitted to this Tribunal to put right its omission by determining *"whether time should be extended on just and equitable grounds for the sole act of victimisation"*.

4. The overall jurisdictional point raised by the Trust is summarised in the EAT Judgment (paragraph 13) as *"a jurisdictional issue that any allegations that predated 27 August 2017 (i.e. 3 months and 16 days prior to the receipt of the claim form) were out of time."* The EAT also observed (paragraph 17) that the only claim of victimisation which succeeded was that in relation to the inadequacy of Ms Ackerley's report and that was some 7 months before the Claimant's claim was lodged with the Tribunal.

5. On 27 May 2020 Regional Employment Judge Pirani sent Case Management Orders to the parties following a Telephone Preliminary Hearing on that day ("REJ Pirani's Orders"). Those Orders invited available dates in July and August 2020 for this hearing *"to determine both the limitation issue and the remedy issue, should it arise."* This Tribunal is, therefore, to decide remedy in the event that the jurisdictional issue is decided in favour of Mrs King.

6. Prior to this hearing the Tribunal discussed how it expected the hearing to proceed. The procedure it decided on was that it would take Mrs King's evidence on remedy first and would then hear from

Ms Hart and Ms Omeri (in that order) on the subject of the jurisdictional point. After that, the Tribunal would hear from Ms Hart and Ms Omeri (again in that order) on remedy. At the commencement of the Hearing this was discussed with Ms Omeri and Ms Hart. Ms Omeri objected to this ordering of events, arguing that the jurisdictional point should be dealt with and decided first. The Tribunal could then move on to the issue of remedy, if appropriate. Ms Omeri's argument certainly reflected the order in which the Tribunal should make its decision or decisions, as appropriate. However, Ms Omeri's objection was not accepted and the Hearing proceeded as the Tribunal had put forward. The reason for this was that this is an old case and it needs to be brought to a conclusion. If the order suggested by Ms Omeri was followed and the jurisdictional point was decided in Mrs King's favour, there was more than a risk that there would have to be a further hearing to decide remedy. In any event, it is an everyday occurrence for a Tribunal to hear evidence and argument on remedy in cases in which the claimant does not ultimately succeed on liability.

7. It is regrettable that it has taken eight months for the case to come back before this Tribunal. This has largely been because of the measures adopted to address the Covid-19 pandemic. In the event, the Hearing was a remote hearing using the Common Video Platform consented to by the parties. A face to face hearing was not held because of the constraints placed on such hearings by precautions against the spread of Covid-19. The Tribunal is satisfied that, in this case, the overriding objective of dealing with cases fairly and justly could be met in this way. In the hearing, Counsel for both sides and Mrs King experienced bouts of communication difficulty. The Tribunal is grateful to them for persevering and ensuring that the matter could proceed.

8. Mrs King gave evidence supported by a written statement.

9. The Tribunal had before it (in a mixture of hard copy and electronic form) the agreed bundle of documentation from the hearing over the 17-21 September 2018, the ET Judgment, the EAT Judgment, Mrs King's Schedule of Loss, REJ Pirani's Orders and an index of cases together with copies of those cases provided by Ms Hart. References in this Judgment to pages are to pages in the bundle unless otherwise specified. In addition, Ms Omeri and Ms Hart produced detailed and cogent written argument in relation to the jurisdictional issue, to which they both spoke. We heard oral argument on the issue of remedy.

10. The hearing concluded at 3.15pm. In view of that and the need to deliberate, the Tribunal reserved judgment.

FACTS

11. The remission to us does not permit further evidence on the jurisdictional issue. (There is nothing to prevent us hearing evidence on remedy.) It is common ground between the parties that, if Mrs King wanted to give evidence during the hearing from 17-21 September 2018 concerning the delay in submitting her claim, she should have done so. Mrs King did not do so. Whilst we do not know for sure, this appears to have been an oversight rather than deliberate.

12. The findings of fact in the ET Judgment remain as they were. Below we repeat some of those findings, which we consider pertinent to the jurisdictional issue we must decide and, as it turns out to be appropriate, the issue of remedy. We also draw further on a few of the documents referred to in the ET Judgment.

13. On 22 October 2016 Mrs King sent a grievance letter to Mr Wenman (135-142). Mr Wenman commissioned Ms Ackerley, an outside consultant, to look into the grievance.

14. The Tribunal's finding was that Ms Ackerley's report amounted to an act of victimisation. It appears to have been delivered on 8 March 2017, although it also has the date of 17 March at its end. The Tribunal found:

> *"Ms Ackerley's report was discussed at a meeting between Mr Nelson, Mrs King, Ms Clare Melbourne (HR Business Manager), Mr Wenman and Ms Ackerley on 7 April 2017. Mrs King says she thought the report was very weak but answered some questions (WS50)."*

15. Referring back to Mrs King's statement referenced above (to be clear - the statement was before the Tribunal at the hearing on 17-21 September 2017 but this passage was not quoted in the ET Judgment) paragraph 50 continued, referring to the report:

> *"I felt that it should have been bolder to support my complaints and it was unfair for Mr Wenman to reject my grievances which related to sex discrimination. This response led me to suffer further isolation and deterioration in my health."*

16. The following extracts from the ET Judgment record the sequence of relevant events thereafter.

17. *"On 17 April Mrs King sent Mr Wenman an e-mail to say that she would be exercising her right to appeal against the outcome of the*

grievance on the grounds that the investigation was inadequate (248-249)."

18. *"On 18 April Mr Wenman responded (247-248). The response can be referred to for its full content. It seems neutral to us. It included a request that Mrs King be specific about her grounds of appeal. Mrs King's response on 19 April was no more specific but alleged that the request for specifics was unfair treatment (247). Mr Wenman decided he should meet Mrs King to clarify what she expected to happen."*

19. *"Mrs King says that, on 20 April 2017, she received a threatening phone call from Ms Manning demanding that she attend the Trust's Exeter HQ (WS53). Mrs King tells us how she felt in her statement (WS53 and 54). It seems that Ms Manning later apologised."*

20. *"Mrs King, accompanied by Mr Nelson, duly met Mr Wenman and Ms Manning that day. Ms Manning took a note (265-266). Although it is not in the note, during the hearing before us Mr Wenman accepted that he said to Mrs King that they had given her everything she wanted, so why did she want to appeal. Mrs King told Mr Wenman that it had been a long road but she did not feel the outcome was enough. Mrs King added that this was not the way she wanted to end her career. (We are unsure what was meant by that but it does beg the question of whether or not Mrs King intended to return to work at this stage.) Mr Nelson clarified that the appeal had been sent in whilst he was on leave, otherwise there would have been more detail. Mr Nelson said Mrs King felt "underwhelmed" by the outcome, although she recognised that all requests for remedy had been addressed. Mr Wenman agreed a seven days extension of the usual timescales for clarification of the grounds of appeal."* [Note: In paragraph 151 of the ET Judgment we referred to Mr Nelson acknowledging that *"all requests for remedy were provided"* in a meeting on 23 April 2017. That stems from a note of Ms Manning's of the meeting referred to in this paragraph on 20 April 2017 (265). The discrepancy in dates arises because the date at the top of page 265 is not clear in the bundle.]

21. *"Mrs King says that during this meeting it was made very clear to her that Mr Wenman was trying to persuade her against pursuing the appeal (WS55). Apart from that assertion by Mrs King there is no evidence to suggest she is right about this. The contemporaneous paperwork supports Mr Wenman's evidence before us. Mr Wenman had been surprised by Mrs King's decision to appeal because he thought agreement had been reached at the meeting on 20 April. When it was put to him, he did not accept that he had been frustrated. No doubt it was not his preferred outcome. On the face of it he was making genuine efforts to save the employment relationship. When it*

was clear that, notwithstanding, Mrs King wanted to appeal, Mr Wenman facilitated that process."

22. *"Mr Wenman confirmed the position in a letter to Mrs King on 2 May 2017 (278-279). At that time no details of the appeal had been received and Mrs King had gone on sick leave on 21 April 2017 (from which she did not return to work before her leaving date on 5 October 2017). Mrs King says that she felt Mr Wenman's letter was an attempt to avoid dealing with her appeal (WS58). On its face it was not."*

23. *"As it happened, the details of the appeal were in hand and were set out in a letter from Mr Nelson to Mr Wenman dated the next day, 3 May 2017 (280-282). This was a somewhat unfocussed document which we will not summarise here for reasons that will become apparent."*

24. *"On 10 July 2017 Mr Nelson, no doubt having had time to consider the position more fully, sent in Mrs King's detailed grounds of appeal (255-264). The appeal ran to ten pages. The original grievance had consisted of eight pages (not including supporting documentation). It was obvious that matters were far from settled."*

25. *"Whilst waiting for the grievance appeal process to run its course, Mrs King was, as we have noted, off sick. The fitness for work notes referred to work related anxiety and stress. As part of sickness absence management Mrs King was referred to occupational health. Dr Antony Webb wrote a report on 21 June 2017 (329-330). This throws light on Mrs King's state of mind, although this comes as little surprise. Dr Webb commented"* [Note: this is a mixture of the material quoted in the ET Judgment and additional material that we now refer to – shown without italics]*:*

> "She has been absent since April due to stress and anxiety which she attributes to a grievance process that she took out against her manager.
>
> **Current Situation**
>
> She feels she has lost confidence because of the grievance process and the interpersonal difficulties with her manager. She is coping well with normal activities at home but feels anxious when coming into contact with situations that remind her of her work. She had some CBT through the primary care counselling service but did not find it a very helpful experience."….
>
> "**Is the reason for ill-health permanent, fluctuating, progressive or resolvable?**

> *I think her stress is situational and related to her perception of issues arising within her work. Unfortunately it appears that she has lost confidence in her employer. Chronic embitterment is a risk in these situations and therefore ongoing discussion with the aim of seeking mutually acceptable solutions to the employer and employee is advisable."….*
>
> *"In my view her perception of the work issues are acting as a barrier to her return and I doubt she will return to work unless they can be resolved. Unfortunately medical input alone is unlikely to solve the issue. I understand that mediation has been advised by HR and I would support this approach too.""*

26. *"The grievance appeal hearing took place on 18 July 2017. Present were Mr Hood (chairing the appeal), Mr Fraser, Ms Faye Wilderspin (HR Administrator who took the note at 351-358), Mrs King, Mr Nelson and Ms Bamford. The grievance appeal had been, in essence, a request to rehear the grievance and expand it to include a wholesale investigation of the culture in the Trust. Faced with this, Mr Hood adopted an approach of working through the grounds of appeal and identifying key points".*

27. *"Following the appeal hearing, Mr Nelson wrote to Mr Hood on 24 August with some supplementary observations (385-6)."*

28. *"On 11 September 2017 Mr Hood wrote to Mrs King dismissing her appeal (403-409). The letter should be referred to for its full content."*

29. *"On 20 September 2017 Mrs King wrote to Mr Hood (415-417). The letter can be read for its full content. There are indications in it of where the matter was going. Implied trust and confidence and detriment were terms used. No response to the letter was forthcoming."*

30. *"On 4 October 2017 Mrs King sent a letter of resignation to Mr Wenman (453-454). The letter can be referred to for its full content. Given that Mrs King had decided to resign rather than re-engage, it contains no surprises and is consistent with the position Mrs King had maintained throughout. Mrs King continued to want something visible done about Mr Boucher and disbelieved the evidence that Mr Hood had produced to demonstrate that the Trust was successfully tackling any sex discrimination, bullying or harassment in the workplace."*

31. We turn now to Mrs King's evidence on the subject of remedy. Mrs King's short statement included this:

> *"I expected my grievance to be given proper consideration and investigated in good faith. When I saw the investigation report I was devastated and so upset at the poor quality of the report "…."After making so much effort to submit the grievance in the first place I felt particularly hurt at the lack of care that was taken in investigating my complaint. I raised this in my appeal to the Respondent immediately after I saw the report as I was so upset at the outcome but nobody listened to me when I raised concerns leaving me feeling isolated and worthless.*
>
> *3. The investigation report made me lose faith in my employer and in the NHS having seen such a poor investigation with no care or thought to the impact on me as an individual who had the courage to step up and complain. It left me feeling disillusioned, worthless and humiliated. I was bitterly disappointed and felt betrayed by the investigation, when I think about what happened it does still bring me to tears."*

32. In response to questions from Ms Omeri, Mrs King accepted that words such as *"devastated", "upset", "hurt", "isolated" "worthless", "disillusioned" "humiliated" "disappointed"* and/or *"betrayed"* did not appear in any of the contemporaneous paperwork relating to Mrs King's reaction to Ms Ackerley's report. Nevertheless, Mrs King maintained that is how she felt. Mrs King added that she did not feel it appropriate to tell her employer about these things at the time.

APPLICABLE LAW

33. Section 123 of the EA, so far as it is relevant, provides as follows:

> ***"123 Time limits***
>
> *(1) Subject to sections 140A and 140B, proceedings on a complaint within section 120"* [we have not set out the relevant part of section 120 but it includes a complaint of victimisation under section 27 EA] *"may not be brought after the end of-"*
>
> *(a) the period of 3 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."*

34. Sections 124 and 119 of the EA, include:

> *"**124 Remedies: general***
>
> *(1) This section applies if an employment tribunal finds that there has been a contravention of a provision referred to in section 120(1).*
>
> *(2) The tribunal may-*
>
> *(a) make a declaration as to the rights of the complainant and the respondent in relation to the matters to which the proceedings relate;*
>
> *(b) order the respondent to pay compensation to the complainant;*
>
> *(c) make an appropriate recommendation."….*
>
> *"(6) The amount of compensation which may be awarded under subsection (2)(b) corresponds to the amount which could be awarded by the county court or the sheriff under section 119."*
>
> *"**119 Remedies***
>
> *(1) This section applies if the county court or the sheriff finds that there has been a contravention of a provision referred to in section 114(1).*
>
> *(2) The county court has power to grant any remedy which could be granted by the High Court-*
>
> *(a) in proceedings in tort;"….*
>
> *"(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis)."*

35. The general principle where a tribunal awards compensation under these provisions is to put the claimant, so far as possible, in the position the claimant would have been in had the discrimination not occurred.

36. We were referred to Peake v Automotive Products Ltd [1977] 1QB 232, MOD v Jeremiah [1980] ICR 13, Trevelyans (Birmingham) Ltd v Norton [1991] ICR 488, BCC v Keeble [1997] IRLR 336, Robinson v Post Office [2000] IRLR 804 (EAT), Simms v Transco plc [2001] AER (D) 245 (Jan), EAT, Steeds v Peverell Management Services Ltd [2001] EWCA Civ 419, Robertson v Bexley Community Centre [2003]

IRLR 434, Southwark London Borough Council v Afolabi [2003] EWCA Civ 15 and [2003] ICR 800, Chohan v Derby Law Centre [2004] IRLR 85, Baynton v South West Trains [2005] ICR 1730, EAT, Accurist Watches Ltd v Wadher (2009) UKEAT/0102/09/MAA, Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, Bahous v Pizza Express Restaurant Ltd (2011) UKEAT/0029/11, Chindove v William Morrison Supermarkets Ltd UKEAT/0201/13/13, Pathan v South London Islamic Centre (2014) UKEAT/0312/13, Little v Richard [2014] ICR 85, Rathakrishnan v Pizza Express Restaurant Ltd [2016] ICR 283 (EAT), Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 (CA) and the instant case in the EAT.

CONCLUSIONS

37. **The jurisdiction issue**

38. In this case the date of the act of victimisation found by this Tribunal was 8 March 2017, when Ms Ackerley produced her report. That is so even though Mrs King did not know this until 4 April 2017, when Ms Katherine Tinson (on behalf of Mr Le Chevalier) sent Ms Ackerley's report to Mr Nelson who forwarded it to Mrs King (bundle 234). The three month primary time limit therefore expired at midnight on 7 June 2017. Mrs King does not enjoy any extension of time under the ACAS Early Conciliation provisions because the Early Conciliation process was not commenced until after the normal limitation period had expired (it was commenced on 30 October 2017). The EC Certificate was obtained on 15 November 2017 (bundle 1). These proceedings were issued on 11 December 2017 (bundle 2). They were therefore a few days over seven months out of time.

39. The issue, therefore, is did Mrs King bring her proceedings in respect of the act of victimisation we have found after the end of such other period as we think just and equitable.

40. In making our decision, the Keeble case directs us to consider the prejudice that each party would suffer as a result of the decision. In doing so we are to have regard to all the circumstances of the case and in particular the factors in section 33 of the Limitation Act 1980. Morgan emphasised that an employment tribunal is not required to go through a list provided it does not leave a significant factor out. In practice, tribunals usually go through the list.

41. General prejudice to the parties

42. As far as overall prejudice to the parties is concerned, the position is relatively straightforward as judgment on the claim has been

delivered in favour of Mrs King. If time is not extended, Mrs King will suffer the prejudice of ultimately not succeeding in that claim and obtaining no remedy for it. However, if time is extended, Ms Omeri argues that the Trust will suffer the prejudice of the claim being permitted to be brought against it notwithstanding that Mr Nelson had assured it that "*all requests for remedy were provided"* (see the note in paragraph 20 above). In addition, the Trust had a legitimate expectation that the possibility of a claim was closed by the expiry of the primary time limit. In our view, Mr Nelson's comment must be seen in the context of Mrs King's decision (evidenced by her actions) to continue the process set out in detail above. As far as the limitation period is concerned, any reliance the Trust placed upon it must also have been qualified by section 123(b) EA.

43. We turn to each of the factors in section 33 of the Limitation Act 1980.

44. <u>The length of and reasons for the delay</u>

45. The delay was a little over 7 months. We know that Mrs King did not know of the report's contents for around a month and there was a compulsory conciliation period of around a fortnight. Around a month and a half of the delay was, therefore, outside Mrs King's control. Apart from those delays, a number of reasons for the rest of the delay have been suggested. The fact remains, however, that we do not know what the reasons were as we have neither heard any evidence nor seen any documentation that is specific on the point. What we do know, because it is plain from the train of factual events set out above, is that, from receipt of Ms Ackerley's report through to the final rejection of Mrs King's grievance concerning it (by Mr Hood in a letter dated 11 September 2017) Mrs King was engaged in a process. That process was to seek, from Mrs King's perspective, a satisfactory outcome to her grievance. It is clear from the EAT Judgment that, in the ET Judgment, we erred in characterising that process as *"conduct extending over a period*" for the purposes of section 123(3)(a) of the EA. However, as the EAT Judgment observes (paragraph 53): *"The continuation of the grievance process might itself be a factor considered by the Tribunal to be relevant in determining whether it would be just and equitable to extend time."*

46. We do not agree with Ms Omeri's characterisation of the process as *"flogging a dead horse".* We do not think that is how Mrs King saw it in context at the time. We consider this factor to be plainly made out and to be of considerable relevance, whilst accepting that it cannot be determinative. There is no general principle that it will be just and equitable to extend time where a claimant has been going through an internal process to try to obtain a satisfactory result from their point of

view, rather than lodging a claim. It is only one factor to be taken into account.

47. Ms Omeri draws our attention to the ET Judgment in which this Tribunal decided that Mrs King had delayed too long in resigning and by doing so had affirmed her contract of employment. As a result, the act of victimisation which the Tribunal had found occurred on 7 April 2017 could not be relied on by Mrs King, when she resigned on 4 October 2017, as a repudiatory breach for the purposes of Mrs King's unfair constructive dismissal claim. Ms Omeri accepts that the tests are different but says that it would be inconsistent with that conclusion for this Tribunal to extend time under section 123(b) EA. Ms Omeri makes her argument cogently in her skeleton which includes this:

> *"Just as the Employment Tribunal found that C had made a choice not to resign within weeks after 7 April 2017, it must similarly find that she made a choice not to bring a claim for victimisation at that point (or any point within the following 3 months) and should not now be permitted effectively to change that decision by time being extended."*

48. It is, indeed, the case that Mrs King did not resign or bring a claim. We do not agree, however, that it follows, from the fact that Mrs King did not to resign, that she made a choice to abandon any claim for the future. Although we do not know, we think that would be surprising. In any event, the relevant tests under section 123(b) are considerably different to the test for affirmation. As far as affirmation is concerned, Lord Denning said in Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA the employee *"must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged."* The test we must now apply is the very different test for the purposes of section 123(b) EA. We do not see anything in our factual conclusion on the issue of affirmation that prevents an exercise of our discretion under section 123(b) EA.

49. We note that Mrs King was on sick leave from 21 April 2017, from which she did not return before her resignation (see paragraph 25 above).

50. We take two points from this. First, although it is apparent from the train of events that Mrs King's sickness absence did not prevent her, with Mr Nelson's considerable help, from participating in the process leading up to the final rejection of her grievance and her eventual resignation, it would not have made it easier. Second, it reflects what we understand the process to have been. From Mrs King's point of view, she was pursuing her grievance. It may have been that she

thought there was little chance of a satisfactory conclusion and that she would ultimately have to resign. Nevertheless, Mrs King pursued the process and the outcome might have been satisfactory on both sides. We know that, throughout, the Trust worked to salvage the employment relationship.

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

52. It is common ground that this is not a relevant factor in this case.

53. The extent to which the party sued has cooperated with any requests for information

54. Again, this is not a relevant factor in this case.

55. The promptness with which Mrs King acted once she knew of the facts giving rise to the cause of action

56. Mrs King did not act promptly to lodge a claim once she had received Ms Ackerley's report. Rather, Mrs King engaged in the process we have described. What Mrs King did subsequently do was act promptly once she knew the grievance process was exhausted. The grievance appeal outcome letter was dated 11 September 2017, Mrs King resigned by letter dated 4 October 2017 and entered into ACAS conciliation on 30 October 2017.

57. The steps taken by Mrs King to obtain appropriate advice once Mrs King knew of the possibility of taking action

58. Here, there is a temptation to speculate in the absence of evidence. We broadly agree with Ms Omeri's argument on this subject. We do not know if or when Mrs King knew of this possibility. All we know is that Mrs King was represented throughout by Mr Nelson, a UNISON full time officer of considerable experience with the resources of that trades union behind him. We do not know what, if any, advice Mrs King received from UNISON about possible employment tribunal claims and/or time limits. We can make no finding on that. All we can say is that Mrs King had available the resource from which to obtain advice. If Mrs King did know about time limits for employment tribunal proceedings, she must have chosen to put them second to engaging in the internal process. We observe that it is often suggested in such circumstances that employees can lodge tribunal proceedings in time, whilst continuing with an internal process. That is true, but it ignores the very real pressure on employees not to jeopardise an internal process with what, inevitably, is seen by an employer as a hostile act.

59. Apart from those factors, we also take account of one other.

60. The Respondent has not had an opportunity to cross examine Mrs King on the reasons for the delay in lodging her claim

61. This is certainly of concern. However, since this Tribunal is taking the approach to the evidence set out in paragraphs 11 and 12 above, we see little, if any, prejudice to the Respondent.

62. Auld LJ made it clear in Robertson that there is no presumption that a tribunal should exercise its discretion to extend time, that time limits are exercised strictly in employment cases and the onus is on the claimant to justify the claimant's failure. Auld J was supported in this approach in Caston.

63. Sedley LJ said this in Caston (paragraphs 31 and 32):

> *"31. In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them.*
>
> *32. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact and judgement, to be answered case by case by the tribunal of first instance which is empowered to answer it."*

64. In this case, on the evidence before us and on the balance of probabilities, the delay was primarily due to Mrs King wanting to engage in a process that might have delivered a satisfactory outcome from her point of view and her return to work, even if she was doubtful about that outcome. The process was not assisted by her sickness absence. Once the process reached an unsuccessful conclusion, so far as Mrs King was concerned, Mrs King acted in a timely fashion to lodge her claim and enter into ACAS conciliation. There is no balance of prejudice favouring the Trust and, weighing the factors in the balance, it is our decision that it is just and equitable to extend time to allow Mrs King to bring her claim in respect of the act of victimisation found by us in the ET Judgment.

65. Remedy

66. In the ET Judgment we made a declaration in respect of the victimisation Mrs King was subjected to. We have no recommendation to make.

67. The only claim for compensation Mrs King makes is in respect of injury to feelings.

68. Compensation for injury to feelings is intended to compensate a victim of discrimination for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. The guidance offered by case law is that such awards should be considered in three bands. The bands themselves are the subject of guidance from the Presidents of the Employment Tribunals in England and Wales and Scotland. This claim was presented on 11 December 2017 and the bands applicable to it are as follows. The top band of £25,200-£42,000 is appropriate in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment. The middle band of £8,400-£25,200 is appropriate for serious cases which do not merit an award in the highest band. The lower band of £800-£8,400 is appropriate for less serious cases, such as one-off occurrences.

69. We have considered the appropriate award to make in this case carefully. This case falls into the lower band. The victimisation found was a one-off occurrence, this Tribunal having found no other discriminatory act.

70. Our attention must be on the injury to Mrs King's feelings caused by the report that was the act of victimisation. Ms Omeri invites us to find that there was little or no evidence of injury to feelings. It is true that there is no record that Mrs King told the Trust that the report had made her feel in any of the ways mentioned in paragraph 32 above. What we do accept is that, as Mrs King said in her statement for the liability hearing, (see paragraph 15 above), she felt it was unfair for Mr Wenman to reject her grievances and that response led her to suffer further isolation and deterioration in her health. Mr Wenman's rejection of Mrs King's grievances was not, itself, an act of discrimination for the reasons we set out in the ET Judgment. It did, however, flow from the act of victimisation, being the report and was a consequence of it. We do not see that the chain of causation is broken. We also take account of the evidence of how Mrs King felt in the occupational health report dated 21 June 2017 (see paragraph 25 above). Mrs Ackerley's report must have been a contributory factor to the feelings described in the occupational health report.

71. Taking all this into account the Tribunal's unanimous finding is that an award of £8,000 is appropriate.

72. Interest is payable on this award calculated as follows:

Days between 8 March 2017 (that being taken as the day of the discriminatory act) and 12 August 2020 (the day of calculation): 1,253

Interest rate: 8%

1,253 (days) x 0.08 x 1/365 x £8,000 = £2,197.04

Employment Judge Matthews

Date: 26 August 2020

Judgment sent to parties: 15 September 2020

FOR THE TRIBUNAL OFFICE