EMPLOYMENT TRIBUNALS

Claimant: Miss E Davies

Respondent: CBRE Managed Services Ltd

Heard at: Liverpool **On:** 20 November 2020

Before: Employment Judge Horne

Representatives
For the claimant: In person
For the respondent: Ms L Gould, counsel

Judgment having been announced orally at the preliminary hearing, and the respondent having requested written reasons at that hearing, the following reasons are provided:

REASONS

Introduction

1. Readers of these reasons may wonder why the heading is marked "Code V". All this means is that the hearing took place on a remote video platform. The parties consented to a video hearing and cooperated well to make it work.

The preliminary issues

2. By a claim form presented on 15 June 2020, the claimant raised three complaints:
   2.1. Unfair constructive dismissal, contrary to section 94 of the Employment Rights Act 1996;
   2.2. Direct sex discrimination, as defined in section 13 of the Equality Act 2010 ("EqA") and in contravention of section 39 of EqA; and
   2.3. Harassment related to sex, as defined in section 26 of EqA, in contravention of section 40 of EqA.
3. In a letter dated 29 September 2020, the tribunal informed the parties that there would be a preliminary hearing to deal with issues relating to jurisdiction and time limits. The letter stated:

   "The claims appear to contain a complaint of constructive unfair dismissal. An employment tribunal shall not consider such a complaint unless it is presented

> before the end of the period of 3 months beginning with the effective date of termination of employment. However, where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of that period of 3 months, the tribunal may consider the complaint if it was presented within such further period as the tribunal considers reasonable.
>
> …
>
> The claim also contains a complaint of sex discrimination including harassment. An employment tribunal shall not consider such a complaint unless it is presented to the Tribunal before the end of the period of 3 months beginning when the act complained of was done (or is treated as done). However, it may consider such a complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.

4. By the time the hearing started, the parties had reached agreement on the effective date of termination. The agreed date was 11 March 2020.
5. During the course of her oral evidence, the claimant provided some clarification of her complaint of direct discrimination and harassment. She told me that the last occasion of discrimination and harassment had been on 9 March 2020.
6. It was agreed at the outset of the hearing that, so far as the complaints of discrimination and harassment were concerned, I should confine my decision-making to the latest allegation in time. If it was just and equitable to extend the time limit in respect of the most recent occasion of discrimination and harassment, it would be premature of me to determine the tribunal's jurisdiction in respect of earlier alleged occasions. The tribunal's jurisdiction to consider earlier incidents would depend on whether or not they formed part of an act extending over a period of time. That question is fact-sensitive. If it is reasonably arguable that there was a continuing act – and the respondent did not contend otherwise – the question should be determined at the final hearing after hearing all the evidence.
7. The claimant did not dispute that her claim had been presented after the expiry of the statutory time limit for the whole of her claim. I had to decide:
   7.1. whether or not it was reasonably practicable to present the complaint of unfair dismissal on or before 10 June 2020; and
   7.2. whether or not the claimant presented the complaints of direct discrimination and harassment within such period after 8 June 2020 as I considered just and equitable.

Evidence

8. I heard oral evidence from the claimant, who confirmed the truth of a brief statement that she had made and answered questions. I also read a 90-page bundle which had been helpfully prepared by the respondent.
9. The claimant gave oral evidence about a conversation that she had had with an adviser from Citizen's Advice (CAB). Before asking questions about this conversation, counsel for the respondent properly and fairly warned the claimant that she did not need to answer questions about what she and the adviser had discussed. I checked that the claimant understood the warning. With that safeguard in place, the claimant proceeded to tell me the detail of her CAB conversation.

10. Whilst answering questions, the claimant referred to two pieces of documentary evidence. One was written confirmation of when she received some medical test results. The other was a record on her itemised phone bill of when she telephoned the Citizen's Advice Bureau. She asked for time to retrieve them. We had a break in order to enable the claimant to look for them. The claimant was already at home, participating remotely on video. Unfortunately, she could not find them. In the end, the parties agreed that I should determine the preliminary issues on the basis of the oral evidence I had heard, without waiting for these documents to arrive.

Clarification of the claim

11. Before giving judgment on the preliminary issues I asked the claimant for some clarification of her complaints of discrimination and harassment. The basis of her claim is set out in a case management order sent separately to the parties. It is not necessary for me to set out the entire formulation here. I do, however, need to repeat some points that emerged from that discussion. This is because part of the respondent's objection to an extension of time is that the Equality Act complaints are weak on their merits.

12. During the hearing, the claimant told me:

    12.1. That the discrimination and harassment had started when she transferred to work at the Liverpool ONE shopping centre;

    12.2. That the perpetrator was the Site Supervisor;

    12.3. That, on some occasions, the Site Supervisor deliberately picked on her because he knew she was a single mother who had to be away by 4pm for childcare reasons; he gave her work to do just before the end of the working day; and he made derogatory comments about her not staying behind when she left work at 4.30 (I refer to these allegations cumulatively as "**the childcare allegations")**

    12.4. That there were many other instances of the Site Supervisor's alleged behaviour being unrelated to childcare responsibilities and working hours;

    12.5. That on all these occasions, the Site Supervisor treated her in that way because she is a woman;

    12.6. That her case was that male engineers were not criticised in the way that she was criticised;

    12.7. That she acknowledged that a male colleague (Mr J) was also treated by the Site Supervisor in a way that was similar to the way in which she was treated;

    12.8. That the Site Supervisor may have targeted both her and Mr J because of their loyalty to CBRE.

13. The respondent has always asserted that Mr J was a senior engineer. The claimant has never expressly contradicted that assertion.

Facts

14. On 11 February 2020, the claimant wrote a detailed letter of resignation. In her letter she complained about the Site Supervisor. Broadly speaking, the reason she gave for leaving was that the Supervisor had behaved unprofessionally and rudely

towards her, that he had made negative comments about her performance and had questioned her working pattern.

15. The claimant's letter did not betray any awareness of the existence of employment tribunals. She told me, and I believed her, that, at the time she wrote her letter, she did not know about employment tribunals or the statutory time limits for bringing claims. In fact, I find, she did not know about these matters until she spoke to Citizen's Advice (CAB) much later.

16. On 19 March 2020 the claimant started a new job within the National Health Service. Just about any reader of this judgment will remember the public health emergency that unfolded during the course of that week. The claimant found her new job "hectic with the pandemic".

17. During the period from March to late May 2020, the claimant was preoccupied with her health. I do not consider it necessary to make a public record of what her medical condition was, or what condition she suspected she might have. It is sufficient to state that she underwent a medical investigation for a suspected abnormality, and until she learned the results of that investigation, she could not concentrate on anything of importance beside her new job and her health worries. When she was informed of the test results, which she described as "fantastic", she was immensely relieved. She told me, and I believed, that it was from the moment of getting her test results that she had the right "mindset" to think about her dispute with the respondent. She could not pinpoint the date when she was informed of the results, but she remembered that it was either on Saturday 30 May or Saturday 6 June 2020.

18. The claimant spoke over the telephone to a professional adviser from the CAB in Mold. She discovered Mold CAB by typing "Citizens Advice" into a search engine. The search revealed Mold CAB and its contact details. In order to type the words, "Citizens Advice", she would naturally have needed to understand that the words referred to a potential source of help and advice in employment disputes. Her evidence was vague as to when and how she came by that understanding. She told me that she might have discovered CAB from something she had seen on the television or possibly from something she had been told. This could have happened at any time, either before or after her employment ended. My finding is that she probably knew that CAB was a potential source of employment advice from March 2020 if not earlier.

19. The likelihood is that she performed the internet search very shortly after she had received her test results. She spoke to the CAB adviser sometime at the end of May or the beginning of June 2020.

20. There was no evidence that the claimant experienced any difficulty or delay in speaking to a CAB adviser once she had the Mold CAB contact details.

21. The claimant and the CAB adviser did not discuss the statutory time limit for employment tribunal claims. The adviser did, however, tell the claimant that she would need to contact ACAS.

22. I also find that the CAB adviser also told the claimant about the possibility of a claim to an employment tribunal. The claimant could not say whether or not the CAB adviser had told her about employment tribunals, but I think it likely that she was given this information. From my own general knowledge, I am aware that employment tribunals are widely known to organisations who provide advice about

employment disputes. Telling the claimant about a potential tribunal claim would be one of the most basic pieces of information for the Mold CAB adviser to give.

23. I also find that it would have been relatively easy for the CAB adviser to tell the claimant about the three-month time limit, to find out from the claimant when she gave her notice and how much notice she gave, and to calculate the last day for presenting the claim. It would also have been a fairly simple matter for the claimant to have discovered the time limit for herself. For example, entering the words "employment tribunal" into a search engine would have taken her to the gov.uk website, where the time limit was clearly displayed.

24. The claimant notified ACAS of her prospective claim, obtained an early conciliation certificate, and presented her online claim all on the same day: 15 June 2020.

Relevant law

Time limit for unfair dismissal

25. Section 111(1) of ERA confers jurisdiction on employment tribunals to consider complaints of unfair dismissal.

26. Section 111(2) of ERA provides

> (1) An employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
>
> (a)before the end of the period of three months beginning with the effective date of termination, or
>
> (b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

27. "Reasonably practicable" means "reasonably feasible". It is not sufficient for a claimant to show that they acted reasonably. The claimant does not, however, have to show that presenting the claim on time was a physical impossibility: *Palmer and Saunders v. Southend-on-Sea BC* [1984] ICR 372.

28. Where the claim was presented late because the claimant did not know about the three-month time limit, the tribunal cannot extend the time limit unless the claimant proves that it was not reasonably practicable for the claimant or her advisors to have discovered the existence of the time limit. The tribunal should take account of the enquiries that it would have been reasonably practicable to have made. If the claimant or her advisors could reasonably have been expected to know about the time limit, the claimant must take the consequences: *Walls Meat & Co v. Khan* [1979] ICR 52, CA.

29. Where a claimant engages skilled advisors, and it would have been reasonably practicable for the advisors to have presented the claim on time, the tribunal must find that it was reasonably practicable for the claimant to have presented the claim within the time limit. If the advisors have made a mistake, the claimant's remedy is against them: *Dedman v. British Building and Engineering Appliances Ltd* [1973] IRLR 379.

30. The mere fact that a claimant seeks advice from the CAB does not, as a matter of law, prevent that claimant from being able to argue that it was not reasonably practicable to present the claim on time. Where a claimant presents the claim late in reliance on mistaken advice from CAB advisers, it is open to a tribunal to

conclude that it was not reasonably practicable for the claim to be presented within the time limit. Much will depend on the circumstances in which the advice was given, the nature of the advice, and whether or not it was reasonable to act on that advice: *Marks & Spencer plc v. Williams-Ryan* [2005] ICR 1293.

Time limits in discrimination and harassment complaints

31. Section 123 of EqA provides, so far as is relevant:

> (1) proceedings on a complaint [of discrimination or harassment in the field of work] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

32. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to "an act of extending over a period".

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

33. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

34. The "just and equitable" extension of time involves the exercise of discretion by the tribunal. There is no statutory presumption in favour of extending time: it is for the

claimant to persuade the tribunal to exercise its discretion in his or her favour: *Robertson v. Bexley Community Centre* [2003] EWCA Civ 576. There is, however, no rule of law as to how generously or sparingly that discretion should be exercised: *Chief Constable of Lincolnshire Police v. Caston* [2009] EWCA Civ 1298. The discretion to extend time is "broad and unfettered": *Abertawe Bro Morgannwg University v. Morgan* [2018] EWCA Civ 640.

35. Tribunals considering an extension of the time limit may find it helpful to refer to the factors set out in section 33 of the Limitation Act 1980 (extension of the limitation period in personal injury cases): *British Coal Corpn v. Keeble* [1997] IRLR 336. These factors include:

    35.1. the length of and reasons for the delay;

    35.2. the effect of the delay on the cogency of the evidence;

    35.3. the steps which the claimant took to obtain legal advice;

    35.4. how promptly the claimant acted once he knew of the facts giving rise to the claim; and

    35.5. the extent to which the respondent has complied with requests for further information.

36. Section 13(1) of EqA provides:

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats, or would treat, others.

37. Sometimes the reason for the less favourable treatment is not the protected characteristic itself, but is nonetheless treated as being directly discriminatory. This occurs where the reason is a "proxy" for the characteristic or is "indissociable" from it: *Lee v. Ashers Baking Company Ltd* [2018] UKSC 49. There must, however, be a perfect correspondence between the reason for the treatment and the characteristic for which the reason is said to be the proxy (see *Lee* at para 25). Where treatment is for a reason (such as precarious immigration status) that is not of itself a protected characteristic, but is linked to a protected characteristic (such as nationality), there is no direct discrimination unless the reason perfectly corresponds to the characteristic: *Taiwo v. Olaigbe* [2016] UKSC 31.

<u>Harassment</u>

38. Section 26 of EqA relevantly provides:

> (1) A person (A) harasses another (B) if—
>
> (*a*) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (*b*) the conduct has the [defined purpose or effect].

39. Subsection (5) names sex among the relevant protected characteristics.

<u>Burden of proof</u>

40. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

41. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination ... These are referred to below as "such facts".
>
> (2) If the claimant does not prove such facts he or she will fail.
>
> (3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of … discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".
>
> (4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
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> (5) It is important to note the word "could" in s. 63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
>
> (6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
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> (7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts…This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
>
> (9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
>
> (10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
>
> (11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

> (12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
>
> (13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

42. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA Civ 1913, *Royal Mail Group Ltd v. Efobi* [2019] EWCA Civ 18.

43. In order to shift the burden, it is not enough for the tribunal to find a difference in protected characteristic and a difference in treatment. Something more is required. There must be facts from which the tribunal could conclude that the *reason* for the difference in treatment was the protected characteristic: *Madarassy v. Nomura International plc* [2007] EWCA Civ 33.

Conclusions

Unfair constructive dismissal

44. I am satisfied that it was not reasonably feasible for the claimant to have presented her claim before she obtained the results of her medical test. She did not know about employment tribunals or time limits. It was not reasonably practicable for her to find out about them, or act upon them, because she was unable to concentrate on anything significant apart from her new job and her own health.

45. It was, nevertheless, reasonably practicable for the claimant to have presented her complaint of unfair dismissal on or before 10 June 2020. In particular, she could relatively easily have presented her claim during the window of time between 6 and 10 June 2020.

46. By 6 June 2020, at the latest, the claimant knew:

    46.1. All the facts giving rise to her claim against the respondent;

    46.2. That she need no longer worry about her health;

    46.3. How to search the internet; and

    46.4. That the CAB was a potential source of help and advice in connection with employment disputes.

47. From the time when the claimant spoke to Mold CAB, she also knew:

    47.1. That employment tribunals could consider employment disputes of the kind she had with the respondent; and

    47.2. That she would need to contact ACAS before bringing a claim.

48. It is not clear exactly how long before 10 June 2020 the claimant had the CAB conversation and when she acquired that additional knowledge. In my view it does not particularly matter. There is no evidence that the claimant had to wait to speak to an adviser once she obtained the details of Mold CAB from her internet search.

It would have been reasonably practicable for her to have spoken to the CAB from, at the very latest, 8 June 2020 (the first weekday after 6 June 2020). From that time onwards, it was reasonably practicable for her find out that employment tribunals could consider claims like hers.

49. As soon as it became reasonably practicable for the claimant to know about the existence of employment tribunals, it also became reasonably practicable for the claimant to know about the statutory time limit. She could easily have discovered it with or without the help of CAB. A simple internet search of "employment tribunals" would have led her straight to that information. As it was, it was also reasonably practicable for the CAB adviser to tell the claimant about the time limit. The adviser could also quite easily have asked her for the date on which she had given her notice and how much notice she had given. That would have enabled the adviser to do a simple calculation and work out that the last day for presenting an unfair dismissal complaint was 10 June 2020.

50. As soon as the claimant was in a position to know about the time limit, she would also have been able to notify ACAS immediately of her prospective claim, to have obtained her certificate, and presented her claim to the tribunal. She did not have any practical difficulty in doing any of those things on 15 June 2020. She could have taken those steps before 10 June 2020.

51. There is no evidence that the claimant was given misleading advice by the CAB or that she acted on any such advice.

52. It was therefore reasonably practicable for the claimant to present her claim before the time limit expired. In those circumstances the tribunal has no power to extend the time limit.

<u>Discrimination and harassment</u>

53. The last incident of discrimination and harassment is said to have occurred on 9 March 2020. As agreed, I confine my analysis to the time limit for that last incident. The final day for presenting the complaints of discrimination and harassment was 8 June 2020. The claim was out of time by seven days.

54. The respondent submits that there is no good reason for the delay. If I were to concentrate solely on the period between 8 and 15 June 2020 I might agree. But I do not see why I should restrict my focus in this way. It is relevant, in my view, to examine the whole of the period from 9 March 2020 until the claim was actually presented. For almost all of that time the claimant had a good reason for not presenting her claim. As I have already found, it only became reasonably practicable for her to present her claim once she obtained her medical test results. Had the claimant not been consumed by her new job and her anxiety about her health, there is no reason to think that she would not have telephoned the CAB much earlier. Had she done so, it is probable that she would also have presented her claim an earlier date.

55. Counsel for the respondent acknowledged that the delay of 7 days has had little or no effect on the cogency of the evidence. This was a sensible and realistic concession for her to make. Not just because the period of delay was so short, but also because the claimant had already put her complaint in writing at the time of resigning, so the respondent had already had the opportunity to investigate.

56. It was, at the most, a matter of a few days between the claimant obtaining her medical test results and her speaking to the adviser from Mold CAB. I am not now concerned with the question of whether it would have been reasonably practicable for her to speak to an adviser a few days earlier. As I have already observed when analysing the reason for delay, any time lag in seeking help is relatively insignificant when seen against the whole limitation period.

57. From the moment she left her employment, the claimant knew about the facts giving rise to her claim. This is not a case where the delay was explained by any failure on the respondent's part to comply with requests for information. But I do not hold this factor against the claimant. Knowledge of the facts would not, by itself, enable her to present a claim. Her ability to present the claim came later, when she discovered about employment tribunals. As I have found, she was only in a position to find out about tribunals once she had got over her health scare.

58. I have reminded myself that the *Keeble* factors are not exhaustive. They are a tool for exercising a broad discretion. Other factors may also be relevant. One such factor is the merits of the claim. If a complaint is bound to fail on its merits, the balance of disadvantage would generally weigh in favour of refusing to extend the time limit. If the extension were refused, there would be little disadvantage to the claimant in depriving her of the opportunity to bring a hopeless case, but if the extension were granted there would be a disadvantage to the respondent in being exposed to the cost of a defending an unmeritorious claim.

59. I started by examining the merits of the complaint of direct discrimination. If the complaint were to go forward to a final hearing, the tribunal would be concerned, not just with how the Site Supervisor treated the claimant, but also with the reason why the Site Supervisor treated the claimant in that way. There would need to be facts from which the tribunal could conclude that the reason was because she is a woman. I attempted to establish whether or not any such facts were being alleged.

60. In my view it is unlikely to be enough for the claimant simply to compare the way she was treated with the way in which male engineers were treated. The tribunal will have to take into account that, on the claimant's own case, the Site Supervisor treated her and Mr J in a similar way. That would tend to suggest that the Site Supervisor was motivated by something that was not the claimant's sex. It may have been, as the claimant suggested, that the reason was perceived loyalty to CBRE, or it may have been something else.

61. There is another alleged fact which could well be an indicator of the Site Supervisor's motivation. This was his alleged attitude towards the claimant leaving work for childcare, as demonstrated in the childcare allegations. There appeared to be a reasonably arguable case that the Site Supervisor treated the claimant less favourably than others because she had childcare responsibilities requiring her to leave work by 4pm. That is not the same as saying that the reason for the less favourable treatment was that she is a woman. Although it is well known that, in general, the burden of childcare falls on significantly greater numbers of women than men, it is also undeniable that many men are also principal carers of children and need to leave work during conventional working hours. For the complaint of direct discrimination to succeed, there would need to be a perfect correlation between the protected characteristic and the reason for the less favourable treatment. There is no such correlation here. It would therefore be necessary to go further and ask whether the reason for the treatment was that the claimant was

a *female* child carer. Another way of framing that question would be to ask whether or not a man with the same childcare responsibilities would have been treated any more favourably than the claimant was treated. There did not appear to be any facts from which the tribunal could conclude that a man in those circumstances would have been treated any better.

62. Had direct sex discrimination been the only complaint, I may well have refused an extension of time on the ground of its poor prospects on the merits.

63. I next looked at the complaint of harassment. I started with the childcare allegations. In my view it was reasonably arguable that the alleged conduct was "related to" the fact that the claimant is a woman. Unlike direct discrimination, there does not have to be a perfect correlation between the reason for the conduct and the characteristic. The alleged conduct was related to leaving work for childcare. Childcare is related to the female sex, in that the burden of childcare in society generally falls on women. There is a reasonable argument to be made that, when those two connections are linked, the conduct was related to sex.

64. For today's purposes, the respondent did not challenge the contention that the conduct had the purpose or effect described in section 26. Again, that was a realistic position to take – those matters are fact-sensitive and require all the evidence to be heard.

65. In my view, therefore, the childcare allegations are complaints of substance. It would put the claimant at a very real disadvantage if the time limit for these complaints were not extended.

66. I have considered whether or not to allow an extension of time in respect of the childcare allegations, but to refuse to extend time for the remainder of the claim. In my view, to proceed in that way might risk causing injustice. The facts are not sufficiently clear at this stage to enable me to say that the childcare allegations were related to sex and the rest were not. The childcare allegations run all through the timeline from December 2019 to March 2020. A tribunal might find that some of the Site Supervisor's other treatment of the claimant were motivated by her childcare responsibilities, even if his actual remarks were not about her departure time.

67. I did invite the claimant to think carefully about which allegations she was pursuing in the light of my observations. But at this stage it would be premature for me to draw bright lines.

68. Once, in principle, the harassment complaint was allowed to go forward, I considered that it would cause the respondent little additional disadvantage if time were extended for the complaint of direct sex discrimination. Some additional fact-finding may be necessary in order to establish the Site Supervisor's precise motivation. But the nature of the alleged treatment is likely to be the same.

69. Taking account of all the factors, including the merits of the claim, I am persuaded that it is just and equitable to extend the time limit by 7 days, so as to enable the claimant to pursue the latest of the discrimination and harassment allegations.

70. As indicated above, there still remains the important question of whether or not the tribunal has jurisdiction to consider any of the earlier alleged incidents of discrimination and harassment. That question will be decided by the tribunal at the final hearing, once it has heard all the evidence.

Employment Judge Horne

2 December 2020

SENT TO THE PARTIES ON

22 December 2020

FOR THE TRIBUNAL OFFICE

Notes:

(1) The hearing code “V” in the heading to this order indicates that the hearing took place on a remote video platform.
(2) These reasons will be displayed on the tribunal’s online Register of Judgments.