Appeal Nos. UKEAT/0028/20/LA (V)
UKEAT/0029/20/LA(V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 21 January 2021
Judgment handed down on
14 April 2021

Before

HIS HONOUR JUDGE AUERBACH

MS V BRANNEY

MR P PAGLIARI

MS S PALIHAKKARA — APPELLANT

1)ROBERTSON BELL LIMITED — RESPONDENTS

2)THE ENGLISH SPORTS COUNCIL

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	Mr JEREMY LEWIS Mr PATRICK TOMISON (of Counsel)
For the First Respondent	Mr DECLAN O'DEMPSEY (of Counsel) Instructed by: DAC Beachcroft LLP St Pauls House 23 Park Square South Leeds LS1 2ND
For the Second Respondent	Ms KATE GALLAFENT (of Her Majesty's Counsel) Instructed by: Fieldfisher LLP Riverbank House 2 Swan Lane London EC4R 3TT

SUMMARY

PRACTICE AND PROCEDURE – Amendment

RACE DISCRIMINATION AND VICTIMISATION – Time Points

The Claimant was placed by the First Respondent (an agency) on a short-time assignment with the Second Respondent. She began work on 9 October 2017. On 9 November 2017 the Second Respondent terminated the assignment. It was agreed that the Claimant would work out a week's notice. However, on 10 November 2017 the Second Respondent required her to leave immediately. On 7 April 2018 the Claimant presented a claim against the Second Respondent (the first claim), including complaints of direct race discrimination and victimisation, relating to the events of 9 and 10 November 2017, and the handling of a subsequent grievance by it.

On 4 October 2018 the Claimant presented a claim seeking to pursue complaints against the First Respondent under the **Equality Act 2010** (the second claim). She also applied to add those complaints against the First Respondent to the first claim. She relied on documents contained in the hard copy disclosure provided by the Second Respondent in relation to the first claim, in August 2018, relating to its communications with the First Respondent in connection with the termination of the assignment with it. The Employment Tribunal held that the second claim had been presented outside the primary time limit, decided that it was not just and equitable to extend time, and refused the application to amend the first claim.

Held: The Employment Tribunal had not erred in identifying that the complaints that the Claimant sought to advance against the First Respondent were not of alleged conduct extending over a period, and hence that they were presented outside of the primary time limit. The Tribunal also reached a proper decision not to extend time, which was not perverse. In particular it was entitled to take account of its finding that the Claimant had been informed about, and provided

with, the documents now relied upon by her, during April and May 2018. It also properly exercised its discretion not to permit the proposed amendment of the first claim.

HIS HONOUR JUDGE AUERBACH

1. We will refer to the parties as the Claimant, RB and ESC. This is the Claimant's appeal.

Introduction and Chronology

2. On 9 October 2017 the Claimant began working for ESC as a Senior Management Accountant on a short-term assignment. She was placed in that role by an agency, RB. In November 2017 ESC terminated the relationship. We need first to describe events following that, and up to the date of the Preliminary Hearing (PH) which gives rise to this appeal. We draw on the Employment Tribunal's decision and other primary documents that were before it.

3. Following the termination of the relationship, the Claimant complained to ESC. She was informed that her complaint was not upheld. She pursued the matter further, leading to a further investigation. On 26 March 2018 ESC sent her a report rejecting her complaint.

The First Employment Tribunal Claim

4. On 7 April 2018 the Claimant, as a litigant in person, presented a claim form against ESC as the Respondent. She wrote that she was called into a meeting on 9 November 2017 where she was abruptly told that her contract was being terminated, and it was then agreed that she would work out a week's notice. Then, the next day, she was told to leave immediately. She claimed that her treatment on each of those occasions amounted to direct race discrimination. She also complained of victimisation and unfair dismissal.

5. The narrative also included a reference to what the Claimant asserted was the reaction of her agent at RB, to the termination of the relationship by ESC, in the following terms:

"My agent ceased all contact with me after a few days, ignoring all my requests for call backs from him. I do not know why that was, other than he was keen to keep the company onside to obtain his future commissions."

6. On 11 April 2018 the Claimant emailed RB a Subject Access Request (SAR). Referring to her agent at RB, Harry Peasnell, she also wrote: "Can I separately log a complaint about the way I was treated and the end of my assignment dealt with by Harry who when my contract ended refused to return calls and basically ignored me, very unprofessional." On 22 April the CEO of RB, Stuart Bell, emailed asking her to expand upon her complaint. In a reply the Claimant wrote that, following the ESC termination, Mr Peasnell had ignored her emails and calls and "never once helped me to get a new role."

7. On 30 April 2018 Mr Bell replied. He stated that ESC had "advised us that they had several concerns around your performance which ultimately led to the end of the assignment." Mr Peasnell had acknowledged that he "could perhaps" have been in touch more regularly. Mr Bell apologised for this. The business was led by client requirements, and with nearly 100,000 candidates and less than 30 staff it was not possible to provide the level of contact that each candidate might ideally like. He concluded: "If you would prefer we did not hold a copy of your CV, please do let me know." In a reply the Claimant asked what ESC's concerns were. Mr Bell replied by an email into which he cut and pasted "our client's version of the sequence of events". This included an entry dated 10 November, which included: "After discussions with Mike, Rona, HR and the agency we agreed to ask to leave SE with immediate effect."

8. On 21 May 2018 Alex Dovaston of RB emailed a reply to the Claimant's SAR. The disclosure included ESC's "file note" email recording its chronology of events (that had been earlier reproduced to the Claimant by Mr Bell). In reply to a query from the Claimant, Alex

Dovaston informed her that the date of the file note was 19 January. The Claimant complained of the absence of communications between RB and ESC. She queried why documents had been deleted "within less than 6 months of an incident occurring, knowing I have escalated it for investigation." Alex Dovaston indicated that everything held by RB that was covered by the SAR had been disclosed, and nothing withheld. There was a clean inbox policy at RB, and it sought to keep as paper-free as possible, meaning that hard copies "go pretty quickly."

9. The Claimant also submitted an SAR to ESC, to which Gail Laughlan replied by email on 23 May 2018. She attached "five PDFs of documents." The Claimant's response included: "I do not have print access, and was expecting any disclosure as hard copies, can you please do that?" and: "There is only one email here, which I have not already got. Is that correct?" In a reply of 25 May Ms Laughlan offered to send hard copies if the Claimant provided a postal address. She also referred to the five PDFs each containing several emails and asked if the Claimant had received all five. In her reply the Claimant did not comment on this.

10. In July 2018 ESC put in Grounds of Resistance to the first claim, which raised jurisdictional issues and denied discrimination. Its case was that it had decided to cease using the Claimant's services because of performance issues; and that it subsequently asked her to leave immediately, because of concerns arising from her behaviour after being told of that decision. It contended that all of the complaints should be struck out.

11. There was a case management PH on 2 August 2018. The unfair dismissal complaint was withdrawn. The complaints were identified, in summary, as being of: direct discrimination because of race by the Claimant being called to a meeting on 9 November 2017 and told that her

contract with ESC was at an end, and by being called into a meeting the next day and told that she had to leave immediately; and direct discrimination and/or victimisation in respect of certain aspects of how her subsequent grievance to ESC was handled.

12. On 21 August 2018 the Claimant emailed Mr Bell. The subject line was "Query re old matter". She attached the email of 30 April 2018 in which Mr Bell had reproduced the chronological account of events that had been provided to RB by ESC. She wrote, in part:

> **"We were in touch earlier in the year about my sudden termination and being marched out of Sport England office with no warning or reasons given. Can I check something on re-reading your note below, the very last line suggests the agency were first consulted and KNEW I was going to be marched out, is that true, it says this was agreed with the agency BEFORE? Yet no one from the agency alerted me or even spoke to me?"**

13. On 28 August 2018 ESC provided the Claimant with its hard copy disclosure documents in the first claim. This included copies of an exchange of emails between Mr Peasnell (of RB) and Ms Jacobs (of ESC) on 13 November 2017. In that exchange Mr Peasnell wrote:

> **"I have received another lengthy email this morning from Sam who wants to speak with HR. Happy to tell her they do not need to speak with her. Just wanted to get your thoughts?**

Ms Jacobs replied:

> **"Thanks for your email. It is not appropriate for our HR team to talk to Samantha as she is not an employee of Sport England."**

14. On 23 September 2018 the Claimant emailed Mr Bell attaching a copy of that email from Mr Peasnell to Ms Jacobs. She commented that she was "disgusted" that he had "actively blocked me speaking with HR". She asked why. She also referred to Mr Bell's "refusal to respond to my last email" which she said she took as a "further act of race discrimination."

15. On 25 September 2018 Mr Bell replied as follows:

"The reason we have not responded is because we are aware that you are currently in legal proceedings with our client (Sport England). Robertson Bell do not feel it is appropriate to be in discussions with you until these have been concluded.

I can tell you that we were made aware very shortly (a matter of minutes) before you were informed directly by Sport England that your contract was being terminated.

I am sorry that you feel disgusted in relation to Harry's actions.

Robertson Bell will not be commenting further."

The Second Employment Tribunal Claim and Application to Amend the First Claim

16. Having started and ended the ACAS Early Conciliation process on 26 September 2018, the Claimant presented a second claim form on 4 October 2018, identifying RB and ESC as Respondents. However, there was, in fact, no new claim against ESC, only a reference back to the first claim against it; and the second claim was accepted as being against RB only.

17. The particulars of claim were set out in an attached document. It began:

"ET1 requested for Robertson Bell Ltd:

i) After seeing some of the bundle documents in respect of my case 2202019/2018 (Sport England), which were previously not given to me, I seek to make an application to the ET to include direct discrimination by the agency Robertson Bell too as another Respondent, and Victimisation, which I was unaware of without seeing these documents which were also withheld from me before when I requested their disclosure, and as it now appears the agency seem to have been fully involved more than I knew originally.

ii) The direct discrimination and victimisation by the agency would be in respect of:

a) the termination without any communication to me at all, and their conduct in that process,

b) and then also afterwards, where within a few days they just ceased all dealings and contact, though never actually stated this, via my agency consultant Harry Peasnell, who simply ignored me. Rather than what an agency should do, i.e. assist me to find another contract at the very least, as well as speak to me to hear my side of matters properly. Instead it seems I was instantly terminated from them too and with no support, communication, etc to find alternative work which amounts to direct discrimination then, and goes hand in hand with the treatment from Sport England personnel.

There was no other justification for the agency consultant to freeze me out in that manner, and added to the trauma of the situation and my distress considerably, as well as loss of earnings. In essence denied me access to any other opportunities that may have come via the agency, e.g. contracts/jobs. I do not know whether Sport England personnel directed them to do this. Also, by severing the tie in the manner they did, means I will never be able to use or trust this agency again. So should

companies who only use this agency want to hire, I will be excluded both at that time, now, and in the future. It amounts to direct discrimination in how the agency treated me.

c) I have been unable to get to the bottom of what really occurred between Sport England personnel and the agency, as when I requested my data from the agency, despite alerting them immediately to a problem and that I logged it as a grievance, they told me they had destroyed all my records.

d) Example below that I have now seen of the agency's involvement, this was the Monday morning after being walked out of the office on Friday 10th November 2017, and the HR lady I spoke to her by phone on the Friday said she would arrange to catch up with me on Monday. However, I was unaware of this behind the scenes by my agency and SE, and why are temporary workers not allowed to speak to HR?"

18. The email exchange between Mr Peasnell and Ms Jacobs, of 13 November 2017, which we have already cited, was then reproduced. The document then continued as follows:

"It has become apparent from documents I have only recently seen, that were previously withheld from me by Sport England when I sought their disclosure by the Respondent, that the agency, Robertson Bell Limited, were more involved in the matter than I was aware of. As such I would like to make this application. I am unclear whether it needs to be added to the other ET1 currently or treated as a separate claim of its own.

Despite being aware of a grievance request being made by me to Sport England, the agent has intentional destroyed evidence I believe that would have supported my case."

19. Also on 4 October 2018 the Claimant emailed the Tribunal applying to amend the first claim to add RB as a Respondent. The email set out the proposed complaints against RB that she sought to add, in substantially the same terms as they were set out in the second claim.

20. A case management PH took place on 2 November 2018. A further PH was directed to consider the Claimant's application to add RB as a Respondent to the first claim, whether the two claims should be consolidated, and "any applicable time limitation points".

21. Then, on 4 December 2018, came RB's response to the second claim. It asserted that the Claimant's services were supplied to ESC by an umbrella company, with which RB contracted. It gave RB's account of events. This included that Mr Peasnell was alerted by ESC towards the end of October 2017 to the fact that it had performance issues with the Claimant, and was informed as a courtesy on 9 November 2017 that ESC was going to terminate the relationship. It went on to give RB's account of communications between the Claimant and Mr Peasnell in the aftermath, and then of later developments.

22. RB contended that the claims were out of time. It denied direct discrimination and victimisation. The Grounds of Resistance also included the following:

> **"30. The Claimant also alleges that the Respondent denied her further work opportunities and this was directly discriminatory. This is denied and is misconceived. The Respondent employs 18 recruitment consultants and has approximately 70,000 candidates on its books seeking work opportunities. The Respondent is led by client requirements not candidate requirements. The failure to place the Claimant after Sport England was not in any way related to the Claimant's race as alleged or at all. The Respondent has only placed the Claimant once during a 5-year period following the Claimant's registration with the Respondent. Furthermore, the Respondent did not terminate the Claimant's registration as alleged."**

23. The document concluded that RB would be applying to have the claims struck out as having no reasonable prospect of success.

The Employment Tribunal's Decision

24. The PH went ahead on 14 February 2019 before Employment Judge Brown. The Claimant was represented by an ELIPS representative, Ms Hearn; RB by Mr Fellow, a solicitor; and ESC by Ms Gallafent QC. The reserved Judgment, sent in March 2019, was as follows:

> **"1 The Claimant's claim against Robertson Bell Limited was presented out of time and the Tribunal has no jurisdiction to hear it. It is struck out.**
>
> **2 The Tribunal does not give the Claimant permission to amend her claim against the English Sports Council to add Robertson Bell Limited as a Respondent and/or to add further claims against Robertson Bell Limited."**

25. The Reasons began by referring to the first claim. They then continued:

> **"3. The Claimant had been placed by Robertson Bell Limited, a recruitment agency, at The English Sports Council (which is also known as "Sports England"). The Claimant made a Subject Access Request to The English Sports Council and, in May 2018, was given disclosure of electronic documents pursuant to that SAR. She was given disclosure of hard copy documents in the ET proceedings against The English Sports Council on 28 August 2018. The Claimant did not review the documents disclosed on the Subject Access Request but did review the hard copy disclosure. Both the hard copy disclosure and the Subject Access Request electronic disclosure contained two emails between Harry Peasnell of Robertson Bell Ltd and Serena Jacobs of The English Sports Council. The first was on 13 November 2017, when Harry Peasnell emailed Serena Jacobs in the following terms:**
>
> > **"I have received another lengthy email this morning from Sam who want to speak to HR, happy to tell her they do not need to speak to her just wanted to get your thoughts."**
>
> **4. Further, in January 2018, Serena Jacobs had emailed Harry Peasnell in the context of the Claimant's grievance, setting out her chronology of events in relation to the Claimant's employment and asking if Mr Peasnell agreed with it.**
>
> **5. On 4 October 2018, following Early Conciliation which started and ended on 26 September 2018, the Claimant made an application to add Robertson Bell Ltd as a Respondent to her existing claim against The English Sports Council. She also presented a new claim to the Employment Tribunal against Robertson Bell. The terms of the amendments sought and the particulars in the new Employment Tribunal claim against Robertson Bell were in almost identical terms. There were as follows, insofar as is material:**
>
> **[*Here the Tribunal set out paragraphs (ii)(a) – (d) of the particular of claim in claim 2 – see our paragraph 17 above.*]**
>
> **6. Robertson Bell Ltd made an application to strike out the new claim on the grounds that it was presented out of time and had no reasonable prospect of success. It also opposed the Claimant's application to amend her claim. These applications came before me today.**

26. The Judge noted that she had heard live evidence from the Claimant, who was cross-examined. The Judge then set out her findings of fact, which we need to reproduce in full.

> **"8. The Claimant was very distressed following the termination of her contract by the Sports England. As a result, she has had treatment from her GP. The GP wrote a letter in this regard on 2 November 2018.**
>
> > **'She came to see us on 24 November 2017 worried as she felt she was about to have a stroke. We advised her to have an MRI scan and full rest. She was also suffering flash backs for about two months she advised. In November 2018 she was also then referred for counselling at that time (and allocated sessions up to 12 months).**
> >
> > **Also, she advised us that she is under an immense amount of stress due to the ongoing employment stressor and I can confirm it was affecting her mental wellbeing in August 2018 and is ongoing.**

Our patient also advised us that she has been suffering migraines during the last 1.5 weeks.'

9. The Claimant told me, and I accepted, that she has had some mental health problems since her contract with The English Sports Council ended. I accepted that she had been receiving counselling and that her mental health issues are continuing. However, she was able to present her claim against The English Sports Council on 7 April 2018 and set out her complaint against it in detail. In that claim, at paragraph 6, the Claimant specifically referred to her agent at Robertson Bell ceasing contact with her a few days after the termination of her contract by Sports England, ignoring requests to call her back. She was therefore able to put those facts in the claim on 7 April 2018, although, at that time, she made no separate claim in respect of them.

10. The Claimant has not worked since her contract with The English Sports Council was terminated, but has continued to look for work, making job applications. I concluded that, since the contract with The English Sports Council came to an end, the Claimant has considered that she would be well enough to work, if she were offered work.

11. The Claimant had been in email correspondence with Stuart Bell, CEO of Robertson Bell Ltd, in April 2018. She made a complaint about Mr Peasnell on 22 April 2018; saying that Mr Peasnell spoke to her on the termination of her employment by The English Sports Council, but then proceeded to ignore her emails and calls and that he had never once helped her to get a new role, which she said was a totally unfair way to be treated. She said that he ignored her and it was appalling.

12. On 30 April 2018 Mr Bell wrote to the Claimant providing detail of The English Sports Council's concerns about her work for them. This included a statement by The English Sports Council, "10 November - … after discussions with Mike Roaner, HR and the agency we agreed to ask SE (*Sports England*) with immediate effect". In other words, The English Sports Council had stated that, on 10 November 2017, after discussions with Robertson Bell ltd, amongst other people, it had decided to ask the Claimant to leave with immediate effect.

13.The Claimant did not read the SAR electronic disclosure documents provided to her in May 2018, but she did read the disclosure hard copy documents provided on 28 August and noted two emails on 13 November 2017 and in January 2018 between Mr Peasnell and Ms Jacobs. She considered that these showed evidence of collusion between The English Sports Council and Robertson Bell Ltd and that she should issue a claim against Robertson Bell Ltd. She sought advice from ACAS in this regard.

14. The Claimant was unfortunately involved in a car accident on 20 September and attended her GP in respect of headaches, whiplash and flashbacks, in the weeks immediately following.

15. The Claimant presented her claim against Robertson Bell Ltd on 4 October 2018 and made an application to amend her claim against at The English Sports Council on that date, at the latest. The Claimant told me that she was aware that Robertson Bell Ltd had destroyed her documents when she requested her documents from the agency."

27. The Tribunal then directed itself as to the law. In relation to applications to amend it set out the guidance and principles that it drew from **Selkent Bus Company v Moore** [1996] IRLR 661, **New Star Asset Management Holdings Limited v Evershed** [2010] EWCA Civ 870 and

A the **Presidential Guidance** of 2014. The Grounds of Appeal, rightly, do not criticise that self-direction as such, and we do not need to reproduce it.

B 28. Under the heading "Time Limits and Continuing Acts" the Tribunal continued:

> **"21. By *s123 Equality Act 2010*, complaints of discrimination in relation to employment may not be brought after the end of**
> **21.1 the period of three months starting with the date of the act to which the complaint relates or**
> **21.2 such other period as the Employment Tribunal thinks just and equitable.**
>
> **22. By *s123(3) EqA 2010*, conduct extending over a period is treated to be done at the end of the period. Failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **23. Where a claim has been brought out of time, the Employment Tribunal can extend time for its presentation where is it just and equitable to do so. In *Robertson v Bexley Community Centre T/a Leisure Link* [2003] IRLR 434 the Court of Appeal stated that there is no presumption that an Employment Tribunal should extend time unless they can justify a failure to exercise the discretion. Quite the reverse: a Tribunal cannot hear a complaint unless the Claimant convinces the Tribunal that it is just and equitable to extend time, so the exercise of the discretion is the exception rather than the rule. In exercising their discretion to allow out of time claims to proceed, Tribunals may have regard to the checklist contained in s33 Limitation Act 1980 as considered by the EAT in *British Coal Corporation v Keeble & Others* [1997] IRLR 336. Factors which can be considered include the prejudice each party would suffer as a result of the decision reached, the circumstances of the case and, in particular, 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 has cooperated with any requests of information, the promptness with which the Claimant acted once he or she knew of the facts giving rise to the course of action and the steps taken by the Claimant to obtain appropriate advice once he or she knew of the possibility of taking action."**

F 29. There followed a section headed "Discussion and Decision" which we set out in full:

> **"24. Applying the law to the facts as I have found them, I have decided that the amendment sought in this case it is not simply an application to add Robertson Bell Ltd to an existing claim, for example, relying on *s.110 or s.109 Equality Act 2010*. The factual allegations against Robertson Bell are different to the allegations relied on in the claim against The English Sports Council. The allegations in the new/amended claim are: first, that the termination was made without communication with the Claimant and Robertson Bell's conduct in that process; second, Robertson Bell ceasing all dealings with the Claimant within a few days and denying her access to other opportunities; three, Robertson Bell destroying records of the Claimant. These are not the same allegations as are made against The English Sports Council Sports as set out at the 8 August 2018 PHC in front of Employment Judge Glennie.**
>
> **25. The facts relied on are different and the Respondent is different; I consider that it is a substantial alteration, to which the time limits would apply.**
>
> **26. The Claimant contends that her contract was terminated in November 2017. Her grievance against Mr Peasnell was presented to Robertson Bell in April 2018 and the destruction of her records must have occurred before then. Robertson Bell's failure**

to contact the Claimant started, at the latest, in November 2017; as the Claimant said, it started within a few days of the termination of the contract with The English Sports Council.

27. I consider, on the Claimant's pleaded case, that the last act complained of, the destruction of her records, occurred by April 2018 when she submitted her grievance against Mr Peasnell. Three months from April 2018 is July 2018. When the Claimant commenced Early Conciliation through ACAS in September 2018, she did so at least two months after the expiry of the relevant time limit. The Claimant's claims were therefore out of time.

28. The Claimant contended that there was a continuing act by the Respondent in failing to offer her further opportunities. However, in April 2018 the Claimant made a complaint about Robertson Bell's decision to stop offering her work had already been made. I conclude that the decision amounted to an act with continuing consequences, rather than a continuing act. Time therefore ran when the decision to stop offering work was made - this was, at the very latest, in April 2018, but probably in November or December 2017.

29. I have considered whether it would be just and equitable to extend time for the Claimant's race discrimination and victimisation claims against Robertson Bell. I conclude that, while the Claimant has been ill, she was able to present a claim against The English Sports Council in April 2018 and was therefore capable of bringing complaints to the Tribunal. She was not prevented from bringing a complaint against Robertson Bell by her illness. Furthermore, with regard to knowledge, I consider that the Claimant knew, on 30 April 2018, that Robertson Bell had been contacted and consulted before decision to terminate her contract by The English Sports Council. Furthermore, in May 2018 she was given SAR electronic disclosure of the emails on which she relies in bringing her claim, although she did not read them at the time. She ought to have known about the emails in May 2018, although she did not read them until August 2018. I find that the Claimant was at fault in not reading those documents earlier. In any event, the Claimant was aware of Mr Peasnell's failure to contact her in November 2017 and December 2017, when it happened, and referred to this in her ET1 against The English Sports Council. She was also aware that Robertson Bell said that it had lost or destroyed her documents. The Claimant was therefore aware of the facts on which she relies much earlier than her claim was submitted to the Employment Tribunal. I do not accept that she did not have the relevant knowledge and that this was a reason to extend time.

30. With regard to hardship and injustice, taking into account those matters, I consider that there is no good reason to allow the amendment in this case. The claim is out of time, time limits are to be applied to prevent stale claims against Respondents. The Claimant, in any event, still has a claim against The English Sports Council which she is able to pursue.

31. I do not allow the amendment. For the same reasons, I strike out claim number 2206320/2018 against Robertson Bell Ltd because it was presented out of time and I do not extend time for it."

30. The Claimant unsuccessfully applied for a reconsideration.

The Grounds of Appeal

31. The Claimant instituted an appeal against the substantive decisions arising from the PH, and the refusal of a reconsideration. At a Rule 3(10) Hearing, at which she was represented by

Mr Lewis of Counsel, through the ELAAS scheme, Choudhury P permitted two amended Grounds of Appeal against the substantive decisions to proceeded to a full appeal Hearing.

32. Those two Amended Grounds are developed over five pages, in what amounts in itself to a supporting skeleton argument. Ground 1 contends that the Tribunal erred in finding that the second claim "was presented outside of the primary three month time limit in so far as it related to [RB] ignoring the Claimant ("C") and not assisting her in searching for or finding alternative work." We will describe how this is developed when we review the arguments.

33. Ground 2 contends that, in deciding whether to permit the complaints against RB to be introduced by way of amendment to the first claim and/or whether (if extension be required) it was just and equitable to extend time in respect of their presentation in the second claim, the Tribunal erred in a number of respects. In summary, the Tribunal was said to have erred: (1) in its approach to time issues, as raised by Ground 1; (2) in its approach to the balance of hardship; (3) by reaching perverse conclusions about what the Claimant could or should have known about RB's involvement or conduct, and when; (4) by failing to consider that a decision in RB's favour would mean that it had benefited from wrongly having deleted the Claimant's data; (5) by reaching a perverse conclusion in relation to the impact of the Claimant's mental ill health; and (6) in taking a view that the proposed complaints against RB were stale.

Argument

34. As we have noted, the Grounds of Appeal themselves contained detailed supporting argument. We also had very detailed written and oral submissions from Mr Lewis and Mr O'Dempsey of Counsel, respectively for the Claimant and for RB. Ms Gallafent QC, whose

client, ESC, was affected by the appeal to a more limited extent, made submissions in relation to limited aspects. We have considered all of this material. What follows is only a summary of what seem to us to have been the most significant aspects of the arguments.

Claimant

35. In relation to Ground 1, Mr Lewis accepted that the Tribunal had, in principle, taken the right approach, by considering what complaints were pleaded in the second claim form, taking the Claimant's case at its highest. However, the particulars of claim appearing at (ii)(b) clearly set out an allegation of conduct extending over a period, encapsulated in the contention that RB "[i]n essence denied me access to any other opportunities that may have come via the agency." It was significant that RB, for its part, asserted that its relationship with the Claimant had *not* been terminated. The Tribunal should have recognised that the substance of the Claimant's case was that she had remained on RB's books, but there was an ongoing state of affairs whereby she was nevertheless passed over for consideration for any opportunities that arose, from time to time. The complaint was factually analogous to that advanced in **Owusu v London Fire and Civil Defence Authority** [1995] IRLR 574. It was not necessary for the Claimant to plead specific examples of being passed over. If there was a discriminatory policy, rule or practice, it was to be treated as ongoing, regardless of whether, or when, it was specifically applied. See: **Cast v Croydon College** [1998] ICR 500.

36. The Tribunal, said Mr Lewis, was wrong, at [28], to rely on its finding that, as the Claimant complained in April 2018 that RB had stopped offering her work, she must have believed that such a decision had, by then, been taken; and then to characterise her complaint as being about, not a continuing act, but an act with continuing consequences. In any event, the

issue was not what the Claimant believed, but what actually happened, which properly fell to be determined only after disclosure, hearing evidence also from RB, and finding of all relevant facts at a full Hearing. RB disputed having made a decision to stop offering the Claimant opportunities. The Tribunal had made no finding about whether it did, or if so, when.

37. Further, the Tribunal had not considered the potential impact of section 123(4) **Equality Act 2010 (the 2010 Act)**. This provides:

> **"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."**

In default of contrary evidence, or a finding of inconsistent conduct, the Tribunal should therefore have considered when, over the succeeding months, RB might have been expected to offer some other opportunity to the Claimant. It should have considered this by reference to all the communications between them, including that it was only in September 2018 that it emailed her that it felt it was inappropriate to respond to her while she was in litigation with ESC.

38. As to the first strand of Ground 2, Mr Lewis relied upon his submissions in relation to Ground 1. In relation to the second strand, he highlighted what he said was the Tribunal's failure, even if this was not a case of a continuing act, to consider the ongoing impact on the Claimant of being excluded from opportunities with companies that only hire through RB. Conversely, the Tribunal failed to take into account that RB had not been caused any practical prejudice, in terms of its ability to defend the claims, by the delay in their presentation. Relevant to that, was the fact that there had already been a grievance investigation in April 2018. The Tribunal's reference to the Claimant still having claims against ESC was also inconsistent with its statement that the

A subject matter of the proposed claim against RB was materially different from that of the claim against ESC.

B 39. In relation to the third strand, the Tribunal had wrongly relied on the 30 April 2018 email from Mr Bell as putting the Claimant on notice about there having been communication between ESC and RB about the former's decision to terminate the relationship. It had failed to consider her explanation that she had not picked this up, as demonstrated by her later email to Mr Bell on C 21 August 2018; and failed to consider properly the impact of her mental ill health at the time. She had also had difficulty accessing the electronic documents attached to the SAR reply from RB in May 2018, as the email exchanges at the time showed. In any event, RB's role in D November 2017 was only part of what the Claimant was seeking to complain about.

40. As to the fourth strand, the Tribunal failed to take into account the impact of RB having E deleted its data regarding the Claimant's assignment with ESC, which, submitted Mr Lewis, was in breach of its own policy. Nor had it properly considered that RB ought particularly to have preserved the data, given that it was made aware that the Claimant had complained to ESC, following the termination of the relationship. Fifth, for a variety of reasons, the ET reached a F perverse conclusion regarding the impact of the Claimant's mental health, on her ability to engage with, and process, the materials that she was sent in the spring.

G 41. Sixth, the Tribunal's reference to "stale" claims showed that it had erroneously taken the approach that there was a general rule against extending time, unless there were exceptional circumstances or good reason for the delay. In any event the proposed claim against RB was not

H

properly viewed as stale, given the lack of any prejudice to RB, and the ongoing impact on the Claimant of being excluded from opportunities by RB.

RB

42. In relation to Ground 1, Mr O'Dempsey submitted that, at [24] and following, the Tribunal correctly identified, on a natural and fair reading of the claim form, what the proposed claims against RB were about, taking her case at its highest: RB's alleged involvement in ESC's decision of November 2017; second, RB "ceasing all dealings with the Claimant within a few days and denying her access to other opportunities"; and third, RB destroying documents.

43. In so far as the Claimant complained that there had been a decision to stop offering her work, the Tribunal rightly characterised that as an allegation not of continuing conduct, but of conduct with continuing consequences. The Tribunal rightly identified that, on her case, that conduct had happened in November 2017, or, at the very latest, by April 2018. The Tribunal was entitled to draw on the fact that, in April 2018, she was complaining that such a decision *had been taken*. The main complaint was correctly viewed as being, in substance, that, just like ESC, Mr Peasnell had decided to terminate RB's relationship with the Claimant. The fact that RB denied this, did not alter the fact that this was the case that *the Claimant* sought to advance. There *was no complaint* in the claim form, of an ongoing policy or practice on the part of RB, of passing the Claimant over for opportunities from time to time. No such prima facie case was raised. Later events, referred to in the details of this Ground of Appeal, had not been relied upon in the way that the claim was put before the Tribunal in the claim form, and could not properly be relied upon now before the EAT.

44. As to the first strand of Ground 2, for the reasons advanced in response to Ground 1, the Tribunal had not erred in its approach to what the proposed complaints were about, or from when time ran in relation to them. As to the second strand, the Claimant's argument that the Tribunal had failed to take into account the ongoing hardship to her of being excluded from opportunities to which RB had peculiar access, depended on the false premise of a reading of what her proposed claim was about, which was not sustainable. As, on a fair reading, the main complaint that the Claimant sought to advance about the conduct of RB related its role in ESC's decision, and Mr Peasnell's response to the loss of the assignment with ESC, it was not wrong of the Tribunal to refer to the fact that she did have an ongoing claim against ESC about the loss of that assignment, even though it also rightly identified that the two claims were different.

45. As to the third strand, the Tribunal did have regard to the evidence it had about the Claimant's mental health, at [8] and [9]. The only *medical* evidence was the GP's letter. The Tribunal also considered her own evidence. It reached permissible conclusions about the significance of her mental health difficulties at the relevant time, there, and later at [29]. On this limited evidence, it was not obliged to take the view that her mental ill health explained, or excused, her failure sooner to act upon the information in the chronology provided on 30 April 2018, about contact between ESC and RB around the time of the ESC termination. The Tribunal was also entitled to take a view that she could have read the November 2017 emails, which, it properly found, were among the attachments to the May electronic SAR disclosure. Once again, it was not perverse not to conclude that her mental health explained her failure to do so. The Tribunal properly concluded that the Claimant had available to her, all the information on which she now sought to rely, many months before she presented her second claim, and made her

application to amend, in October 2018. It was properly entitled to take that into account in declining to extend her time or permit the amendment.

46. As to the fourth strand, the Tribunal correctly identified that the Claimant had been told by RB back in May about its practices in relation to retention or destruction of emails and hard copy documents. It was not obliged to view that conduct as suspect or culpable. The Notice of Appeal sought to rely on an RB policy document, about which arguments had not been advanced before the Tribunal. Had they been raised then, RB would have pointed out that this document post-dated the relevant period. In any event, the documents which the Claimant in fact sought to rely upon in support of her allegations against RB, were the 13 November 2017 emails, and the January 2018 email (in which ESC recorded its timeline), of which the Claimant *had* been given the contents, and copies, in April and May 2018.

47. In relation to the fifth strand, the Tribunal considered the evidence that it had, from the GP and the Claimant, about her mental health. It was the Tribunal's task to evaluate it. It was not obliged to conclude, on the evidence before it, that the Claimant's mental health had had a material impact on her ability to process information, or initiate litigation, during the relevant time period. The November 2018 GP report did not cast any relevant light on the Claimant's capabilities in April and May of 2018, such as to contradict the Tribunal's conclusions.

48. As to the sixth strand, the Tribunal had given itself a correct direction by reference to **Robertson v Bexley Community Centre** [2003] IRLR 434. It properly considered that the onus was on the Claimant to persuade it to extend time. It had *not* made the error (which the Court of Appeal had recently discussed again in **Adedeji v University Hospitals Birmingham NHS**

Foundation Trust [2021] EWCA Civ 23) of treating the **Keeble** case ([1997] IRLR 336) as providing a rigid mandatory checklist. It was entitled to weigh in the balance that to grant an extension of time would deprive the Respondent of its limitation defence. Once again, the evidence relating to the Claimant's mental health was properly evaluated, and did not oblige the Tribunal to conclude that an extension should be granted. Its weighing of the relevant considerations could not be properly described as perverse.

ESC

49. Ms Gallafent's main points were these. First, she drew attention to the fact that the Tribunal had evidence before it that ESC had responded to the Claimant's email of 23 May 2018 about the electronic disclosure, on 25 May 2018; and that she had not at the time responded to that email's reference to the five PDFs. Nor had she provided her postal address for the purpose of her request to be sent hard copies, until August. In all the circumstances the Tribunal had properly found that she could have accessed and read all the material contained in those PDFs – including the November email exchange – at the time when they were sent to her.

50. Secondly, even were the EAT to conclude that the Tribunal had erred in its approach to whether it was just and equitable to extend time in respect of the presentation of the second claim against RB, it did not follow that it would also have erred in refusing the Claimant permission to introduce her complaints against RB by way of amendment of her first claim against ESC. ESC's stance had been, and remained, that the two claims should not be combined. ESC had had a legitimate interest in not having a claim against another Respondent added to the ongoing claim against it, particularly as the first claim was by then well advanced.

51. In that connection, we were informed that, at the time of our hearing of this appeal (in January 2021) the full merits Hearing of claim one was listed for February 2021. Ms Gallafent voiced her clients' concern that the existence of this ongoing appeal should not lead to that listing being lost. However, she accepted that any application to postpone that Hearing on that account would fall to be made to, and adjudicated by, the ET, in the first instance.

Discussion and Conclusions

52. It was common ground before us that the starting point for the Tribunal was to consider, what, on a natural and fair reading of the second claim form, was the case that the Claimant was seeking to advance, as to the conduct that she alleged had factually occurred, and claimed amounted to unlawful direct discrimination and/or victimisation. The Tribunal then had to consider, from when time could, at the latest, have started to run for the presentation of such complaints. This included consideration of whether the alleged conduct might arguably be said to involve conduct extending over a period, taking the Claimant's case at its highest, such as might make the complaints relating to it (or some of them) in time. Finally, if, taking that approach, the complaints were all presented after the expiry of the primary time limit, the Tribunal had to decide, substantively, whether it was just and equitable to extend time.

53. As to the claims that the Claimant sought to advance, the Tribunal, in summary, identified that these concerned three aspects: (a) RB's alleged involvement in ESC's decision to terminate the assignment with ESC; (b) Mr Peasnell's conduct in the aftermath; and (c) destruction of documents. As to (b) the Tribunal read the complaint as being of RB "ceasing all dealings with the Claimant within a few days and denying her access to all opportunities." Unpacking this a little more, it is clear that the Tribunal read the complaint as being that, instead of responding to

her communications and proactively identifying a replacement position for her, Mr Peasnell had terminated her relationship with RB and completely cut her off.

54. In our judgment that was a fair and correct reading of the contents of the second claim form. On a natural reading, the whole thrust of this proposed claim, was that RB had been complicit in ESC's decision to terminate the Claimant's assignment with it, that RB had itself, in similar fashion, responded by terminating its own relationship with the Claimant, and that, thereafter, knowing that she had complained about how she had been treated, it had destroyed documentation. Further, the natural reading was that the second claim related to alleged conduct of RB many months ago, but that the Claimant was only now presenting that claim, because she had only recently seen, for the first time, documents which revealed more than she had previously known, about RB's conduct and involvement at that time.

55. All of this was conveyed, for example, in the reference (in box 15) to the existing claim against ESC and then to it having become apparent that "the agency was more involved than I had realised". The particulars of claim then refer to RB having been "fully involved more than I knew originally" – again, plainly meaning, involved in the conduct of ESC; then to RB "within a few days … ceasing all dealings and contact", then to not assisting the Claimant to "find another contract" – that is, to replace ESC, and to RB not speaking to the Claimant "to hear my side" – that is, of what happened with ESC. Most explicitly, the complaint is that, *instead*, "I was instantly terminated from [RB] too", which went "hand in hand" with the conduct of ESC. Further on it referred to RB "severing the tie in the manner that they did". The 13 November 2017 emails were then set out, at section (d), as evidence of RB's "involvement" on the working day after the Claimant was "walked out of the office" by ESC.

56. In his skeleton argument, Mr Lewis highlighted the words: "In essence denied me access to any other opportunities that may have come via the agency." He submitted that the Tribunal erred by not identifying that the Claimant was complaining that, in a context in which RB had *not* terminated the relationship, she remained on its books, but was "passed over for any opportunities that arose". The disparate times at which, he submitted it was to be inferred, on her case, she was not put forward for such opportunities, and others were put forward ahead of her, "were plainly connected by a continuing state of affairs and constituted a continuing act."

57. However, we agree with Mr O'Dempsey that there was no error in the Tribunal failing to detect or identify such a complaint; and that, on a fair and natural reading of the particulars of claim, none was present. Reading paragraph (b) of the particulars of claim as a whole, the sentence beginning: "In essence denied me access to any other opportunities", and the reference, a little further on, to being excluded "both at that time, now, and in the future", plainly referred back to the alleged conduct whereby the Claimant was "instantly terminated" by Mr Peasnell's decision to "freeze me out in that manner", thereby "severing the tie" at that time. The Claimant then went on, in that section, to assert that *that conduct* "means" that she will never be able to trust RB again, so that she will miss out on opportunities in the future. The natural meaning is that it was an ongoing *consequence* of the conduct of which she complained that she would not feel able to turn to RB to help her find work in the future.

58. Nor do we think that it can be said that the claim was potentially ambiguous and should have been construed as *possibly* embracing a complaint of the type framed by Mr Lewis in his skeleton, in the alternative. The context was not an ongoing employment relationship, as in

Owusu or **Cast**, but a limited agency relationship. The proposition that RB had decided to keep the Claimant on its books, but nevertheless *also* decided that she would not be put forward for any more opportunities that might be suitable for her, was not one that could be naturally inferred from her complaint. Though Mr Lewis referred in his skeleton to a passage in the reconsideration application referring to this possible scenario, that does not demonstrate that this contention should have been identified as having been advanced in the original claim form.

59. For completeness, we note that RB appear to have read the second claim in the same way. It responded, in its Grounds of Resistance, to the criticism of Mr Peasnell by reference to the November 2017 emails, and to the complaint of a "failure to place the Claimant after Sport England", by asserting that it "did not" terminate the registration "as alleged". That was surely a response to the complaint that Mr Peasnell's reaction to the termination of the ESC assignment *had been* thereby to instantly terminate the Claimant's relationship with RB as well.

60. The Tribunal also read the second claim as containing a further substantive complaint concerning RB's destruction of documents. As to that, the Claimant asserted (in box 15 and in the particulars at (i) and (iii)) that the documents which she had now seen (in ESC's hard copy disclosure for the purposes of claim one), in particular, the email exchange of 13 November 2017, had previously been "withheld" by ESC. Paragraph (c) of the particulars might have been thought then to be merely by way of further comment on why she could not expand on her complaint against RB and/or had not seen these documents sooner (on the footing that RB had not hitherto provided them either), rather than by way of conveying a distinct complaint of discrimination on the part of RB. But the Claimant *did* convey that she considered that RB ought not to have destroyed her records so swiftly, when it was aware that she had complained to ESC; and the

Tribunal's reading of paragraph (c) (which reading was not challenged by RB before the EAT), as containing a further substantive complaint, erred in her favour.

61. Finally, there is no reference anywhere in the second claim form, to any subsequent communication or contact with, or alleged conduct of, RB, after May 2018, (including none to the 25 September 2018 email), such as might have pointed to the Claimant seeking to raise a further discrete complaint about any other ongoing or more recent conduct on RB's part.

62. For all these reasons, we do not think that the Tribunal erred by not construing the claim form as raising a complaint, or a *prima facie* complaint, that RB itself also adopted an ongoing policy, rule or practice of excluding the Claimant from consideration for future opportunities from time to time, or as raising a complaint about alleged conduct said to have occurred later than that alleged against Mr Peasnell, and the alleged improper destruction of documents.

63. We turn to the Tribunal's approach to the question of when time began to run in respect of these complaints. The alleged involvement of RB in ESC's decision to terminate the assignment with ESC, plainly was said to have occurred around the time of that decision. In so far as the facet of the complaint referring to Mr Peasnell's lack of support or responsiveness, might be characterised as alleging an omission, we do not think that section 123(4) should have pointed the Tribunal to a different conclusion than it in fact reached. The Claimant's very case was that Mr Peasnell ought to have been proactive in the immediate aftermath of the loss of the ESC assignment, in trying to secure her a *replacement* assignment: in other words that it was *at or around that time* that he could have reasonably been expected to take such action.

64. As to the overarching complaint that RB, through Mr Peasnell, had terminated the relationship, the Tribunal correctly construed this as a complaint of discrete conduct with continuing consequences. The Tribunal's assessment that, on the Claimant's case this occurred "at the very latest, in April 2018, but probably in November or December 2017" fairly took her case at its very highest. As the Tribunal did not err, by not construing the claim as asserting that RB had adopted an ongoing policy, rule or practice, of keeping the Claimant on its books, but nevertheless excluding her from consideration for opportunities from time to time, nor did it err in failing to construe the complaint as being, in that respect, of ongoing continuing conduct.

65. As to the destruction of documents, the Tribunal (at [27]) considered that this was alleged to have occurred "by April 2018 when she submitted her grievance against Mr Peasnell". In oral submissions Mr Lewis noted that the reply to the SAR itself did not come until 21 May. However, at [15] the Judge also stated that the Claimant "told me" that she was aware that RB had destroyed her documents "when she requested the documents from the agency". Mr Lewis also himself acknowledged that, even if time fell to be calculated as running from 21 May 2018, the complaints would still be significantly out of time. Further, in considering whether to extend time, the Tribunal identified, correctly, at [29], that the 30 April email communicated that ESC had consulted RB before taking its decision, and that the 13 November emails were included in the electronic disclosure in May, and that RB had told the Claimant of its destruction of her documents. Ultimately, it seems to us, the Tribunal effectively in fact treated the May date as the material long stop for time purposes.

66. Pausing there, for all these reasons, we do not think the Tribunal erred (a) in its reading of what, in substance, was the alleged conduct of RB about which the Claimant was seeking, in

the claim form, to complain, (b) by failing to take this at its highest, (c) by failing to identify a complaint or *prima facie* complaint about continuing conduct, such as was, or was potentially, in time, nor (d) by concluding that her complaints were presented outside of the primary time limit, so that she required a just and equitable extension of time to enable them to be considered. For all of the foregoing reasons we conclude that Ground 1 fails.

67. We turn to Ground 2. As to the first strand, it follows from our discussion of Ground 1, that the Tribunal did not err in its conclusion that the proposed complaints were all, in principle, considerably out of time. As we have noted, it was not suggested that there was any error in its self-direction on the law relating to amendment. Nor do we consider that there was any in its self-direction in relation to just and equitable extension. It did not, as suggested by Mr Lewis, make the error of holding that an extension should be granted only in exceptional circumstances. Rather, it accurately cited the guidance given by the Court of Appeal in **Robertson**, to the effect that there is no presumption in favour of an extension, which is, in *that* sense, therefore the exception rather than the rule. We also agree with Mr O'Dempsey that it did not err in its approach to **Keeble**.

68. It is convenient next to address the fifth strand, concerning the evidence regarding the Claimant's mental ill health and what impact it may or may not have had at the relevant time. This was specifically addressed at [8] – [10] and [29]. It was for the Judge to reach conclusions about this aspect, on the basis of the *overall* evidence before her, in particular as to whether the state of the Claimant's mental health in April and May 2018 materially impaired her ability either to read and process the contents of the various materials that she was sent then, or to present a claim against RB thereafter. The Judge expressly considered the medical evidence – which

consisted solely of the GP's letter of November 2018 – and the evidence of the Claimant herself about this. She was also entitled to take into account the evidence she had, about the Claimant's ability to put together and submit her complaint to RB, and her first Tribunal claim against ESC, at the relevant times, and her evidence that she had been looking for work during the relevant period. In light of the overall evidence that she had, the Judge's conclusions on this aspect were properly reasoned and reached and cannot be said to have been perverse.

69. As to the third strand, it appears to us that the Tribunal properly concluded, on the material before it, that during April and May 2018 the Claimant was provided with the content of ESC's timeline, including the record that there was a discussion with RB before ESC's decision to terminate the assignment was taken, and was told that this dated from January 2018, and was provided with copies of the email exchange of November 2017. In relation to those emails, we note, for completeness, that during the course of our Hearing, Mr Lewis confirmed on instructions relayed via his co-counsel Mr Tomison, that the relevant PDF had been among the attachments received in the Claimant's webmail (though he could not confirm whether they reached her computer inbox). But in any event, the Tribunal was certainly entitled to proceed on the basis that this material was all available to the Claimant, having regard to the evidence of the email trails before it; and indeed it had evidence that, in response to a query from her, ESC specifically highlighted to her that there were five PDFs, each containing a number of emails.

70. For reasons we have stated, we do not think it was perverse of the Tribunal not to conclude that the state of the Claimant's mental health materially impacted her ability to read and process these materials at around that time. Nor do we agree with Mr Lewis that the Tribunal should have regarded the Claimant's 21 August 2018 email as pointing to such a conclusion: it simply

A referred to what the Claimant had picked up on "re-reading" the 30 April email. Once again, evaluation of this aspect of the overall evidence was the task of the Tribunal. Its conclusions about it were not perverse and the EAT cannot interfere with them.

B

71. The Tribunal's conclusion that the Claimant was "at fault" in not reading these documents earlier may be thought to have been a somewhat harsh way to put it; but it is clear from this paragraph as a whole, that the substantive point the Tribunal was making, was that the Claimant had all the material on which she sought to rely in October, available to her at that earlier time. The Tribunal was entitled to conclude, as it plainly did, in considering whether to extend time or permit the amendment, that there was no good or compelling reason why a complaint relying on this material could not have been presented much sooner than it was.

C

D

72. As to the fourth strand, regarding the deletion of the Claimant's data, as we have noted, favourably to the Claimant, the Tribunal construed her second claim form as including a proposed *complaint* that relevant documents had irregularly been destroyed. But, with regard to just and equitable extension, once again, the Tribunal properly found that the documents that the Claimant later relied upon in October, had in fact all been provided to her by ESC by the end of May in any event. Nor does the Tribunal appear to have been invited to find, for the purposes of what it had to decide at this PH, that RB had in fact acted irregularly in this regard; nor indeed, on the basis of the evidence it had at that stage, could it properly have done so.

E

F

G

73. Finally, we can take together the second and sixth strands, which relate to the question of the balance of prejudice and hardship. The Tribunal specifically referred to this at [30]. While its reasoning is rather compressed, we think it is clear that it did consider the potential hardship

H

or prejudice to both the Claimant and RB, depending on which way it decided. As to the former, it was inherent in the exercise, that, if the Claimant's applications were refused, she would not be able to pursue her proposed claims of discrimination and victimisation against RB. The Judge's reference to the fact that the Claimant "still has a claim" against ESC, also implicitly acknowledges this fact. We do not think it was necessary for the Judge to go further, and set out once again at this point, what the proposed claims were about, or what the Claimant said were all the consequences for her, of the conduct about which she sought to complain.

74. Nor do we think that the reference to the Claimant still having her claim against ESC conflicted with its earlier assessment that the proposed amendment to the first claim would involve a substantial alteration to it. The Tribunal fairly identified, at [24] and [25], that this case was not comparable to a case in which an individual Respondent is added to a corporate Respondent in respect of the same factual allegations. They concerned the alleged conduct of a new and distinct party, in distinct particular respects. But the proposed complaints, as correctly identified by the Tribunal, *did* concern RB's alleged involvement in, and reaction to, ESC's decision to terminate its relationship with the Claimant; and we do not think, therefore, that it can be said that the Tribunal should have regarded the fact that the Claimant would still be able to pursue her claims against ESC in that regard, as a wholly irrelevant consideration.

75. Turning to the question of potential prejudice or hardship to RB, it is true that the Tribunal did not refer to the absence of any particular difficulty caused by the delay, in terms of RB's practical ability to defend the proposed claims. But it does not appear ever to have been suggested that there was any in this case; and we do not think the mere failure to mention a feature that was not, and was not said to be, present, shows that the Tribunal erred. It is established, and obvious,

that the absence of what is sometimes called forensic prejudice does not mean that there is no prejudice at all to the party against whom an out-of-time claim is asserted, in allowing it to proceed. Time limits exist in order to confer a measure of certainty and finality in litigation; and the granting of an extension means that the party concerned has to defend a claim that it would not otherwise have to defend. The Tribunal, plainly, it seems to us, was making this general point about time limits, when it referred to "stale claims" at [30]. It was not suggesting that there was any particular forensic prejudice in this case, or otherwise making an impermissible finding that these particular claims were stale in any other sense.

76. For all of the foregoing reasons, we conclude that the Tribunal did not err in declining to extend time for presentation of the second claim, or, relying on the same analysis, in declining to permit the Claimant to amend her first claim to add her proposed complaints against RB to that. Mr Lewis advanced his case on the basis that the considerations relevant to each substantially overlapped. Ms Gallafent validly submitted that, in this case, the amendment application faced the additional hurdle, that it would adversely impact on ESC, by adding complaints against a new and different Respondent to the ongoing complaints against it, which had been well advanced when the second claim was presented. In all the circumstances the Tribunal properly declined to extend time in respect of the second claim, and properly refused also to permit the proposed complaints to proceed by way of amendment of the first claim.

Outcome

77. For all the foregoing reasons the appeals are dismissed.