EMPLOYMENT TRIBUNALS

Claimant: Mrs Y Simon

Respondent: WKCIC Group (1)
Morgan Hunt UK Ltd (2)

Heard at: London Central Employment Tribunal (in public; by video)

On: **27 August 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr T Perry counsel (1)
Mr A Crow, employee (2)

RESERVED JUDGMENT

(1) All of the complaints against each respondent were presented outside the applicable time limit. No extension is granted all the complaints are dismissed.

REASONS

Introduction

1. I apologise to the parties for the lateness of this decision.

2. The Claimant was an agency worker who, at relevant times, was supplied by the Second Respondent to work for the First Respondent. This was a preliminary hearing to consider time limit issues.

The Claims

3. As set out more fully in my record of the preliminary hearing of 30 March 2020, the Claimant's claims were for direct discrimination because of race, direct discrimination because of disability, failure to make reasonable adjustments, discrimination arising from disability, failure to provide (or pay in lieu for on termination) annual leave entitlement, unauthorised deduction from wages.

The Issues

4. The list of issues was agreed between the parties at the preliminary hearing of 30 March 2020 and set out in my record of that hearing. For the public preliminary hearing on 27 August 2020, the issues for me to consider were whether the claims and complaints were brought within the relevant time limit and, if not, whether time should be extended.

5. That in turn gave rise to sub-issues:

    5.1 For each complaint, and for each respondent, what was the date of the act or omission complained of (or the latest in a series, or the end of a continuing act, as the case may be)

    5.2 What were the dates of Early Conciliation?

    5.3 For each complaint, and for each respondent, what was the date on which the time limit (as extended by early conciliation) expired

    5.4 On what date or dates was the claim presented (against each respondent and for each complaint)

    5.5 For each complaint, if the claim was presented out of time, then (a) what is the applicable legal test for whether time should be extended and (b) should time be extended?

The Hearing

6. The hearing took place fully remotely via video. The parties had each consented to this. At the very beginning of the hearing there were some minor connection difficulties for Mr Crow and a slight delay in getting the Claimant's camera to work. Other than that, the hearing proceeded without technical difficulties.

7. Up until around 11:05am, there was a preliminary discussion about the purpose of the hearing and ensuring that I and each of the parties had the same documents.

8. During this time, it became apparent that the bundle which I had received from the First Respondent's solicitors did not match the one which Mr Perry had. The Claimant had copies of the items which were missing from my version. It seemed that the documents had been kept out of my version of the bundle in case the items were documents over which the Claimant – a litigant in person – could properly assert legal advice privilege and/or litigation privilege. They included communications between the Claimant and her former solicitors.

9. I explained to the Claimant that she potentially had the right to keep these documents confidential from the respondents (who had already seen them) and from me. I explained that if she wanted to rely on them as evidence then she could do so, but that would potentially mean that she was waiving privilege over other communications between herself and her legal advisers, meaning that she could be compelled to disclose additional items. The Claimant understood the explanation and confirmed that she wished to rely on the items. It was therefore agreed that Mr Perry would email me a full copy of the bundle, including the items

over which the Claimant could have asserted legal professional privilege. There was also some without prejudice material, and Mr Crow made clear that the Second Respondent did not waive privilege, and therefore that material remained redacted.

10. It also became apparent that the Claimant had not prepared a specific written statement for today's hearing (as required by para 10.1 of my orders from the 30 March hearing). She told me that she had prepared an impact statement. My orders of 30 March (paragraph 7.5 required that to be done by 30 June), but the Claimant believed she had sent it to tribunal around 9 March. I gave her permission to email that impact statement to me.

11. We then broke until 11.30am for the documents which had been identified to be circulated. From just after 11.30am to just after 12:50pm, the Claimant gave oral evidence by answering my questions, and then being cross-examined by each respondent.

12. During the Claimant's cross-examination it became apparent that the Claimant had received a potentially important email from her solicitors dated 19 March 2020. (She had disclosed a later communication from her solicitors which referred to the 19 March item, but not the original). The Claimant attempted to find the item in her email inbox during cross-examination (and, with my permission, her husband attempted to help her find it). However, it could not be located at that time. I said that we would break for lunch and I ordered the Claimant to make a further attempt to find the missing item, and any other correspondence from her solicitors dealing with issuing the claim or advice on time limits. During the lunch break, she found the item and emailed it to me along with some other items. By the time we started again at 2pm, each respondent's representative had these items and neither I nor either representative thought it necessary to recall the Claimant to give further witness evidence about these newly disclosed documents.

13. I then heard submissions. I informed the parties that I would reserve my decision.

The Evidence

14. There was a bundle from the First Respondent and a bundle from the Second Respondent. During the hearing, I received a copy of email from the Claimant sent to tribunal on 4 March 2020 (which had previously been sent to the respondents). This had the subject heading "impact statement" and focused on the Claimant's (alleged) medical conditions. I took this item into account. It did not deal directly with the dates on which the claim was issued or the reasons for any delay.

15. Within the First Respondent's bundle, there were emails from the Claimant to the other parties giving an account of why the claim was issued when it was. I took those items into account as well as Claimant's oral evidence on oath. There were no witnesses other than the Claimant.

The findings of fact

16. The Claimant was supplied to the First Respondent ("the College") by the Second Respondent ("the Agency"). The Agency alleges that there was no contract of employment between it and the Claimant, but I do not need to make a finding about

that for present purposes. The Claimant worked for the College as an agency worker, and not as the result of any direct contract between the Claimant and the College. The College did not have any contractual responsibility to make any payments to the Claimant for wages or holiday pay. The Agency was responsible for making all and any payments to the Claimant.

17. The assignment ended on 8 November 2018. The exact details of what happened are not agreed between the parties. The previous day (7 November 2018), the Claimant informed the Agency that she would not be continuing at the College because of allergic reactions. Whether that was because of decisions made by the Claimant or decisions made by the College is potentially in dispute; either way, the Claimant was at the work location only until 1.30pm on 8 November 2018, at which point the assignment ended.

18. Acts of discrimination are alleged to have happened on 8 November 2018 in that the Claimant says that her assignment was terminated that day, and the termination was an act of direct race discrimination and/or direct disability discrimination. She also alleges that a requirement to work in a confined space in proximity to persons wearing leather continued until that day.

19. On 30 November 2018, the Claimant received the payment for the whole of 8 November 2018 (rather than just the hours up to 1.30pm). On the Agency's case, that meant that she had been paid everything that she was entitled to, including a sum in lieu of holiday. On the Claimant's case, there was a shortfall in that she was not paid for holiday. She also alleges that the payment in respect of 8 November 2018 ought to have been made sooner.

20. The Claimant had a legal expenses insurance policy. Via her insurer, she appointed solicitors who were to advise her and who were also to assess the prospects of success so that the insurer could decide if her policy cover would include issuing proceedings.

21. Around Christmas/New Year, the Claimant had some time away from home, but was back by early January. On 8 January 2019, she signed the forms to confirm instructions to the solicitor. The form that she signed advised her that there was a time limit to bring claims "subject to first going through the ACAS Pre-Claim process". The form also stated that it appeared the time limit would be 7 February 2019 in the claimant's case.

22. The effect of the initial agreement between the Claimant and her solicitors was that the solicitors made clear that they would not necessarily issue proceedings on her behalf. There was to be a later discussion between the Claimant and her solicitors before a decision was made to issue proceedings, and before a decision was made as to whether the solicitors would do that for her or not.

23. On 7 February 2019, the solicitors commenced ACAS early conciliation in relation to the College. The name and address appear to have been correct. In due course, ACAS issued a certificate to the solicitors by email on 7 March 2019. The reference number was R115974/19/51. The solicitors sent this certificate to the Claimant by email on 19 March 2019. I will call this "the College Certificate".

24. On 7 February 2019, the solicitors sought to commence ACAS early conciliation in relation to the Agency. The name appears to have been slightly incorrect in that the name "Morgan Hunt" was used, rather than the fully correct name "Morgan Hunt UK Ltd". In due course, ACAS issued a certificate to the solicitors by email on 15 February 2019. The reference number was R116005/19/63. The solicitors sent this certificate to the Claimant by email on 19 March 2019. I will call this "the First Agency Certificate".

25. Based on the documents before me, someone sought to commence ACAS early conciliation in relation to the Agency on 15 February 2019, this time correctly using the name "Morgan Hunt UK Limited". This document was in the bundle prepared by the respondents. In evidence, the Claimant stated that she had not previously noticed that there were two certificates for the Agency. She was unable to say when, or if, she received this later certificate. Based on the other evidence, I am satisfied that on or around 15 February 2019, the Claimant's solicitors became aware of the Second Respondent's correct formal name. As a result, there was a termination of the early conciliation that had used the name "Morgan Hunt" and the solicitors and ACAS acted on the assumption that a new early conciliation in relation to "Morgan Hunt UK Limited" had commenced. On 15 March 2019, by email, ACAS issued a certificate with reference R119214/19/88 to the Claimant's then solicitors. I will call this "the Second Agency Certificate".

26. The Second Agency Certificate was not attached to the email of 19 March 2019 sent to the Claimant by her solicitors. During the hearing the Claimant disclosed an email dated 10 June 2019 sent to her from her former solicitors but without including the attachments. My finding, based on the wording of the solicitors' covering email, is that, on 10 June 2019, the solicitors sent again the same attachments that were attached to the 19 March 2019 email.

27. Thus, a copy of the Second Agency Certificate was not attached to either the 19 March 2019 email or the 10 June 2019. On the balance of probabilities, my finding is that it was not sent to her by the solicitors at all, and the Claimant did not see it until disclosed by the Second Respondent during this litigation.

28. On Tuesday 19 March 2019, the Respondent's then solicitors sent an email to her. It was stated to be confirmation of information which had previously been given orally to the Claimant "last week" (so some day between Monday 11 March 2019 and Friday 15 March 2019 inclusive).

    28.1 The attachments to the email were the College Certificate and the First Agency Certificate and those two items only.

    28.2 The email stated that the insurer would not pay for any further work and that the Claimant would either have to instruct the firm privately or act as a litigant in person.

    28.3 The email informed the Claimant that her medical conditions (allergies and eczema) could potentially amount to disability under the Equality Act and the termination of her assignment could potentially constitute direct discrimination. It also referred to the possibility of a claim for failure to make reasonable adjustments.

28.4 The email also discussed potential complaints of race discrimination.

28.5 The email contained a fairly lengthy discussion of early conciliation. Based on my findings of fact above, the email omitted some potentially relevant information in that it failed to discuss the fact that, for the Second Respondent, there were two certificates, with different respondent names, different certificate numbers and different dates of issue.

28.6 The email stated that "*The initial period for the EC was due to end on 7 March 2019 although the ACAS conciliator has the discretion to extend the period by two weeks if both parties agree. I therefore understand that the college and/or agency were not willing to enter into negotiations and the conciliator therefore issued the EC Certificate to confirm that the EC period was over*." Immediately after that, in a new paragraph, it continued, "*I attach the EC certificates for your records and you shall need to include the EC Certificate number in any employment tribunal application you make*." Thus the email did not contain any explicit statement about the date on which early conciliation ended for each respondent though it did attach a certificate for each respondent, and each certificate contained a date of issue (7 March 2019 for the College Certificate, and 15 February 2019 for the First Agency Certificate).

28.7 The email continued: "*As advised when we spoke on the telephone last week, now that EC is over, you have a limited time period to submit your employment tribunal application. While there are limited circumstances in which you can ask for this deadline to be extended, if you are going to pursue a claim I recommend that you send your claim form (known as an ET1 form) to the tribunal immediately and certainly by 6 April 2019 at the latest. If your ET1 is not received by the tribunal in time, it is very unlikely that you will be able to pursue any claims. As you may be aware, the government no longer charges fees to bring a claim in the employment tribunal*."

28.8 It then contained some accurate information about the process for issuing a claim and concluded: "*Assuming you are not in a position or indeed do not wish to continue instructing Hansells on a private paying basis, my next step will be to notify ACAS that we are not acting for you any longer and ask them to correspond with you directly*".

29. The Claimant did not instruct the firm privately. There was some discussion between the Claimant and ACAS after 19 March 2019, although the Claimant was not able to recall the precise details. The Claimant has not disclosed any email from ACAS supplying her with a copy of the Second Agency Certificate. The Claimant had not realised, until I pointed it out to her, that there were two certificates for the Agency.

30. The email of 19 March 2019 from the Claimant's solicitors made clear that even if settlement negotiations continued then (a) there was a specific deadline for a claim to be issued and (b) that the solicitors would not be issuing the claim.

31. On 8 April 2019, the Claimant submitted a claim form to the tribunal. There was no medical reason that the claim could not have been presented on the date suggested by the solicitor (6 April 2019). The issue of whether or not the Claimant

has a disability has not been resolved; however, the alleged disability did not prevent the Claimant submitting the claim form sooner, or make it difficult for her to do so.

32. In giving her evidence, the Claimant was unable to suggest any particular reason that the claim form could not have been submitted earlier other than:

    32.1 That her solicitors had been supposed to submit the claim. My finding is that the Claimant knew from no later than 19 March that they were not doing so.

    32.2 That ACAS and/or her solicitors were carrying out some investigation. My finding is that the Claimant knew from no later than 19 March that her solicitors were not still investigating the merits of her claim. Privilege in relation to without prejudice communications has not been waived by the respondents. However, even if the Claimant was hypothetically waiting for some information from her solicitor or ACAS in relation to without prejudice communications, my finding is that she had been told by no later than 19 March that her claim should be submitted by 6 April 2019 or else it would be out of time.

    32.3 That there was a delay in relation to one of the ACAS certificates.

33. The 8 April 2019 claim form was referred to Regional Employment Judge Wade who found that there were two defects (one for each respondent) and the claim was rejected for both respondents.

    33.1 In the first space for details of the intended respondent, the Claimant had not included the name of the College, but had instead used the name of an individual employee of the College. She did accurately include the certificate number from the College Certificate. However, the name of the respondent on that certificate did not match that on the claim form.

    33.2 The defect for the other respondent was that no different certificate number was included, but rather R115974/19/51 (the number from the College Certificate) was repeated. That number, of course, did not match an Early Conciliation Certificate using any variant of the Second Respondent's name.

34. In fact, the name that was actually used on the 8 April 2019 for the intended second respondent, was "Morgan Hunt Agency". That precise name did not match either the First Agency Certificate or the Second Agency Certificate, but the lack of a match to those certificates was not one of the reasons that the claim was rejected, as REJ Wade had not – at that stage – seen either the First Agency Certificate or the Second Agency Certificate.

35. Following correspondence from the Claimant, REJ Wade decided that the decision to reject the claim had been correct. That decision was communicated to the Claimant by letter dated 28 June 2019. On 2 July 2019, the Claimant sent an email to the tribunal naming the College as the intended respondent for Box 2.1, and attached the two early conciliation certificates which the Claimant had received from her solicitors on 19 March 2019 (which I have found were the same documents that she received from them again on 10 June 2019). In other words, she attached the College Certificate and the First Agency Certificate.

36. On 31 July 2019:

    36.1 The Claimant received permission to amend her claim so that the First Respondent would be "Westminster Kingsway College". REJ Wade's decision was that the claim against the First Respondent had been validly presented on 2 July 2019.

    36.2 The Claimant was asked to explain why her form stated R115974/19/51 as the number for the second respondent, but she had supplied, on 28 June, a certificate (the First Agency Certificate) bearing number R116005/19/63.

37. On 1 August 2019, the Claimant replied to state that R116005/19/63 was the correct number for the Second Respondent and asked for permission to amend her claim to reflect that. By letter dated 29 November 2019, the tribunal informed the Claimant that this second amendment request had been granted, and the claim form was treated as including certificate number R116005/19/63 for the Second Respondent. REJ Wade's decision was that the claim against the Second Respondent was accepted and that it was validly presented on 1 August 2019.

38. The matter came before me at a preliminary hearing on 30 March 2020. Up to that hearing, the Second Respondent's name was still being treated as "Morgan Hunt Agency". At that hearing, by consent, permission was given for the name to be amended to Morgan Hunt UK Ltd.

39. My finding is that the Claimant did not receive a copy of the Second Agency Certificate either from ACAS or from her former solicitors. However, if I am wrong about that, and she did receive it at some stage, she placed no reliance on the document (and, indeed, did not realise that it was a different document to the First Agency Certificate, which she had received on 19 March 2019). The existence or content of the Second Agency Certificate did not motivate the Claimant or affect any decisions which she made.

40. I do not have enough information to come to any detailed view of the merits of any of the claims. However, I take account of the following.

    40.1 The unauthorised deduction claim and the working time regulations claim cover the same dispute. The Agency says the correct amount has been paid, and the Claimant asserts otherwise. It is likely to be a simple matter of arithmetic, but I do not have enough information to form any view.

    40.2 In relation to the disability discrimination claims, the Second Respondent points to contemporaneous documents in which the Claimant did not refer to the alleged disability. I have seen no medical evidence, but if the facts stated in the Claimant's impact statement are true, then there is a good chance that she would establish that she is a disabled person.

    40.3 In relation to the race discrimination complaints, the Claimant suggests that there are relevant comparators who have disabilities and who received more favourable treatment than she did because of race. It does not seem to be allege that the comparators had identical medical conditions to the Claimant's or that they received the adjustments that the Claimant says should have been made for her.

40.4 There are very significant factual disputes about what the Claimant said (and when) to other people about her medical conditions.

40.5 In summary, the reasons put forward by the respondents for their treatment of the claimant do not, on the face of it, lack plausibility. It does not follow that the Claimant could not succeed, of course. The whole point of trials is to test the evidence and, in discrimination cases, it is important not to simply take the respondents' explanations at face value. However, on the basis of the very limited information available to me, I was not persuaded by the Claimant that self-evidently strong claims against either respondent.

The Law

41. A claim should be presented

41.1 within three months of the date of the act or omission for an alleged breach of the Equality Act. See section 123 Equality Act 2010.

41.2 within three months of the date of the last in a series of deductions from wages. See section 23 Employment Rights Act.

41.3 within three months of the date on which payment should have been made in relation to any failure to pay for leave, or in lieu of leave. See regulation 30 of the Working Time Regulations 1998.

42. In each case, the time limit is potentially extended by the requirement first to approach ACAS with an early conciliation request. Time is extended by stopping the clock for the period of conciliation. Where (even after the extension just mentioned) there is less than a month between the date of issue of the early conciliation certificate and the date by which the claim would have to be submitted, there is an automatic extension to one month from the date of the certificate.

43. The tribunal may extend time in discrimination cases if it considers it just and equitable to do so. There is no presumption in favour of extending time, and the burden is on the Claimant to show that it would be just and equitable to do so. Extensions of time remain the exception and not the rule. A tribunal can take into account the multiple factors under section 33 Limitation Act 1980, including the length of, and reasons for, the delay, but those factors do not place a limitation on the tribunal's broad discretion.

44. For the wages claim and the working time regulations claim, the tribunal can only extend time where it is satisfied both (i) that it was not reasonably practicable for the Claimant to comply with the time limit (taking into account the applicable ACAS early conciliation extension) and (ii) that the claim was submitted within a reasonable time thereafter. When a claimant argues that it was not reasonably practicable to present the claim within the time limit, there are questions of fact for the tribunal to decide in order to decide whether it was reasonably practicable or not. The onus of proving it was <u>not</u> is on the claimant. The phrase "not reasonably practicable" should be given a liberal interpretation in favour of the Claimant. If the tribunal is satisfied that it was not reasonably practicable to present the claim within the time limit, then it is necessary to consider whether the period between the expiry of the time limit and the eventual presentation of the claim was reasonable

in the circumstances. This does not necessarily mean that the Claimant has to act as fast as would be reasonably practicable.

45. If an error of a firm of solicitors causes, or contributes to, a time limit being missed then

45.1 For the reasonable practicability test, an error of the solicitors can potentially be treated as if it was an error of the claimant. As discussed in ***Wall's Meat Co Ltd v Khan 1979 ICR 52, CA***, ignorance or a mistaken belief will not be reasonable if it arises either from the fault of the complainant or from the fault of her solicitors in not giving her such information as they should reasonably (in all the circumstances) have given to her.

45.2 For the just and equitable test, the fact that an error was made not by the claimant, but by her advisers, is one of the factors that can be weighed when considering whether to extend time. The fact that – if time were not extended – a claimant might have a remedy against the solicitors does not imply that the solicitors' error cannot be a good enough reason to grant an extension.

46. In accordance with the Employment Tribunal Rules of Procedure, the effect of Rules 12(1)(f) and 12(2A) is that a claim shall be rejected if the name of the respondent on the ACAS certificate and on the claim form do not match, unless the judge thinks that the Claimant made a minor error and that it is not in the interests of justice to reject the claim form.

47. The early conciliation certificate provisions do not allow for more than one certificate of early conciliation per respondent per "matter" to be issued by ACAS. If more than one such certificate is issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. Thus if a second later certificate is relied upon by a claimant (as extending a limitation period) then the judge would have to decide if either the respondent or the "matter" was different to that to which an earlier certificate related.

Analysis and Conclusions

College – Discrimination Claims – time limit

48. Based on the issues identified on 30 March 2020, all of the complaints against the College are allegations of breaches of the Equality Act. There is no alleged act or omission taking place after 8 November or continuing after 8 November 2018. Thus, the clock starts on 8 November 2018 and – but for early conciliation – would end on 7 February 2019. The time limit clock remained frozen from 7 February 2019 to 7 March 2019. 7 March 2019 is "Day B" in relation to the College, within the meaning of Section 140B of the Equality Act 2010. By virtue of section 140B(4), the time limit expired one month after Day B, which is 7 April 2019.

49. Thus, in relation to all the complaints against the College, the claim form was submitted to the tribunal one day after the expiry of the time limit. Of course, as mentioned above, the claim form that was submitted on 8 April 2019 was rejected and the claim against the College was not validly presented until 2 July 2019. Therefore, it is necessary to consider whether time should be extended.

Agency – wages claim and holiday claim – time limit

50. In relation to the Agency, it made a payment to the Claimant on 30 November 2018. The Claimant alleges that that payment contains an unauthorised deduction and/or that it failed to contain a proper payment in lieu of holiday entitlement. Thus, the clock starts on 30 November 2018 and– but for early conciliation – would end on 28 February 2019.

51. In my judgment, the Second Agency Certificate is not relevant when calculating the expiry of the limitation period.

    51.1 It was the First Agency Certificate that was relied on by the Claimant when seeking to have her claim accepted. She received permission to amend her claim so as to include the number from the First Agency Certificate.

    51.2 Although the claim form used "Morgan Hunt Agency" as the respondent name, that did not cause any delay in the acceptance of her claim.

    51.3 The Claimant has never sought an amendment of the claim to use the certificate number from the Second Agency Certificate. If she did make such a request, then, even it were granted, that would not backdate the presentation date to any date earlier than 1 August 2019.

    51.4 For the sake of completeness, if the Second Agency Certificate were to be relevant when calculating the expiry of the limitation period, then the clock would have frozen from 15 February to 15 March 2019. However, because less than one month of the 3 month period would remain when the clock was unfrozen, then the time limit (based on the Second Agency Certificate) would have been one month after 15 March 2019, namely 15 April 2019. Thus, the defective claim form would have been presented 7 days before that time limit.

    51.5 However, even a claim that relied on the Second Agency Certificate for an extension of the time limit would have been presented out of time. The form submitted on 8 April 2019 would have still have been defective because it did not include the ACAS conciliation number from the Second Agency Certificate. That defect was not corrected any time earlier than 1 August 2019. The issue had not been raised prior to the preliminary hearing of 27 August 2020.

    51.6 For these reasons, the issue about whether the Second Agency Certificate is a nullity does not have to be determined.

52. In my judgment, only the First Agency Certificate is relevant. It caused the clock to stop for 8 days. Day B for the Agency was 15 February 2019. The extension until 8 days after 28 February 2019 would have led to the time limit expiring less than a month after Day B. Therefore, the actual time limit for the agency expired one month after Day B, namely 15 March 2019.

53. Thus it will be necessary to consider whether time should be extended for these claims against the Agency in all the circumstances, including the fact that the time limit (in my judgment) expired before the Claimant received the 19 March 2019 email from her solicitors.

Agency – Equality Act claims – time limit

54. Based on the issues identified on 30 March 2020, all of the Equality Act claims against the Agency relate to alleged acts or omissions taking place no later than 8 November 2018. Thus, the clock starts on 8 November 2018 and – but for early conciliation – would end on 7 February 2019. Due to the existence of the First Agency Certificate, the revised time limit would expire on 15 March 2019, one month after Day B.

55. For completeness, if the allegations of shortfall in payment, or delay in payment were treated as alleged acts of discrimination (and such allegations are included in the list of issues produced on 30 March) then the time limit for the Equality Act claims would still be 15 March 2019.

Reasonable Practicability

56. In my judgment, it was reasonably practicable for the complaints of unauthorised deduction from wages and of breach of working time regulations to have been presented by 15 March 2019. It was the solicitors who originally commenced early conciliation using the respondent name "Morgan Hunt" and who later commenced (or purported to commence) early conciliation using the name "Morgan Hunt UK Ltd". The solicitors received the relevant certificate on (or shortly after) 15 February 2019, and they were able to email it to the Claimant on 19 March 2019.

57. My finding was that the solicitors did not supply the Claimant with the Second Agency Certificate. (This is a finding on the balance of probabilities, and without having heard from the solicitors, and is made for the purpose of deciding the issues before me only, and not for any other purpose.) However, the advice which they gave to the Claimant appears to have been on the assumption that the end date of early conciliation, as per the Second Agency Certificate, was the relevant date when calculating a revised time limit. Of course, if someone (whether the Claimant in person, or anyone on her behalf) had submitted a claim after 15 March 2019, but no later than 15 April 2019, and had accurately included the number from the Second Agency Certificate, then different legal issues may have arisen. That might have led to the need to decide if the early conciliation from 15 February 2019 to 15 March 2019 in relation to named respondent "Morgan Hunt UK Ltd" validly extended the time limit in circumstances in which there had been earlier conciliation in relation to named respondent "Morgan Hunt". However, that is not what happened. It would, however, have been reasonably practicable for the solicitors to supply the Claimant with the Second Agency Certificate by no later than 19 March 2019 (and, indeed, by no later than Monday 18 March 2019, even assuming the solicitors received it from ACAS after close of business on Friday 15 March 2019). It would therefore have been reasonably practicable for a claim to have been presented on or before 15 April 2019 which used the number from the Second ACAS certificate. This did not happen and no such claim was presented.

58. I have also considered whether the claim was presented within a reasonable period of time after 15 March 2019. In my judgment, it was not. If (contrary to my actual decision), I had decided that it had not been practicable for the claim to be presented by 15 March 2019 then I would have decided that presentation on or before 6 April 2019 was within a further reasonable period in all the circumstances,

given that that was the date which the solicitors said should be the latest submission date. (They did, in fact, recommend doing it "immediately" as of 19 March 2019.) Extending the time limit to 7 April or later would not have been reasonable in this case, because it would have been unreasonable for the Claimant to miss the deadline which her solicitors mentioned to her.

Just and Equitable – College

59. The claim was validly presented on 2 July 2019, as opposed to the actual time limit of 7 April 2019. In other words, the claim was slightly less than 3 months late. Of course, the actual attempt to present the claim, on 8 April, was only one day late. In my judgment, the Claimant acted reasonably promptly when replying to the tribunal about the rejection of her claim against the College. The fact that it took until 2 July to correct the defect owed more to the time taken by the tribunal to complete the administrative steps, than it did to delays by the Claimant. That being said, the claim form presented on 8 April 2019 was defective. Thus, this is not a case of a valid claim being one day late. It is a case of an attempt to claim being one day late, and still not being valid even then.

60. In relation to the College, there was no error of any adviser causing the claim to be late. If the Claimant had issued the claim on or before 6 April 2019 (as per the 19 March 2019 advice) she would have been in time. The Claimant is solely responsible for both (i) the fact that no attempt to submit the claim form was made until 8 April and (ii) the fact that claim form did not contain the name of the proposed (first) respondent in Box 2.1. In fact, the correct name of the proposed (first) respondent could not accurately be deduced even from the particulars of claim that were attached to the ET1 (though it is true to say that the names of some centres operated by the First Respondent are mentioned in those particulars).

61. The College accepted that no relevant witnesses had become unavailable. Given the nature of the allegations, it seems unlikely that there would be much by way of relevant documents, but there is no particular reason to think that any such documents as still existed in early April would have been destroyed by early July. There seems to be some difficulty in identifying the individuals whom the Claimant wishes to rely on as comparators. The passage of time (and particularly the fact that the claim was validly presented late in the academic year) will make it slightly more difficult to determine which persons were working at the same time as the Claimant. I do not think the task will be impossible, given the College's recordkeeping obligations.

62. In my judgment, there was no information or documents that was in the exclusive possession of the Respondent, that was relevant to the solicitors' assessment of the merits of the claim. While I am aware that ACAS early conciliation took place, I am not aware of any other requests for the College to supply information to the Claimant's solicitors. In any event, the solicitors had enough information to advice the Claimant and/or the insurers on the merits of the claim prior to 19 March 2019.

63. The Claimant seems to have acted reasonably promptly to seek advice after 8 November 2018. I was not given details of when she first contacted her insurers, or when she was first put in contact with the solicitors. However, given that the retainer was signed on 8 January 2019, and the fact the Claimant spent some time

away from home, I do not think there was an unreasonable delay. In any event, any delay between 8 November 2019 and 8 January 2019 was not the cause of the claim's being submitted late.

64. The Claimant does not have a good reason (or, at least, was not able to suggest one to me) for failing to follow up on the advice given to her on 19 March 2019. Had she acted reasonably after 19 March, she would have been able to submit a claim form on or before 7 April 2019.

65. The Claimant – having obtained legal advice – does not have a good reason for failing to put the (first) respondent's name correctly on Form ET1. The correspondence with the solicitors made it clear that it was the College, not an individual, who would be the respondent. Since the Claimant put the early conciliation number in the ET1, she did have the ACAS certificate – correctly stating the identity of the organisation – to hand.

66. If time is not extended, then the Claimant will be prejudiced as the merits of her claim will not be further considered meaning that she would not have a remedy if there had, in fact, been breaches of the Equality Act. If claim is extended, then the prejudice to the Respondent would be that it would incur the expenses of defending the claim, regardless of whether there was merit in the claim or not. Managers and witnesses would need to spend time in preparation of the defence rather than on other duties.

67. If time is not extended, the Claimant would not gain something of value (the right to purse the claims against the First Respondent) and the Respondent would have the benefit of not having to defend the claims. If time is extended, the Respondent would lose something of value (the opportunity to simply rely on a time limit defence, without having to prepare documents and witness testimony on the substantive issues) and the Claimant would have the benefit of being able to pursue the claims and have the merits determined by a full tribunal panel.

68. Taking all of the above into account, I am not persuaded that it would be just and equitable for me to exercise my discretion to extend time from 7 April 2019 to 2 July 2019 for the complaints against the College. While it is true that this means that the Claimant is losing the ability to purse the claim, that is true of any person whose claim is presented late and who is not granted an extension of time. I am not persuaded that there is anything about the Claimant's own particular circumstances which means that the extension should be granted in relation to her claims against the College about the termination of the assignment, the failure to make adjustments or discrimination arising from disability.

Just and Equitable – Agency

69. The claim was validly presented on 1 August 2019, as opposed to the actual time limit of 15 March 2019. In other words, the claim was around four and a half months late. The defective attempt to present the claim, on 8 April, was about three and a half weeks late.

70. As discussed above, I have decided (for the purposes of deciding the issues before me) that there were some errors by the Claimant's solicitors.

70.1 They failed to supply the Second Agency Certificate to the Claimant. Had they done so, she could have submitted a claim using the number from that certificate and potentially argued for a later limitation date (of 15 April 2019).

70.2 They failed to identify the correct limitation date. They stated 6 April 2019 instead of 15 March 2019.

70.3 When they gave the Claimant written instructions about issuing a claim (on 19 March), the limitation date had expired (although some of the information had been conveyed orally the previous week).

71. I make the following observations about those errors.

71.1 For the first of these errors:

71.1.1 Since the Claimant failed to input the number from the First Agency Certificate onto the ET1 submitted on 8 April, there is no reason to think that she would have correctly input the number from the Second Agency Certificate even if she had had it.

71.1.2 The fact that the Claimant did not state the name "Morgan Hunt UK Ltd" on the form did not cause a rejection of the form, or a delay in acceptance.

71.1.3 The Claimant did not delay submission of the (8 April) ET1 (or the submission of any later correspondence to tribunal) while waiting on receipt of the Second Agency Certificate, as she does not seem to have been alerted to its existence (and did not mention its existence in the ET1 or subsequent correspondence with the tribunal).

71.2 For the second of these errors, the Claimant did not submit the claim by 6 April 2019.

71.3 For the third of these errors, there is potentially a just and equitable reason for time to be extended to some date later than 15 March 2019, given that the Claimant was not told about that limitation date by her solicitors. However, the issue I have to decide is whether an extension should be to 1 August 2019.

72. The Claimant did not delay unreasonably when answering any of the correspondence sent to her by the tribunal. However, the tribunal had to write to her more than once before she specified what the early conciliation number for the Agency should be.

73. The Agency still has some relevant documents and witnesses available to it.

74. The Claimant did not delay in seeking advice. That advice was provided to her in March 2019. The advice in relation to the limitation date for a claim Agency was late, but that was not the fault of either the Claimant or the Agency. Once she did have the advice (by 19 March 2019 in writing, following earlier oral advice), the Claimant did not act on it promptly.

75. The discrimination claims against the agency do not appear to be strong. Documents exist in which the Claimant informed the Agency that she did not have a relevant disability, which will be relevant to the issue of what the Agency knew, and when. For the race claim, it is the College which allegedly treated the alleged comparators differently, and if the Agency did not (as they claim) know that the Claimant had a disability, then a failure to liaise with the College about the Claimant's (alleged) disability cannot have been because of race.

76. If time is not extended, then the Claimant will be prejudiced as the merits of her claim will not be considered meaning that she would not have a remedy if there have been breaches of the Equality Act. If time is extended, then the prejudice to the Respondent would be that it would incur the expenses of defending the claim, regardless of whether there was merit in the claim or not. Staff would be spending time in preparation of the defence rather than on other duties. Although it is possible that the Claimant's complaints could succeed, based on the available information, her discrimination claims against the Agency appear to be weak.

77. Taking all of the above into account, I do not exercise my discretion in the Claimant's favour. It is not just and equitable for time to be extended for the Equality Act complaints against the Agency until 1 August 2019. While it is true that this means that the Claimant is potentially losing something of value (the right to purse the claim) that is true of any person who is not granted an extension of time. My decision is that, in all the circumstances, an extension to 1 August should not be granted for claims against the Agency about the termination of the assignment, the failure to make adjustments or discrimination arising from disability.

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Employment Judge Quill

Date: 1 December 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/12/2020

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FOR EMPLOYMENT TRIBUNALS