# EMPLOYMENT TRIBUNALS

**Claimant:** Miss J Cammish

**Respondent:** Secretary of State for Justice

**Heard at:** Manchester (in private) **On:** 14 September 2020
18 November 2020
(In Chambers)

**Before:** Employment Judge Holmes sitting alone

**Representatives**
For the claimant: In person
For the respondent: Mr J Hurd, counsel

# JUDGMENT ON PRELIMINARY HEARING AND ON RECONSIDERATION

It is the judgment of the Tribunal that :

**A.Reconsideration of the Tribunal's judgment of 16 March 2020, sent to the parties on 8 July 2020.**

The claimant's application for reconsideration of this judgment is refused, and the judgment and orders made stand, save appears below.

**B.Determination of whether the pre – 2017 claims were presented out of time, and, if not whether it would be just and equitable to extend time for their presentation.**

The pre - 2017 claims were presented out of time, and it would not be just and equitable to extend time for their presentation. They are dismissed.

**C. Determination of whether the two remaining post – 2017 claims were presented out of time, and, if not whether it would be just and equitable to extend time for their presentation.**

Claims no 1, in so far as they relate to the alleged delay by Joanne Town in progressing the claimant's IAW application between August 2016 and August 2017, and claim no. 2 , in so far as they too relate to any alleged delay occasioned by Joanne Town in the initial decision upon the claimant's IAW application of the post -

2017 allegations were presented out of time, and it would not be just and equitable to extend time for their presentation. They are dismissed.

**D.Application to amend the claims to add new claims.**

None of the claimant's claims remaining before the Tribunal, there are no claims to amend, and the Tribunal does not consider the claimant's application of 7 November 2019 to add any further claims.

# REASONS

1.This preliminary hearing was listed following the previous preliminary hearing held on 16 March 2020 , at which the Tribunal made Orders, sent to the parties on 8 July 2020, whereby the Tribunal struck out all but two of the claimant's post – 2017 claims on the grounds that they had no reasonable prospects of success. The Tribunal proposed to make deposit orders in respect of these two claims.

2.The Tribunal on that occasion did not consider the rest of the claimant's claims which pre-date 2017, and consequently this hearing was convened to consider:

a) whether or not it is reasonably arguable that the pre-2017 allegations formed part of an act extending over a period including any post-2017 allegations which are permitted to proceed after this preliminary hearing , or payment of any deposit(s) ordered;

b) In respect of any alleged discrimination or victimisation occurring before 21 March 2019, to consider whether or not it would be just and equitable to extend the time limit;

c) If the Tribunal has jurisdiction to consider the whole or part of the claim as set out in the original claim form, to consider the claimant's application to amend her claim to introduce the allegations set out in the further particulars;

d) To clarify any complaints that are permitted to go forward to a final hearing and to identify the issues in relation to those complaints;

e) To consider the time allocation ,case management , and timetable for the final hearing.

3.The Tribunal also directed that the claimant , if she was to seek the exercise of the discretion to extend time on the grounds that it would be just and equitable to do so, as to make and serve upon the respondent a witness statement addressing the factors that the Tribunal would be likely to consider in relation to that application.

4.By email of 21 July 2020 the claimant sought reconsideration of the Tribunal's previous judgment.

5.The claimant complied with the Tribunal's orders for this hearing by preparing a witness statement , running to 28 pages, and signed and dated 6 September 2020. She appended to it a Time Line summary , two earlier Witness Statements from her of 6 January 2020, and 54 pages of medical evidence.

6.The claimant appeared again in person, and Mr Hurd of Counsel again appeared for the respondent. The respondent did not submit any further documents for this hearing. The Tribunal utilised the respondent's bundle from the previous hearing , again referred to by the denomination "R" in referring to pages numbers, and references to the claimant's bundle will be similarly denoted (but this will be to the bundle she has produced for this, and not the last, hearing).

7.It was agreed that the Tribunal would hear the application that was listed, and would also deal with the claimant's reconsideration application in one judgment.

***The reconsideration application.***

8.It is logical first to consider the claimant's application for reconsideration of the previous judgment and orders, made on 16 March 2020, sent to the parties on 8 July 2020.

9.That judgment provided:

*1.Save for the claims referred to as claim no 1, in so far as they relate to the alleged delay by Joanne Town in progressing the claimant's IAW application between August 2016 and August 2017, and claim no. 2 , in so far as they too relates to any alleged delay occasioned by Joanne Town in the initial decision upon the claimant's IAW application, the post -2017 allegations are struck out pursuant to rule 37(1)(a) of the 2013 rules of procedure on the grounds that they have no reasonable prospect of success.*

*2The Tribunal is considering making a deposit order in respect of those remaining post – 2017 claims, on the grounds that they have little reasonable prospects of success.*

*3.The claimant , if she wishes the Tribunal to take into account her ability to pay, before making any deposit order shall by* ***3 August 2020*** *provide the Tribunal, and copy to the respondent, any financial information as to her assets, income liabilities and means.*

10. Thus the Tribunal struck out most of the claimant's post-2017 claims, and proposed to make deposit orders in respect of the two remaining claims.

11. The claimant's application was made on 21 July 2020. In it she sets out grounds for reconsideration, seeks to set aside the Tribunal's proposal to make deposit orders, and to "allow Particulars of Claim dated 7 November 2019" . These are three separate applications, and only the first two are applications for reconsideration as such.

12. In relation to the first, which is the claimant's main application for consideration, she appears to drawing the Tribunal's attention to an additional claim, which she contends was not reflected in the Horne Tribunal's Case Management Summary , but was discussed in the hearing before him on 12 November 2019. It was she puts it "seeking early reconciliation with Julie Collins as it was in her power to make recompense as a result of the grievance findings being upheld in part."

13. She goes on to say this was discussed in the hearing, but was wrongly assumed to relate to the period June to August 2018, but in fact it related to the period June to August 2019. She then refers to the amended response , the grievance and how victimisation was denied. The claimant then goes on to refer again to the link she makes between her Injury at Work application and her grievance outcome. She then states how, once the appeal outcome was known in summer 2019 , her union representative made contact with Julie Collins to seek recompense for her losses, referred to in page 8 of her additional information (i.e of 7 November 2019).

14. The respondent responded to the application by letter of 11 August 2020. The respondent questioned the point that the claimant was seeking to base her application on a further alleged act of victimisation by Julie Collins in July or August 2019. It was suggested that this really was an issue which really went to time limits, and not relevant to the reconsideration application.

***Discussion and ruling.***

15. That is the extent of the claimant's application. Rule 70 of the Tribunal's rules of procedure provide that the Tribunal may reconsider any judgment if it is in the interests of justice to do so. Further any application for reconsideration, by rule 71, must be made within 14 days that the judgment was sent to the parties. The claimant's application was made in time. The previous 2004 rules specified grounds for reconsideration, which were not replicated in the 2013 rules. They were , leaving aside procedural issues such as not receiving notice of a hearing, or a decision being made in the absence of a party, that new evidence had become available , or that it was in the interests of justice to grant a review, as it then was.

16. The new (2013) rule does not repeat those specific grounds, but is now solely based on the interests of justice.

17. The Tribunal therefore has sought to discern the basis upon which the claimant is seeking to argue, in effect, that the Tribunal erred in making the decision that all bar two of the claimant's post – 2107 claims should be struck out. The Tribunal cannot discern any. The claimant merely seeks , it seems, to make reference to another, not recognised as yet, claim arising out of an alleged request made in summer 2019 to Julie Collins , after the IAW appeal was dismissed, for recompense for the claimant's losses.

18. Firstly, this seems to have more to do with time limit issues, which were not the basis upon which the post – 2017 claims were struck out. Secondly, nothing in this point remotely addresses the Tribunal's findings that these claims had no reasonable prospects of success, for the reasons comprehensively set out in the Tribunal's judgment.

19. All the claimant appears to be seeking to argue is that she has a further potential claim of victimisation in August 2019 arising out of the alleged failure or refusal of Julie Collins to grant the claimant "recompense" for her losses. Assuming that she does , in fact, have such a claim before the Tribunal, the Tribunal cannot see that this would have any better prospects of success. It is unclear what the claimant means by this "recompense". It is , presumably, not the power she had not to uphold the appeal – that would be the same claim addressed as complaint no. 3 , "refusing the application on its merits", which the Tribunal found had no reasonable prospects of success. It is presumably some other power Julie Collins had, the claimant referring to the ET1 form at page 8. The Tribunal account see what she means, and as the ET1 and attachment are not paginated, this is hard to follow.

20. The claimant alleges that Julie Collins made no reply, in which case there is no specific positive act relied upon Whatever the position, this does not appear to be a claim before the Tribunal, it is not included in the post – 2017 claims identified by the Horne Tribunal.

21. Again, as discussed in the context of the other victimisation claims that the Tribunal has struck out, it is not enough that the claimant considers this unfair, or unreasonable. She has to raise a prima facie case that this treatment , if such it was, was because she had done a protected act, i.e she had raised a disability - related grievance. Again, as observed previously, failure to resolve a grievance in favour of the griever is not to be equated with victimisation for having raised it. Assuming that this claim is before the Tribunal , it would not have any better prospects of success.

22. Even if it did, however, that is no basis for the Tribunal reviewing its decision that the other post - 2017 claims have no reasonable prospects of success. The claimant has advanced nothing to begin to make the Tribunal have any doubts that its judgment on the prospects of success of all but two of the post – 2017 claims was not correct.

***Reconsideration of the proposal to make a deposit order.***

23. The second part of the claimant's application is to set aside point 3 of the judgment, which is the proposal to make deposit orders in respect of the two post – 2017 claims that were not struck out.

24. The short point is that the Tribunal has not yet made a deposit order, so there is no judgment or decision to reconsider.

25. In the alternative, the Tribunal finds this application unclear and confusing. The claimant seems to be saying that the claimant had tried to "reconcile" (i.e "conciliate") her dispute on a number of occasions. She then refers to other claims/information being "simply incidentals" , which were listed to show the extent of her suffering.

26. Two points. Firstly, whether the claimant did or did not try to conciliate these claims is irrelevant to whether any deposit orders should be made. Secondly, if the claimant means by this assertion that she is not in fact making these claims , but is merely going to refer to these matters in evidence , then she should withdraw them. That would, of course , mean that none of the post – 2017 claims remain.

27. The claimant has supplied the details (in rather broad terms) of her means as directed, and the Tribunal will go on to consider what deposit orders to make. In the light, however, of the Tribunal's determination of the time limit issues applicable to these claims, this issue falls away.

***The respondent's application in relation to the pre – 2017 claims.***

28. The Tribunal accordingly now turns to the respondent's application in relation to the pre – 2017 claims. To summarise the claims, the Tribunal adopts and refers to the summary in the previous preliminary hearing.

29. The pre – 2017 claims are not pleaded in any formal document, such as a Scott Schedule, and Mr Hurd took the Tribunal through the claimant's rider to her ET1 claim form (R13 to R25). Her claims appear to go back to November 2013, and start with her issues with her managers Andrea Feehan, and Kandy Pickering. These were the issues that she had raised in her grievance. This grievance was raised in September 2015, and contained 24 allegations. Of these, four were upheld, but the other twenty were dismissed. In broad terms, these twenty mirrored the allegations made against Andrea Feehan and Kandy Pickering set out in pages R14 to R15, of bullying , or failure to make reasonable adjustments, in 2014 and 2015.

30. The claimant received a final written warning on 15 September 2015. In January 2016 she made an application for Industrial Injury benefit, as she had been advised that her pay would drop to half pay from February 2016, and would then be reduced to nil pay. She had done this quite some time before the outcome of the grievance was known.

31. Whilst the claimant has suggested that the four aspects of her grievance that were upheld support the claims she is making in the Tribunal, on analysis this is not so. Discrimination was not found.

32. Going on through the claims, at page R21 the claimant is complaining about Deborah Smith, and Kandy Pickering, in June 2016. In July 2016, page R22, the claimant makes her first complaint about the conduct of Joanne Town. The outcome of the grievance was received in August 2016, and on page R23 the claimant complains that the outcome of the grievance had yet (i.e at the time that her claim was submitted) to be actioned.

33. The claimant's last complaint appears to be on 29 September 2016, when she attended a meeting, which Mr Hurd described as a grievance appeal, although it seems it probably was not. This was about potential vacancies at Leeds or Bradford. This appeared to be the last of her claims.

34. Mr Hurd submitted that the respondent would accept that there was an arguable case that the matters of which the claimant was complaining in this timeframe, i.e. from early 2015 to September 2016 could amount to conduct extending over a period of time for the purposes of s.123(6) of the Equality Act 2010. The issue, however, was whether there was any arguable case that there was a link to the post – 2017 claims, (which have been struck out), so as to entitle the claimant to advance that argument in relation to them as well, and make her pre – 2017 claims in time.

35. He submitted that there was no reasonable prospect of the claimant successfully advancing such an argument. The post – 2017 claims have been very clearly and narrowly defined, and are wholly different in character , and in the nature of the allegations made, from the pre – 2017 claims. These proceedings were brought on 28 July 2019 , almost three years after the last claims which arose in September 2016. Unless the Tribunal was to find that it should grant the claimant an extension of time on the just and equitable basis, it had no jurisdiction to hear them.

36. He referred the Tribunal to para. 14 of the case summary at page R55, and how the claimant's claims had been identified as the disability discrimination about which she had complained in her grievance in September 2015, described as the "original discrimination".

37. He then took the Tribunal in more detail to the grievances raised by the claimant , and their outcome. These documents are not in either party's bundle, but were sent to the Tribunal following the hearing in March 2020. The grievance documentation is comprised, in effect, of one document, a 21 page GRM01 document, in which the claimant's grievance is recorded, the considering manager's response is set out, along with the claimant's subsequent appeal, and the grievance appeal manager's response to that appeal. Included with these documents was the Investigation Report dated 20 April 2016, notes of the grievance hearing(s) on 1 and 4 July 2016, and notes of the grievance appeal meeting held on 21 October 2016.

38. The classification of the claimant's grievances into 24 allegations had been carried out by the investigating officer, Janet Smith. The outcomes, or findings, at pages 5 to 16 of GRM01 , adopt this enumeration. Mr Hurd took the Tribunal to the four outcomes where the grievance was upheld, or partly upheld. They were nos. 4, 14, 17 and 18. None of these were findings that that the claimant had been bullied.

39. In relation to no.4, the respondent found that there had been failings in complying with MOJ policies and procedures in relation to formal review discussions , and performance improvement plans, on the part of the manager in question, but this was attributed to her being newly promoted , and struggling, rather than any malicious or bullying intent.

40. Allegation no. 14 related to the manager allegedly telling the claimant that there were no non - telephony roles (i.e the type of role that the claimant was seeking as a reasonable adjustment) available. The finding was that non – telephony roles could have been explored in more detail, and that all such discussions about reasonable adjustments (although that word is missing from page 8 of the document) should be documented and reviewed. Again, it was submitted, there was no finding of bullying.

41. Allegation no. 17 related to delay in conducting a stress risk assessment that the claimant had first requested in December 2013, and had not been completed until March 2015. The finding was that this was upheld, in that this assessment should have been completed when the manager was made aware of the request. The manager had received training on how to conduct such assessments, and any further failures would be treated as performance issues for her. Again, Mr Hurd submitted, no finding of bullying.

42. Allegation no. 18 related to the failure of the manager to advise the claimant of the RASS or other assistance until 20 September 2015. The finding as that the manager had failed in this regard, but had been given coaching and training , and any further instances would be dealt with as performance issues. Again, it was pointed out that there was no finding of bullying.

43. Finally, Mr Hurd submitted that Andrea Feehan had left the respondent's employment in January 2019, and the respondent was unlikely to be able to call her.

***The claimant's response, and application for an extension of time.***

44. The claimant , before giving evidence, made some opening submissions. She confirmed that she did wish to proceed with, as part of her claims to the Tribunal, the bullying and harassment allegations she had made in her grievance. She had made her Industrial Injury benefit in January 2016. She was due to have an operation in November/December 2015, and was aware her pay would be reduced. She was told to make that application.

45. She agreed that the Industrial Injury benefit application would not remedy her grievances, and would not affect the things she had raised in it. In fact remedies were put in place, and her reasonable adjustments had been reinstated. All that was left was the financial aspect , which was to be dealt with through that application. Everything else had been resolved, and she did not need any further help going forward. The only remaining issue was financial.

46. The claimant then gave evidence. She confirmed her witness statement of 6 September 2020. Pages 1 to 23, paragraphs 1 to 127 , of the statement are a chronology of all the events from the claimant going off work sick on 13 August 2015 to the presentation of her claim on 28 July 2019, and a little beyond that.

47. The following facts are contained in this statement:

47.1 The claimant has had assistance from her trade union throughout these matters, since September 2015 ;

47.2 ACAS were first contacted for advice in September 2015 (paras. 3 to 6). An early conciliation certificate was obtained on 16 October 2015, but no claim was issued (para.10).

47.3 The claimant also took advice from DAS LAW , solicitors, through her household insurance policy (para. 14) , instructing them on 27 October 2015. She was advised by them of the time limit for Tribunal claims.

47.4 DAS Law advised the claimant of her prospects of success on 9 March 2016 (para.36) , and she awaited the outcome of the grievance. If she was to return to work without reasonable adjustments she was to send further correspondence to DAS to reconsider.

47.5 The claimant received the outcome of the grievance on 17 August 2016 (para.65).

47.6 The claimant appealed the grievance outcome , and attended an appeal hearing on 21 October 2016 (para.80). The claimant received the grievance appeal notes and the outcome on 27 October 2016 (par.81).

47.7 The claimant returned to work at Huddersfield County Court on 17 March 2017 (para.83).

47.8 Between August 2017 and 8 May 2018 the claimant was awaiting the outcome of her Industrial Injuries benefit application, submitted on 8 January 2016. She received the outcome on 8 May 2018 (para.90)

47.9 On 18 September 2018 the claimant submitted an appeal against the decision on her Industrial Injuries benefit application (para.105).

47.10 On 3 May 2019 the claimant received the appeal outcome (para. 106).

47.11 The claimant sought further assistance from her union, who put her in touch with Thompsons, Solicitors (paras.109 and 110).

47.12 The claimant's union sought to mediate between 3 June 2016 and 18 July 2019 (para.111). The claimant then sought to appeal to the CSAB, on union advice, but this was not the correct procedure.

47.13 The claimant spoke to Thompsons again on 19 June 2019, when she was advised of the tight deadlines in employment cases.

47.14 The claimant commenced early conciliation on 20 June 2019 and obtained a certificate on 20 July 2019.

***The claimant's submissions.***

48. The claimant's initial submission was that the claims were all one continuous act, running from her grievance. They were therefore all in time. She had not accepted the outcome of the grievance or the appeal, and sought to rely upon matters raised in her further particulars document of 7 November 2019. She referred to the Timeline in her witness statement.

49. The respondent had taken a long time to deal with her grievance, and did not follow its own policies. Its time limits were not adhered to, and all this had impacted upon her.

50. She went on to deal with the specific claims she makes in relation to Joanne Town, who was not independent , and should not have heard the grievance. She referred to two other managers , about whom she had complained in her grievance. She explained why she had put in the injury benefit claim in January 2016, knowing she would be on nil pay the next month. She needed this to replace her lost wages, and this is what her claims were about.

***The respondent's submissions.***

51. For the respondent , Mr Hurd submitted that however one looked at the claims, they were out of time. The original grievance had been filed in September 2015, and was very stale when the claims were brought in July 2019. Joanne Town had dealt with it three years previously. The claimant had perhaps confused the consequences of a decision, with the decision itself. Continuing consequences did not man there was a continuous act.

52. He took the Tribunal through the basic principles of the just and equitable extension, citing ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** , and the test to be applied analogous to that applied under s.33 of the Limitation Act 1980, which identifies the factors to be taken into account when determining whether the Tribunal should exercise its discretion.

53. Turning to those, in terms of the length of the delay, it was extensive, at least two years and nine months after the last of the acts complained of.

54. In terms of the reasons for this delay, the claimant had cited health, her CFS, but this was not a disability which had prevented her from bringing the claims. She had had the condition for years, and it had not stopped her doing her job or other tasks. She perceived that bringing the claims would have an effect upon her health, but that is all.

55. In terms of awaiting the outcome of the internal process, this was not a good enough ground for granting the extension of time sought. He cited the Court of Appeal judgment in ***Apelogun – Gabrils v London Borough of Lambeth [2002] IRLR 116*** as support for that proposition.he accepted that it was a factor to be considered, but it was not, of itself, a good enough reason to grant the extension.

56. The Tribunal had to balance the prejudice between the parties. The cogency of the evidence had to be considered and whether a fair trial was still possible. One of the respondent's witnesses, Angela Feehan, no longer worked for the respondent. The Employment Judge did ask at this point if anyone had tried to trace her, but no enquiries had been made.

57. Discrimination claims are highly fact sensitive, and the recall of witnesses after this length of time is unlikely to be good.

58. There were good reasons why the strict time limit of three months was provided, and these claims were nearly three years out of time. The evidence was bound to be less cogent.

59. Turning to the conduct of the respondent, there were two ways the case could be put. The grievance and the appeal took a very long time, as did the claimant's injury benefit application. The claimant could also say that she was misled as to how that application was likely to achieve the remedy that she sought.

60. He referred to the Tribunal's previous judgment, and para. 52, where the link between the injury benefit application and the grievance was questioned. The claimant may have been told that the application was a formality , but she could not reasonably have believed that. The respondent's conduct in all this is less relevant or significant than the claimant's.

61. Turning to the last two factors he submitted that these overlapped. The claimant was represented by her union throughout. It was somewhat startling to see an early conciliation certificate from October 2015. That had been obtained by her trade union representative, and the claimant also had advice from DAS Law at the time.

62. The claimant accepted that here were 24 items in her grievance, but she decided not to progress them but to concentrate on future reasonable adjustments and her return to work. She appears to have taken no further legal advice upon her return to work. It was the claimant who decided after the appeal hearing that she would settle for that decision, a decision she made without advice from DAS Law or her union.

63. The claimant had taken a "head in the sand" approach to the time limits. She knew of them, and also knew that only four of her grievances had been upheld. She could not have expected those would lead to any remedy.

64. She has, however, resurrected the dismissed grievances in these claims. It would not be just and equitable to allow her to do so.

65. Finally , he turned to the claims relating to Joanne Town, which remain from the post – 2017 claims, subject to a potential deposit order. He submitted these too must be dismissed as out of time and that the extension should not be granted in respect of these claims too. The period they cover is August 2016 to August 2017. The claims relate to her alleged delay in the injury benefit application process. There has been no grievance in relation to these claims. It will be difficult for her to respond to such claims so long after the events, and explain what steps she did or did not take at any given time.

66. The claimant responded to this by suggesting that Joanne Town had been the subject of an investigation into these matters ion 2017.

***The claimant's Particulars document of 7 November 2019.***

67. There was then discussion about this document, the claimant wishing to rely upon it and include it as part of her claims. As was pointed out by the respondent, this was dealt with in the Horne Tribunal, at paras.18 to 21 of the Case Management Summary, where it was determined that this document, in so far as it seeks to introduce new claims , would be an application to amend, As there was an application to strike out the claims, if that succeeded, there would be no claims to amend , it was expressly not considered, and is not to be at this stage.

68. Without prejudice to that ruling, however, to the extent that matters contained in that document, whether new claims or not, may be relevant to the issues on the application to extend time, the Employment Judge has, in any event, considered its contents.

***Discussion and rulings: initial observations.***

69. The reason why the Tribunal considered that it had first to determine the claimant's application for reconsideration of its previous judgment was that , the post 2017 claims having been (mostly) struck out, time limit issues in respect of the pre – 2017 claims become more relevant, if the Tribunal does not have before it any in time claims, to which the pre – 2017 claims can be related.

70. The effect of the Tribunal's previous judgment, which is confirmed, is that , with the exception of the two claims relating to Joanne Town's involvement with and handling of the claimant's injury benefit application, all other claims are struck out. As identified in the previous judgment, the period to which these two claims relate is August 2016 to August 2017. The claim form was presented on 28 July 2019, which presents limitation problems for the claimant, given that those claims are also at least almost one year or more out of time.

71. This is highly relevant, of course, to consideration of the pre – 2017 claims, some of which go back to 2015. The last of them is on 29 September 2016 , when the claimant attended an informal attendance review meeting. This makes the limitation period in respect to the last incident 29 December 2016, plus any extension for early conciliation. Thus when the claim form was submitted on 28 July 2019, the claims were two and a half years out of time.

72. The respondent's application , in relation to these claims, unlike the post -2017 is based on them being out of time. This , however, is a substantive determination, not an application to strike on the basis of prospects of success. The first issue is whether there is any prospect of the claimant establishing that the pre – 2017claims formed part of a course of conduct extending over a period of time falling within s.123(6) of the Equality Act 2010. If not, the Tribunal will decide whether to exercise its discretion to extend time under the just and equitable provisions.

73. The position now is that, even with the two remaining post – 2017 claims, if proceeding, no claims before the Tribunal are in time. Thus, even if there is conduct extending over a period of time, there are no in time claims to which these claims can attach . Thus, all the claims now before the Tribunal are out of time, and the issue of discretion is the only issue before the Tribunal.

***The just and equitable extension.***

74. This raises the issue of whether it would be just and equitable to extend the time for presentation of these claims. In deciding whether to exercise its discretion , the Tribunal takes into account the guidance upon how it should approach this task set out in ***British Coal Corporation v.Keeble [1997] IRLR 336*** , This discretion, of course, is the same as conferred by several other discrimination statutes, and caselaw has evolved as to how a Tribunal should approach the exercise of its discretion. One of the leading cases is ***Robertson v. Bexley Community Centre t/a Leisure Link 2003 [IRLR] 434*** ,a judgment of the Court of Appeal. Of particular note is the judgment of Auld L J, who made it clear that there was no presumption of extension, but rather the converse was the case, extension was the exception, not the rule, and an out of time claimant had to convince a Tribunal why an extension should be granted. In terms of the principles upon which a Tribunal should approach the exercise of the discretion, the EAT in ***Chohan v. Derby Law Centre [2004] IRLR 685*** endorsed the approach taken in ***British Coal Corporation v. Keeble*** to the effect that Tribunals should consider the factors listed in s.33 of the Limitation Act 1980 , which applies to the exercise of discretion to extend time in personal injury claims before the civil courts. Those factors are:

The length of and reasons for the delay;

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

The extent to which the party sued had co-operated with any requests for information;

The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;and

The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

75. Those factors, whilst useful, must not, however, be regarded as a checklist, or exhaustive. In ***London Borough of Southwark v. Afolabi [2003] ICR 800*** the Court of Appeal held that the s.33 factors were of utility, but that as long as no significant factor was left out of consideration, a failure to follow the express provisions of s.33 would not be an error of law. In that case, delay of 9 years was, exceptionally, not fatal to the application to extend time. The claimant was directed to address these considerations in her witness statement, and did so. Turning to each, in turn, the Tribunal finds as follows.

***The length of and reasons for the delay;***

76. The length of the delay is substantial. Taking the last of the claimant's pre – 2017 claims as the meeting on 29 September 2016 , the delay until 28 July 2019 is over two years, allowing for the three month time limit, and some extension for early conciliation. The Tribunal accordingly has to consider the reasons for that delay. Two highly significant factors, in the Tribunal's view are that the claimant, with the assistance of her union , obtained an early conciliation certificate on 16 October 2015. She did not, however, instigate any proceeding then. She then had the advice and assistance of not only her union, but also DAS Law, whom she instructed on 27 October 2015, but still no proceedings were issued.

77. In the ensuing months she appealed the grievance outcome, and instigated the Industrial Injuries application. She then went down to nil pay from 2 February 2016. She was in further contact with DAS Law , and on 9 March 2016 they provided her with some advice. The claimant has not waived privilege as to what that advice was, but suffice it to say she did not then, despite having obtained an early conciliation certificate, instigate any proceedings. She told the Tribunal in evidence that she was given some advice on the three month time limit, and how she took a conscious decision at that time not to bring a claim, her focus being upon the reasonable adjustments she required being made, and financial compensation. She did not want to go into the issues of harassment and bullying that had been a large part of her grievance. The reasonable adjustments had been remedied, and she was looking to move on with her work life.

78. Her reasons for not doing bringing claims at that stage are slightly complex. She relies in part upon her health issues, and very heavily upon her understanding that the industrial injuries application would provide her with the financial recompense she was seeking, and this was on hold pending the grievance outcome. She also believed (she claims that she was told this by the respondent, but this is disputed, and is not supported by anything in the documentation) that only one aspect of the grievance had to succeed in order for the industrial injuries benefit claim to be successful.

79 The grievance outcome was given on 17 August 2016, but the claimant did not bring a claim then, she appealed. That appeal was concluded, and the outcome provided to her on 27 October 2016. That would seem an obvious point at which, if the claimant was to bring any claims, to bring them.

80. She did not. She says in para. 81 of her witness statement, dealing with this stage of the process:

*"At the conclusion of the Grievance Appeal , reasonable adjustments that had previously been in place , were re-instated , the Claimant had been offered a role at Huddersfield County Court and she had resubmitted her Application for Industrial Injuries to receive the financial recompense , she had been informed was a mere formality. Now all aspects of her requested outcome had been covered by her employer and considering the Claimant's health she was happy to settle on those terms. She could concentrate all her efforts on managing her disability with a view to returning to work."*

81. This rather reinforces how the claimant set great store by, and put all her hopes of obtaining financial redress for her loss of earnings, the only remedy that she then sought, in the Industrial Injuries application. That was, whatever she was told, unwise, and the Tribunal would have expected any lawyer or trade union representative and indeed the claimant, to have appreciated how , given the time limit issues, which were already pressing, delaying proceedings for this application to produce the required result, was a dangerous route to take.

82. Thereafter, of course, there was , as discussed in the judgment on the post – 2017 claims, further delay in that application being progressed. One would have thought that would be a trigger for claims to be presented, as the respondent was, on the claimant's case, delaying this process, and depriving her of the remedy she had been led to believe she would receive. But still the claimant brought no claim.

83. What, then, were the claimant's reasons for not presenting these , already quite historic, claims between January 2017 and July 2019? Her pay had gone down to nil on 22 February 2017, and she had started work at Huddersfield County Court on17 March 2017. She was clearly well enough to do so. She sold her house in March 2017, and moved in with her parents. She had issues with her pay in April 2017, and had to raise a complaint about this to get them resolved. This , however, did not prompt any action in the form of starting proceedings.

84. There is then a period from March 2017 to 18 May 2018 when the claimant did nothing to further her claims. She was, it is true , awaiting the outcome of the application, but, as is well documented , she considered that the respondent was dragging its feet on this, and was having continually to chase it up. Para. 12 of the Case Management Summary sets out how the claimant's case is to this effect. That did not, however, prompt her to take any action.

85. When she got the outcome in May 2018 the claimant , who had expected the application to be a mere formality, then thought that the decision had been a mistake. She thought that it would be successful once her grievance was taken into account. Around this time she had a new union representative, Karen Challenor. She assisted the claimant with the appeal, which was lodged on 18 September 2018.

86. This, of course, was a further delay, of some four months, from when the claimant received the decision and indicated she wanted to appeal. Whilst the claimant explains this delay by reference to a number of factors, she also says this is a

"testament to the lack of timely assistance by the Claimant's Union Representative". Thus, the presentation of the claims was being delayed by the appeal being submitted, which was itself then delayed , to some extent by the claimant's union representative.

87. There ensued a further 8 months of delay until the decision on the appeal on 3 May 2019. There is no explanation as to why the claimant did not, during this further period of delay instigate proceedings. Given the view that the respondent was doing this deliberately so that the claims would be out of time (the allegation made in para. 12 of the Case Management summary referred to above) makes this even more surprising.

88. Whilst the appeal outcome was the very end of the process as the claimant saw it, and was the thing she had been waiting for, even then there was delay. She contacted her union representative again, but it took a further month , until 3 June 2019, that she got a response. Thereafter the representative contacted the union solicitors, Thompsons.

89. The claimant commenced early conciliation on 20 June 2019, and obtained a certificate on 20 July 2019 (this appears to be an agreed fact, though no copy is contained in any bundle before the Tribunal, nor, oddly, on the Tribunal's file). She then presented the claims on 28 July 2019. The Tribunal presumes that the claimant agreed to the respondent being contacted with a view to conciliating, as she contends that the respondent would not engage in the process. Quite why she did not simply obtain a certificate at that stage, rather than seek to conciliate , when there were likely to be limitation issues, is unclear.

90. The claimant addresses this factor in section A of her witness statement. She does so briefly, contending that there was no delay in presenting the claims, saying that there was one continuous act ending on 3 May 2019.

91. That argument , however, is not open to her. Her problem is that the Tribunal has struck out her later claims, save for two in respect of which deposit orders are proposed. These two, however, relate to events in 2017 at the latest, so they too are out of time. She thus has no in time claims before the Tribunal. Even if her argument that the pre- 2017 claims can be linked to the post – 2017 is correct, there are no claims to which she can attach these claims, so all her remaining claims before the Tribunal are out of time, and the "continuous act" argument cannot assist her.

92. The claimant must therefore fall back upon the discretion to extend time. The Tribunal thus has had to consider the length of, and reasons for ,the delay, as discussed above. As observed , the length of the delay , two years at least from the last claim, and four years from the first one which goes back to 2015, is significant, particularly given the time limit of three months.

93. In terms of the reasons, the claimant has advanced something of a mixture. Central, however, is the theme of relying upon the industrial injury benefit as potentially resolving her grievances. This was, with respect, misguided. Even if the claimant was led into this reliance by the respondent, it was, or should have been clear to the claimant that in both the handling of the application, and the subsequent appeal, the respondent was dragging its feet (or appeared to be, but that is her case). The

claimant had in October 2015 gone so far as to obtain an ACAS early conciliation certificate , and had the benefit of legal advice. She took a conscious decision then not to bring any claim. It is to be noted that her claims at that stage could only be in respect of the pre – 2017 claims, the very ones being considered by the Tribunal.

94. The claimant still had legal advice available from DAS, and was advised by her union throughout. Quite why her union allowed this state of affairs to drag on for so long is unclear, but the claimant herself seems to have been content during this period to await the outcome before bringing any claims.

95. Indeed, as the claimant's evidence shows, as at October 2016 , she was content to leave matters after the grievance appeal. By "matters", of course, the Tribunal means those matters which had been the subject matter of her grievance, going back to 2015, which are the very claims the claimant seeks to bring in these proceedings. It is the subsequent failure to obtain financial recompense that has been the trigger for these claims being made at all. Indeed, the claimant in the course of her evidence, at one point suggested that she had only raised these matters as background, and all she wanted was her financial loss. The Employment Judge discussed with her how she had nonetheless sought to bring these matters as claims, not just background.

96. The claimant has also relied upon her health as a reason for delay. It is right that she has a disability, in the form of Chronic Fatigue Syndrome. She has had well documented treatments for pain management, She has made an impact statement, dated 6 January 2020, and produced medical evidence. In that statement, she says this, at paras.14 and 15:

*"14. Following the conclusion of the Grievance Appeal in October 2016 and an end to the aggressive management style , with the associated stress, I was able to put my full energy into managing my CFS, in order to return to work.*

*15.I returned to work in March 2017. It has been a continual struggle to manage my symptoms. However, with kind support and understanding of managers at Huddersfield I am currently managing my CFS. I have still to establish a baseline with the changes of implementing new working roles."*

97. The claimant has had no period of sickness absences after March 2017. In section B of the claimant's witness statement she addresses her health issues. Unfortunately, she concentrates on the period after the claim from was presented. That is not the relevant period which the Tribunal needs to examine. That period is from September 2016 until July 2019.

98. In terms of that period, as observed, whilst the claimant was off work from 13 August 2015 until 16 March 2017, and hence medical issues may have affected her ability to bring any Tribunal claim in that period, thereafter there are no obvious medical issues which would affect her ability, particularly with union assistance, to present these claims to an Employment Tribunal.

99. The claimant in evidence said that whilst not actually ill during this period, she was concerned that her health may be adversely affected after her return to work, if

she were to make a Tribunal claim. Apart from a seizure in January 29018, she had had no significant change in her health between March 2017 and July 2019. She remained concerned that her health may suffer if she brought proceedings in the period September 2018 to May 2019.

***The extent to which the cogency of the evidence is likely to be affected by the delay;***

100. The claimant contends that there is no likely effect upon the cogency of the evidence, making the point that all these matters are well documented. That is, of course, correct, but it has to be remembered that whilst there was a grievance process, which was documented, as the claimant's claims in the – pre 2017 are in effect raising the same matters as were raised in that grievance, the Tribunal will have to hear evidence from those involved, and against whom the claimant's allegations are made. Taking the time that the claim form was presented as the relevant date, this would be at the earliest two and a half years after the events, and in some case nearly four, or even more. Even with notes and other documents, the cogency of the evidence must be affected by such a delay, albeit to a lesser degree than in other cases. Further, as Mr Hurd points out, the claimant has challenged the accuracy of some of the notes produced by the respondent, so that documentary evidence cannot simply be relied upon at face value, there will be challenges to it which require oral evidence. The Tribunal's view therefore is that there will some, whilst not major, effect upon the cogency of evidence.

***The extent to which the party sued had co-operated with any requests for information;***

101. The claimant's submission in her witness statement, at section D, is less than clear on this issue. She does not appear to be contending that this is a relevant consideration. It can be , in cases where a claimant claims that the claim could not be have been brought within time because the respondent withheld vital information that the claimant needed to know that he could bring a claim or to assist him in formulating it. That is not the case here,

***The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action;***

102. At Section E of her witness statement the claimant says that she has followed the respondent's procedures , but the respondent gave her wrong information regarding the procedure to resolve the dispute. One all avenues were exhausted on 3 May 2019 she took prompt action.

103. The problem with this submission is that it again conflates the post – 2107 claims with the pre – 2017 claims. The former relate to the failure of the claimant's injury benefit application, the latter to the events of alleged bullying and harassment , and withdrawal of reasonable adjustments, which formed the basis of the grievance that was raised by the claimant. The promptness that is to be examined, therefore , is in relation to those matters, not the subsequent benefit application.

104. The claimant has not acted with promptness in relation to these claims, as they go back to 2016, or even earlier. She knew of the facts giving raise to the cause of action long ago, before she raised the grievance, and upon its dismissal , and the dismissal of the appeal, on 27 October 2016. Having had that knowledge , she did not bring the claims until July 2019.

***The steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.***

105. The claimant's case on this factor is brief, and she refers to the chronology in her statement. The claimant clearly took steps in 2016 by instructing DAS Law. She also took union advice throughout this process. Quite why she did not revert back to DAS Law after the benefit application appeal was dismissed is not clear, but she did not.

***Conclusion.***

106. Taking all these factors into account, the Tribunal is not persuaded it should exercise its discretion to extend time. The length of delay is considerable, and is a factor which can carry much weight. Secondly, the reasons for the delay are not easy to understand, and seem to vary a little. That the claimant had union assistance and access to legal advice, and got as far as starting early conciliation in October 2015 are highly relevant factors. Whilst her fears that the starting of proceedings may impact upon her health may explain the claimant's reluctance, she did have assistance available, and her health had improved since she went to work at Huddersfield County Court. There will be some affect upon the cogency of the evidence if the claimant is to pursue the same matters as she raised in her grievance, going back to 2015, or even further.

107. The Tribunal has considered the prejudice to the parties. It may be said that there is little prejudice to the respondent, if these claims proceed, other than that which arises from defending claims to which it would have a limitation defence. The need to establish prejudice, however, is not a pre – requisite for denial of an extension of time, as was considered in the judgment of Laing J in ***Miller v Ministry of Justice [UKEAT]0003/15***, where she said this:

***"[13]*** *It seems to me that it is not necessary for me to deal with that bald submission, because, as I explain below, the EJ did, to the extent that he was required to, take into account prejudice to both sides. But if I had needed to, I would have rejected that submission. It is clear from para 50 of Pill LJ's judgment in* DCA v Jones *that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case.* DCA v Jones *also makes clear (at para 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much*

*depend on the way in which the ET sees the facts; and the facts are for the ET. I do not read the decision of the EAT in* ***DPP v Marshall*** **[1998] ICR 518** *(and in particular paras 527H-528G, which were relied on by Mr Allen and Mr Sugarman) as contradicting this approach; but if it does, I bear in mind that the observations relied on are from the EAT, and pre-date* ***DCA v Jones****."*

108. In weighing up prejudice, however, the Tribunal does take into account what the claimant will lose. She will lose the chance to litigate claims that relate to matters which arose between 2013 and 2016, relating to her treatment by her then managers. She has since moved on, and has secured the restoration of reasonable adjustments that were removed from her. Those claims, if successful, do not give rise to immediate financial losses, although they may have led to later financial losses. She would need, however, to establish causation. Her main claims, the post – 217 claims are the ones where this was her objective, but they cannot proceed. As the claimant has said, these claims were always, it seems, somewhat secondary, and appear to have been intended to prove the suffering which the claimant underwent. To that extent, they may never really have been intended to be claims , as such. They are claims made, however, and have to be considered in that light. As claims, they should have been brought much sooner than they were, and they were only , in the Tribunal's view, ever brought at all as adjuncts to the claimant's real claims arising out of the injury benefit application.

109. To that extent, given that those claims too cannot proceed, but for different reasons, the Tribunal does not consider that the claimant has lost much additionally, by the dismissal of these claims.

***The two "post – 2017" claims.***

110. That leaves, potentially, the two claims which were not struck out as having no reasonable prospects of success. Those too, however, are out of time, and the respondent invited the Tribunal to determine that there should be no extension of time for those claims.

111. The Tribunal considers that the issues are no different for these claims as the pre – 2017 claims. The Tribunal considers that has before it all the material it needs to determine whether the just and equitable extension is granted in respect of these claims.

112. Whilst not as out of time as the pre-2017 claims, they are still , with the last one being Joanne Town's delay of the injury benefit application up until August 2017, at least 18 months out of time, again a significant period of delay. The claimant's reasons delay in making any claims about this are less understandable. This was the very application she was relying upon, and Joanne Town was delaying it. The claimant was aware of this because, as can be seen from emails she has disclosed to her union representative, she was complaining about this (e.g on 7 March 2017, see p.65 of the claimant's bundle for the previous preliminary hearing). Whilst delaying other claims pending the outcome of this application may be understandable, not making any claim about the serious delay in this crucial process being carried out is not.

113. Again, there are no good reasons that the claimant has advanced as to why she did not bring these claims – relating specifically to Joanne Town, whom she knew was responsible for the delay, and whom she had previously complained of in relation to hearing the grievance - much sooner than July 2019. She may have been awaiting

the outcome, but as at August 2017, she should have been doubting whether she would ever get one.

114. As the same considerations, save for a slightly shorter period of delay apply to these claims as apply to the pre – 2017 claims, the Tribunal makes a determination that these were presented out of time, and that it would not be just and equitable to extend time for their presentation. The proposed deposit order therefore is not necessary, as all the claimant's claims are now dismissed.

Employment Judge Holmes
18 December 2020

JUDGMENT AND REASONS SENT
TO THE PARTIES ON:
21 December 2020

FOR THE TRIBUNAL OFFICE