EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112445/2019 (V)

Held in Glasgow on 1 May 2020
(Preliminary Hearing held remotely by Kinly cloud video platform)

Employment Judge Ian McPherson

Mr David Odigie	**Claimant** **In Person**
Renfrewshire Council	**Respondents** **Represented by:** **Ms Eilidh Clements-Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) Having heard evidence, and thereafter considered parties' closing submissions in private deliberation following close of the Preliminary Hearing, the Tribunal finds that the claim, presented on 9 November 2019, was presented out of time, but that it is just and equitable, in terms of **Section 123 of the Equality Act 2010,** to extend the time for lodging the claimant's ET1 claim form with the Tribunal.

(2) In these circumstances, the Tribunal does therefore have jurisdiction to consider the claimant's complaint of alleged unlawful direct racial discrimination against him by the respondents, and the Tribunal **refuses** the respondents' application to strike out the claim, under **Rule 37 of the Employment Tribunals Rules of Procedure 2013**, as having no reasonable prospects of success.

(3) Having allowed the claim to proceed, although lodged late, the Tribunal **orders** the claim and response to be listed, in due course, for a Final Hearing before a full Tribunal for full disposal, including remedy, if appropriate, and instructs the clerk to the Tribunal to issue date listing stencils to both parties for that purpose, with a view to a Final Hearing to be held, on dates to be hereinafter fixed by the Tribunal, within the proposed listing period of **October, November or December 2020**.

(4) When responding to the date listing stencils, the Tribunal further **orders** that both parties shall advise the Tribunal whether they are content for that Final Hearing to proceed by way of video evidence from both parties, again using the Kinly cloud video platform, and after the preparation and mutual exchange of witness statements prior to the start of that Final Hearing, or whether, instead, they seek to have an in-person Hearing at the Glasgow Employment Tribunal, and, if so, to clarify whether with or without the use of witness statements.

(5) Further, the Tribunal **orders** that the respondents' solicitor shall, **within no more than 28 days from date of issue of this Judgment**, lodge with the Tribunal, by email, with copy sent at the same time to the claimant, detailed grounds of resistance to the merits of the claim brought against them, by way of further and better particulars fully answering the claimant's complaint, as set forth in the ET1 claim form, and so augmenting the ET3 response previously lodged with the Tribunal in skeletal form, denying the discrimination allegation, but otherwise only addressing the time-bar argument.

(6) The Tribunal also **orders** that the claimant shall, **within no more than 28 days from date of issue of this Judgment**, lodge with the Tribunal, by email, with copy sent at the same time to the respondents' solicitor, a detailed Schedule of Loss setting forth the amount of compensation he seeks from the respondents, in the event that his complaint against them is to be upheld by the Tribunal after determination at a Final Hearing, together with an explanation for how he has calculated the amount claimed, and he shall also clarify whether or not he still seeks a recommendation from the Tribunal, in

terms of **Section 124 of the Equality Act 2010,** as previously indicated in his ET1 claim form, and, if so, in what terms, **allowing** the respondents' solicitor a period, **not exceeding 14 days from intimation of such Schedule of Loss**, to make written comment or objection to the Tribunal, with copy sent at the same time to the claimant, including any Counter-Schedule.

REASONS

Introduction

1. This case called before me again on the morning of Friday, 1 May 2020, for a public Preliminary Hearing before me as an Employment Judge sitting alone, to consider the respondents' opposed application for Strike Out, under **Rule 37 of the Employment Tribunal Rules of Procedure 2013,** on the basis that the respondents submit that the claim is time-barred, and thus it has no reasonable prospects of success, as it would not be just and equitable to grant any extension of time to the claimant, in terms of **Section 123 of the Equality Act 2010.**

2. On account of the ongoing Covid-19 pandemic, and joint Presidential Guidance issued by the Presidents of Employment Tribunals in Scotland, and England & Wales, in March 2020, and on account of there currently being no in person Hearings conducted, and both parties notified accordingly, this listed Preliminary Hearing took place remotely given the implications of the pandemic. It was a video (V) hearing held entirely by Kinly CVP, and parties did not object to that format.

Background

3. The case had first called before me on Thursday, 19 March 2020, for an in-person Case Management Preliminary Hearing, conducted in private, at the Glasgow Tribunal office, but with social distancing measures put in place in the Tribunal hearing room, on account of Covid-19. My written Note and Orders, dated 23 March 2020, was issued to both parties under cover of a letter from the Tribunal dated 31 March 2020.

4. At that earlier Hearing, having heard from both parties, and taking account of the **Presidential Guidance in connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic**, I ordered that the case was to be listed for a one day Preliminary Hearing to be held in public before me (if available), which failing another Judge, at the Glasgow Employment Tribunal, on Friday, 1 May 2020, as mutually agreed as convenient to parties, their witnesses and representatives, commencing at 10.00am, or as soon after that time as the Employment Judge could hear it, to hear evidence from the claimant first, then his wife, and then closing submissions thereafter by both parties, respondents first, then claimant, on the disputed preliminary issue of time-bar.

5. My written Note and Orders made necessary case management orders and directions in that regard, in exercise of my general case management powers under **Rule 29**, and, in particular, it was recorded that this Preliminary Hearing would be conducted by use of electronic communications (by video conferencing, or Skype, or equivalent, if possible), which failing by telephone conference call, all as per **Rule 46 of the Employment Tribunals Rules of Procedure 2013.**

6. Further, and, as per **Rule 43,** parties mutually agreed that the evidence of the claimant and his wife, restricted to the disputed preliminary issue of time-bar, and not the merits of the complaint against the respondents, would be provided by way of previously written witness statements, format and content as provided for in paragraph 20 of my written Note, ordered to be intimated within 4 weeks, i.e. by no later than 16 April 2020, which witness statements would shall stand as their evidence in chief, and be taken as read at this Preliminary Hearing.

7. At that earlier Hearing, I also ordered that, within 2 weeks, i.e. by no later than 2 April 2020, the respondents' representative should intimate to the Glasgow Tribunal office, by e-mail, with copy sent at the same time to the claimant, an outline written skeleton argument of their submissions to the Tribunal, together with a hyperlink to all legal authorities which the respondents' representative intended to refer to or rely upon in the course of her

submissions at this Preliminary Hearing. Their skeleton was to identify relevant statutory provisions and case law to be relied upon in argument at that Preliminary Hearing on time-bar, identifying clearly the relevant legal principle being relied upon, with full citation of page / paragraph number of the judgment relied upon, so as to give the claimant, as an unrepresented party litigant, advance fair notice of the factual and legal arguments being presented to the Tribunal by the respondents' representative.

8. The respondents' representative timeously intimated her outline written skeleton argument, and list of seven case law authorities, on 2 April 2020, sending a copy to the claimant. I detail these later, at paragraph 30 of these Reasons below. The claimant did not, however, lodge witness statements by 16 April 2020, nor seek an extension of time to do so. He wrote to the Tribunal, on 1 April 2020, stating that he wished to include his GP, The Barony Practice, Paisley, as an expert witness in this matter, as he had seen several doctors in his GP, and he proposed either Dr John Hislop or Dr Lorna Corfield. He asked the Tribunal what he needed to do next, did he get in contact with his GP or would the Tribunal get in contact with the GP? Nor did he intimate any additional case law authorities that he wished to rely upon, by 24 April 2020, as previously ordered by the Tribunal, but he did so in advance of the start of this Hearing, as I detail later, at paragraph 12 of these Reasons below.

9. When the claimant's enquiry was passed to me, on 16 April 2020, the Tribunal clerk replied to him, on my instructions, stating that it was his responsibility to contact his GP but the Tribunal understood, from the Hearing on 19 March 2020, that there was only going to be evidence from him, and his wife, and not a medical witness, although his witness statement might have included any supporting medical evidence that he sought to rely upon. Nothing further was heard from the claimant about calling a medical witness, although at this Hearing, he appeared to suggest that the Tribunal should have ordered a medical report from his GP as he would have been unable to pay for such a report privately. It is parties' responsibility to arrange for the attendance of witnesses, and, further, the claimant made no request to the Tribunal for a Witness Order to be granted to compel the attendance of his GP.

10. Most recently, on 23 April 2020, when he intimated two "***personal statements***", one from himself, and the other from his wife, the claimant indicated to the Tribunal that he was seeking advice from the Strathclyde University Law Clinic, but he was not sure if they would be able to represent him. No application was made to postpone this listed Preliminary Hearing, and the claimant sent to the Tribunal, with copy to the respondents' representative, the two personal statements which, although undated and unsigned, have been received and placed on the casefile as the witness statements previously ordered by the Tribunal.

11. At the start of this Hearing, it emerged that the claimant had re-submitted his witness statements by email to the Tribunal, and copied to the respondents' solicitor, in the early hours at 02:59 on Friday, 1 May 2020. He had made what he described as "***slight and insignificant changes"*** to the witness statements, to conform to the Tribunal's earlier directions, and certifying that the information provided in the statements is true and accurate to the best of the witness's knowledge. They retained the same dates as before, but they were still unsigned. Ms Clements confirmed that she had received them, and I had the clerk to the Tribunal send me a copy, by email, for my use at this Hearing.

12. The claimant's email confirmed that the Law Clinic had emailed him the previous day to advise that they would not be able to represent him at this Hearing, as they are in the middle of exam diet and working remotely, with limited resources and student availability, but they would be applying for more time to represent him if they were to take on his case going forward. His email to the Tribunal, copied to Ms Clements, at 23:55 on Thursday, 30 April 2020, further advised that he would be relying on two cases, which he identified (without any legal citation) as being **Norbert Dentressangle Logistics Ltd v Mr Hutton**, and **Robinson v Fairhill Medical Practice**. Ms Clements advised me that they were both EAT judgments, and available on the ***Bailli*** website, so I was able to access them online and read them, albeit the claimant had not provided copy judgments to the Tribunal.

Claim and Response

13. The claimant, acting on his own behalf, presented his ET1 claim form in this case to the Tribunal, on 9 November 2019, following ACAS early conciliation between 2 and 13 June 2019. It was accepted by the Tribunal administration, and served on the respondents by Notice of Claim issued by the Tribunal on 12 November 2019. Their ET3 response was due by no later than 10 December 2019.

14. In his ET1 claim form, having ticked in section 8.1 that he was discriminated against on the grounds of race, and indicating no other type of complaint against the respondents, the claimant stated his case, in a separate paper apart enclosed with his claim, reading as follows:

1. The reasons why I delayed at brining (sic) *this case before the tribunal was that I had some other cases put before the tribunals, as of when those cases were put before the tribunal, I don't have a lawyer and I was handling the case management alone. The management of the cases by myself had put enormous pressure on me and my family and my relationship with my wife.*

2. As a result of what I was going through, I was frequently having panic attach (sic) *; I could hardly sleep at night and I was diagnosed of anxiety.*

3. My wife is a student and had recently given birth to a bouncing baby boy on the 15th 0f December 2018, he is just about eleven months old, I had to take care of my boy to allow my wife to study.

4. I was recently writing my dissertation and I had a deadline to meet, despite all what I am going through, I had to encourage myself and find the strength to write the dissertation.

5. The above are some of the reasons why I delayed putting the case forward despite the fact that the Acas Certificate was issued at on the 13th of June 2019.

6. I received an email inviting me for an interview on the 15th of April, the email stated that

"Dear D

We are pleased to advise you that your application has successfully progressed to the next stage of our recruitment process. Please ensure you read the full email before booking your interview slot. Please select one of the timeslots below for your interview.

Your interview will include a presentation. The presentation should last no longer than 10 minutes and be based on the following:

"Describe your role in implementing a new recycling initiative, highlighting the key components of the project and any problems you overcame"

Equipment will be available to carry out your presentation.

Please email your presentation to lindsey.hepburn@renfrewshire.gov.uk by no later than 12pm on Wednesday 12 April."

7. After booking my interview slot, I received the second email stating that

" Dear D

Thank you for your application for the position of Waste Operations Team Lead (Permanent). We are delighted to confirm your interview details as shown below:

Date: 18/04/2019

Time: 15:00

Location: Customer Service Centre, Renfrewshire House, Cotton Street, Paisley, PA1 1LQ ".

8. The interviewers comprise of a male and two females, one of the females happen to be Lindsey Hepburn. The interview went on very smoothly and I was told they would get back to me before the end of the next day.

9. Two weeks after the interview, they still had not get back to me about the outcome of the interview, I then sent an email on the 30th of April, 2019, stating that

10. "Dear Lindsey,

I just want to remind you that I have not heard from you concerning the outcome of my interview for the post of Waste Operations Team Leader.

I would be looking forward to hearing from you.

Thanks."

11. On the 2nd of May I received an email stating that I was not successful. The email stated that

12. Dear D

Thank you for attending the recent interview for the above post with Environment & Communities. After careful consideration, I write to advise that on this occasion we will not be taking your application further.

If you have not done so already, we recommend that you take advantage of our email job alert service so that you can receive the latest vacancies as they arise. You can register at our website once you have carried out a search.

We would like to take this opportunity to thank you for the interest you have shown in this post and to wish you every success in the future.

Many thanks,

Renfrewshire Council

myjobscotland.gov.uk

13. I also received a call from the male interviewer, he told me that I was not successful and I asked why, but he could not tell me why I was not successful, I decided to request for a detail feedback concerning my interview, in which he replied that people don't normally ask for detail feedback, you tell them they are unsuccessful and they say ok and you end the call.

14. I insisted that I want detail feedback to know what my weakness and put things in place to improve. He then told me that one of the interviewers is on

holiday, that when she comes back, they would have a conference call with me to give me the feedback I requested.

15. On the 3rd of May I sent an email to Linsey Hepburn requesting formally for a detail feedback. I also sent a remainder (sic) *on the 10th of May. On the 14th of May. I was given the feedback.*

16. I was told that I had a very good presentation but the presentation was not scored.

17. I was asked 9 questions in which I had the top mark (Highest mark) in five of the questions and very high mark in the remaining four questions.

18. I was informed that they don't have any area I should improve on since I had a very good interview.

19. I asked Linsey," what the successfully candidate did different to get the job" She said they were internal and they gave examples specific to Renfrewshire Council.

20. On the 23rd of May, I sent this an email accusing Renfrewshire Council of Racial discrimination, the email stated that

" Dear Lindsay,

I would like to thank you for the feedback you gave me regarding my interview with you, having fully regurgitated over and over about it, I believe I was racially discriminated against. The only issue you had with my interview was that internal staff were specific in highlighting issues facing waste management operation in Renfrewshire Council. You have every opportunity to have advertised this job internally but you never did. Advertising it to the public, you should have put everybody on a level playing field. I have worked in at least 3 councils and I would like to point it out to you that every council has a similar issue related to waste management.

You also said you did not score the presentation because it's not part of the interview, I totally disagree with you, the presentation is the hardest part of

the interview and should have been scored. You are trying to cut every leverage I have for the interview in order to deny me the post.

I have decided to take legal action against Renfrewshire Council for racial discrimination.

Thanks.

21. I believe not getting the job was racially motivated, no matter how good I am, they will always make up excuses to disenfranchise me from getting the job. This has become a common practice.

22. If I was a white person, I would have been offered the job based on my interview.

15. When the Tribunal issued the standard "***Claim Accepted Out of Time***" letter on 12 November 2019, along with Notice of Claim served upon the respondents, they were advised that they might wish to submit a skeleton response at that stage dealing only with the time-bar issue, and provide a full response dealing with the merits of the case at a later stage, if the Tribunal decided that it could consider the claim. On 10 December 2019, an ET3 response, defending the claim, was lodged by Mr Nairn Young, in-house solicitor with the respondent Council, and that ET3 response was accepted by the Tribunal administration, on 12 December 2019, and a copy sent to the claimant and ACAS. It denied the allegation of racial discrimination, and submitted that the claim was time-barred, and it should be held to be outwith the jurisdiction of the Tribunal, submitting that it was not just and equitable to grant the claimant an extension of time.

16. In particular, section 6.1 of that ET3 response submitted as follows:

"*This response is limited only to the issue of timebar, which is to be dealt with at the preliminary hearing fixed for 2pm on 19 March 2020. Should the Tribunal decide it can consider the claim, the Respondent would request further time to address the merits of the case. For the avoidance of doubt, the Respondent denies having discriminated against the Claimant in any way.*

The Claimant accepts, and the Tribunal has already identified, that this claim has been brought outside of the time limit imposed by s.123(1)(a) of the Equality Act 2010 ("the Act"). The Tribunal may therefore only consider it if it deems it just and equitable to do so. The Respondent submits that that test is not met, for the following reasons:

1. The claim is significantly late. The Claimant was turned down for employment by the Respondent on 2 May 2019. He referred the matter to ACAS for early conciliation on 2 June 2019. An early conciliation certificate was issued by ACAS on 13 June 2019. The Claimant therefore required to bring his claim to the Tribunal by 13 August 2019, in order to comply with the three month time limit imposed by the Act. He did not raise this claim until 9 November 2019: almost fully another three months after the expiry of the time limit. The Court of Appeal has observed that, "It is… of importance to note that the time limits are exercised strictly in employment and industrial cases." (LJ Auld, in Bexley Community Centre v Robertson [2003] IRLR 434 CA, para.25.)

2. The Claimant is well aware of the time limit that applies, having raised the further claims he refers to, which the Respondent understands were themselves raised out of time. It is not just or equitable for a Claimant to be allowed continually to pay no heed to the time limits set in primary legislation.

3. Against that background of familiarity with the law in regard to the time limit, no sufficient explanation for lateness is offered by the Claimant. The vague reasons advanced amount, at best, only to the ordinary pressures of day-to-day life and should not therefore be considered as establishing sufficient grounds to treat this case as an exception to the general rule that claims must be brought in time. There is no indication as to why any reason given specifically prevented compliance with the requirements of the law, at the relevant time.

4. Allowing the claim to be heard, although late, will be significantly prejudicial to the Respondent. By the time of any hearing, at least a year will have passed since the events that the hearing will be considering. The Respondent

will therefore be hampered in presenting its case by the fading memories of officers in regard to the precise content of statements they may have made to the Claimant. In addition, the burden of having to defend a claim made out of time, with the implications that has for resources and the use of officers' time, constitutes significant prejudice.

5. On the other hand, any prejudice the Claimant will suffer In the claim not being allowed to proceed is minimal, on the basis that it is any event without merit The averments made in the claim, even if they were taken as being entirely true, do not constitute a factual basis upon which a Tribunal could conclude that there was a potentially discriminatory act. On the contrary, the Claimant's issue appears to be with the criteria used to score the interview process and with the judgement of the interview panel that the ability to provide answers specific to the Respondent's circumstances merited a higher score. The claim does not disclose any basis upon which a Tribunal could conclude that a white individual performing similarly in the interview would have received different treatment from the Claimant."

17. Thereafter, on 13 December 2019, Employment Judge Frances Eccles, having considered the file, at Initial Consideration, ordered that the case proceed to the already listed Case Management Preliminary Hearing on 19 March 2020, which is when this case first called before me. The claimant's completed PH agenda was due by 27 February 2020, and the respondents by 12 March 2020. The completed PH Agenda for the respondents was submitted by Ms Eilidh Clements, solicitor, on 11 March 2020, but the claimant only intimated his completed PH Agenda at 04:07 am on Wednesday, 18 March 2020.

18. Attached to the claimant's PH Agenda was a medical report, dated 4 February 2020, from his GP, Dr Lorna Corfield, The Barony Practice, Paisley, to the Ethnic Minorities Law Centre, who he advised me had represented him earlier in another Tribunal case against another respondent, and his completed PH Agenda referred to the "***impact of discrimination on his mental health***", but without any further elaboration, other than to state he felt medical or other expert evidence was required. While he stated that he had received legal

aid, through ABWOR, to pay the £100 fee for that medical report, the claimant stated at that earlier Case Management Preliminary Hearing held before me that he could not afford to pay for any further medical report, and he was not proposing to call his GP as a witness at any future Tribunal Hearing.

19. A copy of that GP report by Dr Lorna Corfield dated 4 February 2020 was, however, available at this Preliminary Hearing, and Ms Clements, the respondents' solicitor, cross-examined the claimant about its terms, and the absence of any other medical evidence supporting the claimant's assertions in his ET1 claim form, as also in his witness statement that he had been diagnosed with depression, anxiety and insomnia.

20. It is convenient, at this stage, to note the specific terms of the GP's report, reading as follows:

"*Dear Sir/Madam*

I am writing following your request for a medical report for the above named patient.

I can indeed can confirm that Mr Odigie sought medical assistance at the surgery on 24th June 2019. He was not given a diagnosis at the time. The symptoms he complained of were of not sleeping for the preceding 2-3 weeks, due to anxiety regarding a pending court case. He described feeling agitated and anxious throughout the day and also of being unable to sleep at night time. He described the insomnia as his main problem. We discussed the possibility of introducing a trial of a beta-blocker for as and when required to treat anxiety throughout the day, but agreed we would start with some night sedation. With this in mind he was given a prescription for Phenergan 25mg (a sedating anti-histamine tablet). it was noted at this appointment that he had failed to attend an appointment with our community link worker, this had been arranged to provide him with some support around trying to gain employment etc. It was strongly suggested at this appointment that he re-arrange the community link worker session for support. It was agreed that he would return to the surgery if he did not feel that the medication we had given him had been helping.

He then contacted the surgery again 2 days later requesting a letter to state that he was unfit to attend court. This was letter was not generated, as it had been requested at very short notice. There is nothing documented in his notes as to whether he was considered to be either fit or unfit to attend a hearing. I am therefore unable to comment on his fitness, as it is not documented in his notes."

21. As I explained to the claimant, and set forth in my written Note & Orders issued after that Hearing on 19 March 2020, production by him of medical evidence was clearly a matter for the claimant to reflect upon, given, as I understood matters, he sought to rely upon his mental health as a factor in explaining why his ET1 claim form was not presented until 9 November 2019, when he had obtained an ACAS Early Conciliation Certificate on 13 June 2019, following his notification to ACAS on 2 June 2019, after he had received an email from the respondent Council on 2 May 2019 stating that he was not successful in his application for a job with them, and he had emailed the respondents on 23 May 2019 complaining of racial discrimination.

22. The claimant also handed to the clerk, on 19 March 2020, with copy for Ms Clements, a 4-page set of photographs and labels for his current medication, being Mirtazapine 15mg and Sumatriptan 50mg tablets, prescribed on 10 February 2020, and Amitriptyline 10mg tablets, prescribed on 5 March 2020. These productions were put to him, in cross-examination at this Preliminary Hearing, by Ms Clements, the respondents' solicitor.

Preliminary Hearing before this Tribunal

23. When this Preliminary Hearing started, just after 10.00am, on Friday, 1 May 2020, it was conducted remotely, by prior agreement with both parties and the Tribunal, by the use of the Kinly CVP video conferencing facility, having been listed on the publicly available CourtServe website as a public Hearing that any interested party could join by contacting the Glasgow ET office.

24. There was no public or Press attendance at this remote Hearing. Parties were both provided with the opportunity, the previous day, by the Tribunal administration, to test their ability to join the CVP, and shown how to participate in the Hearing, where we could see and hear each other, although all joining from separate locations.

25. The chat room function was also used when there was an issue with audibility, at one point, with the claimant, and for me to draw both parties' attention to a reported EAT case law authority that I wanted them to consider when addressing the relevant law on extensions of time in a discrimination complaint before the Tribunal. They were able, during the lunch time adjournment, to access it by use of the ***Bailli*** hyperlink which I posted on the chat room function message to them.

26. At this Preliminary Hearing, the claimant was in attendance, unrepresented, and unaccompanied. His wife attended as a witness, they both being in the family home. Ms Clements, solicitor, appeared for the respondents, unaccompanied, and calling in from her home, rather than the Council offices, which she advised were closed. Given the claimant's situation, as an unrepresented, party litigant, I explained to him the procedure that was going to be followed, as previously set out in my earlier written Note and Orders, and we agreed that, to minimise inconvenience to his wife, who was in their house, with family responsibilities, we would hear her sworn evidence first, followed by his, then closing submissions by Ms Clements, followed by him in reply.

Findings in Fact

27. On the basis of the sworn oral evidence from the claimant and his wife, subject of cross-examination by the respondents' solicitor, and questions of clarification asked by me as the Judge, and the documents available to the Tribunal at this Preliminary Hearing, I have found the following essential facts established:-

(a) The claimant, who is a black, Nigerian national, is aged 46. He lives in Paisley, Renfrewshire, with his wife (aged 35) and family of 4 children, aged from 1 to 13 years.

(b) On 2 May 2019, the claimant received an email from the respondents stating that he was not successful in his application for a job with them. On 18 April 2019, he had been interviewed by a panel for the post of Waste Operations Team Leader with the respondents

(c) On 3 May 2019, the claimant asked the respondents for feedback on his interview, and this was provided to him on 14 May 2019. Thereafter, on 23 May 2019, the claimant sent an email accusing the respondents of racial discrimination arising from his non-appointment to the post applied for, in the terms set forth at paragraph 20 of the paper apart to his ET1 claim form presented to the Tribunal, as reproduced above at paragraph 14 of these Reasons.

(d) Thereafter, on 2 June 2019, the claimant referred the matter to ACAS for early conciliation with the respondents, and an early conciliation certificate was issued by ACAS to the claimant on 13 June 2019. The claimant presented his ET1 claim form to the Tribunal on 9 November 2019. He did so as soon as he was able to manage his emotional trauma arising from the respondents' rejection of his application for employment.

(e) In the period from 2 May 2019, when he was advised his application for the post had been unsuccessful, and 9 November 2019, when he presented his ET1 claim form, the claimant was unemployed, living at home with his wife and family. As his wife was studying, and working 15 hours per week, as a social carer, his family was his priority.

(f) He was able during that period to instruct solicitors to act for him in connection with other Employment Tribunal proceedings which he had brought against other respondents, all alleging unlawful racial discrimination when he was unsuccessful in obtaining advertised posts with those other potential employers, but he advised the Tribunal that he had been unable to get legal representation for this case, despite attempts to do so. Having met

with the Citizens Advice Bureau, the claimant was unable to secure legal representation to pursue this claim against these respondents. As soon as he was able to do so, the claimant drafted his own ET1 claim form, and that without any assistance.

(g) When asked about his other Tribunal claims, the claimant gave some vague evidence, but no documentary evidence was provided to the Tribunal, by either party, as to those other Tribunal proceedings, when they had been brought, whether or not the claimant was represented, and whether or not his claims were late, etc.

(h) Further, there was no clear evidence before the Tribunal about the sequencing of the other Tribunal claims in relation to date of presentation of this claim. What was clear, from the claimant's evidence, was that he was aware of Tribunal time limits, as at the time relevant for bringing a case against these respondents.

(i) However, during that same period, June to November 2019, the claimant was not functioning well, as noted by his wife, and he was referred for help to RAMH (Recovery Across Mental Health), and he had appointments with a Tom McAuley, a mental health adviser. On the claimant's account, he was handing this case without a lawyer, and that was putting pressure on him and his family, and his relationship with his wife.

(j) He spoke of panic attacks, insomnia, and being anxious. He had some suicidal thoughts. He had to look after his youngest child to allow his wife to study. He was also himself trying to complete a University dissertation, which he only completed in mid-September 2019, having obtained extensions of time due to extenuating circumstances.

(k) His wife was concerned about his health and well-being during this same period. The claimant described himself in evidence to this Tribunal as being "***in a very bad place"***, and "***emotionally fragile***". According to his evidence, he could hardly sleep, he was not coordinated, and he was on medication.

(l) The claimant consulted with his GP, on 24 June 2019, according to the medical report, dated 4 February 2020, from his GP, Dr Lorna Corfield, The Barony Practice, Paisley, to the Ethnic Minorities Law Centre, who he advised had represented him earlier in another Tribunal case against another respondent, as referred to earlier in these Reasons, at paragraph 20 above. As per the GP's report, the claimant was not given any diagnosis at that time.

(m) No further medical reports were provided to the Tribunal by the claimant, nor any reports or documents supporting his reference to and support provided by RAMH, nor the nature, extent and frequency of that support for his mental health, including his referral to the mental health practitioner at Abbey Mill around August 2019. As per the claimant's evidence to this Tribunal, he had an emotional trauma, and experienced all of anxiety, depression, and insomnia, for which he was prescribed medication by his GP.

Tribunal's assessment of the evidence heard at this Preliminary Hearing

28. In considering the evidence led before the Tribunal, I have had to carefully assess the evidence given by both the claimant and his wife, and to consider it against their written witness statements, and their answers to points of clarification asked by me as the presiding Judge, and their answers in response to their cross-examination by Ms Clements on behalf of the respondents. I now set out my assessment of their evidence in the following sub-paragraphs: -

(1) **Mrs Mary Odigie**

(a) In her evidence to the Tribunal, Mrs Odigie confirmed that this was her witness statement, dated 23 April 2020, and resubmitted on 1 May 2020, and she confirmed its terms as follows:

1. My name is Mary Olayemi Odigie, I am the wife of David Odigie.

2. I had two major operation on December, 2018 during the birthday of my youngest child. Due to this, I was not able to work full time and I am also a full-time student. During this period, we were unable to pay our bills especially

the house rent and the electric and gas bills which are the bulk of our bills. My husband was doing all he can to get a job since he detests collecting benefit. When we were on the verge of becoming homeless after the housing association took us to court to evict us, we were then advice to collected universal credit.

3. David is a very good man, upright and intelligent, he always wants to be a good role model for his children, he talks to our children the important of hard work and education and try to lead by example.

4. The racial discrimination treatment of Renfrewshire Council towards him affected him badly, I was very much concern about his health and wellbeing. He could hardly sleep despite the fact that he takes his medication meticulously, I know this because I was monitoring him. It also had an effect on me too that, I was placed on medication and referred to RAHM (Recovery Across mental health), each time I have an appointment with Tom McAuley, all I do is cry and talk about my husband, I was afraid he was going to kill himself. Tom had to personally called him and persuaded him to book an appointment with him.

5. David like hiding his emotion and want to be strong for his family, I have heard him on several occasion go to the toilet to cry, lost in thought and even talk to himself. I had to call his mother to help me talk to him because I know he love and adore his mother. David was like a time bomb that could explode at any time. How is his pulling through the situation is a miracle to me.

6. David is the person that is always trying to get out positive outcome out of a negative situation, he is a motivator and my backbone, and stood by me, even when I tried to drop out of school because of the difficulty the family was going through. He gives me reason to be moving on even at his detriment.

7. I don't even want him to fight the case because the case is taking a lot from him and our family. But he says if he doesn't fight it, it will continue to happen and might even happen to our children in future.

8. I believe his mental state must have been part of the reasons why he could not start fighting this case earlier.

(b) In giving her evidence in chief, Mrs Odigie confirmed that her evidence in chief was as per her written witness statement, and nothing needed to be changed, and in answer to certain points of clarification raised by me, as presiding Judge, she further stated that she is aged 35, and a social carer, and she has been married to the claimant for 13 years, with them having a family of 4 children. She spoke of her husband keeping things to himself, and her being worried, and she spoke also of him having appointments with Tom McAuley at RAMH, but that she did not go with him to them.

(c) When cross-examined by Ms Clements, solicitor for the respondents, the claimant's wife stated that the period from December 2018 was very difficult for her and her family, and it was around February / March 2019 that they got a letter from Sanctuary Scotland, their landlords, about court proceedings for eviction. They had the prospect of losing their home, and Mr Odigie getting an interview with the respondents, in April 2019, she described that as something for him to hope for, and get their family help.

(d) When her husband didn't get the job, he had applied for with the respondents, she described that as a real blow, and that things were made worse. At that time, June 2019, she stated that, having been on maternity leave since 2018, she was returning to working 15 hours per week, as a social carer, while studying in her 3rd year in HR Management at the University of the West of Scotland.

(e) Overall, Mrs Odigie's evidence to the Tribunal was supportive of her husband's position, and explained her concerns about his health and well-being, and why she believed his mental state must have been part of the reasons why her husband could not start "***fighting his case***" earlier. In that

regard, it was complimentary to the evidence given by Mr Odigie in his own evidence to the Tribunal.

(f) I had no issues with her credibility as a witness, and while I was conscious that she is the claimant's spouse, there was no suggestion that her evidence was other than genuinely stated as reflecting her belief and understanding of matters.

(g) Her narration of her medical circumstances in December 2018, as spoken of in paragraph 2 of her witness statement, were irrelevant to the period of time I was looking at, from 2 May to 9 November 2019, but she did confirm that apart from the family and financial responsibilities there were for her and her husband, she was a full-time student, and the family was living on State benefits, having nearly been evicted and made homeless by their landlords, a housing association.

(h) Her evidence about RAMH was more related to her own referrals and help there, than the claimant's appointments with Mr McAuley, but her evidence to the Tribunal did vouch that she had been instrumental in her husband going to RAMH for help too.

(2) **Mr David Odigie: Claimant**

(a) In his evidence to the Tribunal, Mr Odigie confirmed that this was his witness statement, dated 21 April 2020, and resubmitted on 1 May 2020, and he confirmed its terms as follows:

1) My name is David Odigie, I wish to certify that the information provided in this statement is the truth and it is accurate to the best of my knowledge.

2) This claim is not time-barred, as alleged by the respondents for the following reasons, which are as follow:

3) I was emotionally disturbed and distressed by what Renfrewshire Council did, that trying to remember what had happened bring a wave of disturbing emotion that bring about suicidal thoughts. The best way I dealt with it was to try and avoid anything concerning the case until I am able to manage the emotion. As of when I put in the case to the tribunal on the 9th of November, 2019, I was able to manage the emotion that comes with the case.

4) As a result of what had happened, I do have panic attach (sic) *and sleeplessness, which further resulted in serious headache. I was initially diagnosed with anxiety and mild depression and further diagnosed with migraine. Despite the medication that was prescribes, it has no effect on me, though the medication makes me sleepy but I could not sleep. I have terrible headache that bedridden me for the rest of the day. With this situation I was unable to compose myself to put in the case to the tribunal.*

5) We had a bouncing baby boy on the 15th of December, 2018. Apart from him we had three other children with age 6,11 and 12 years old as of when the application was put in before the tribunal. My wife is a student, all my energy was directed to support my wife so that she could study and also help with the children. My family is my priority, they are the reason I am still standing and fighting. They are my world and I won't let them go through what I am going through.

6) During this period, I was also writing my dissertation, I had missed the deadline on several occasion because of what I was going through and I had put in several extenuation circumstance to extend my submission date and I still missed it. It had affected my grade seriously that It dropped.

7) I had looked for a lawyer to take over the case so that most of the pressure of the case will be off my shoulder, I have had several appointment with Citizen Advice Bureau , with Tom McAuley and his boss at RAMH (Recovery Across Mental Health), I had met with several law firm who on their website says they deal with employment cases, on approaching them, they say they are not specialise on racial discrimination cases.

8) I believed that I have done everything possible a reasonable person could have done but the circumstance before me prevented me from putting in the case to the tribunal within three months period.

9) If the Tribunal finds this claim to be time-barred, It will be just and equitable for the tribunal to allow for an extension of time for the above stated reasons and the injustices I had suffered from Renfrewshire Council.

(b) In giving his evidence in chief, the claimant, aged 46, confirmed that his evidence in chief was as per his written witness statement, and in answer to certain points of clarification raised by me, as presiding Judge, he further stated that, as at the date of this Hearing, he was unemployed, and in receipt of State benefits, namely Universal Credit, for his family. He confirmed the key dates from the ET1 claim form as being 2 May 2019, when he was advised he was unsuccessful in his application for employment with the respondents, advising them, on 23 May 2019, that he believed he had been the subject of racial discrimination, and then going to ACAS on 2 June 2019, receiving their early conciliation certificate on 13 June 2019. He also agreed that he had lodged his ET1 claim form on 9 November 2019.

(c) When I asked him about the respondents' ET3 response, the claimant stated that he did not have a copy there to look at, so the Hearing was adjourned, for about ½ hour, to allow me to have the Tribunal clerk scan a copy of the ET3 and email it to the claimant. When we resumed, and he had that email, I then asked him to clarify certain points arising from what he had stated in his ET1 claim form, specifically the 22 points narrated in the separate, paper apart, referred to at section 8.1 of his claim form. He advised me that when he lodged this claim, he knew that it was late, which is why he explained the delay at paragraph 1 of his paper apart.

(d) Further, the claimant advised that the first Tribunal claim he had brought, against North Ayrshire Council, was lodged on 3 January 2019, when he

didn't know anything about Tribunals, and it was after that he learned of the 3-month time limit for bring a claim. Just prior to the Case Management Preliminary Hearing, in this case, on the afternoon of 19 March 2020, the claimant had been at the Glasgow ET in connection with a time-bar point in another case, against Argyll Community Housing Association, where that claim was dismissed as lodged out of time, and the Judge there had not found it just and equitable to extend time.

(e) The claimant further advised me that, as at the date of this Hearing, he had brought 6 claims to the Employment Tribunal, excluding this present case. He stated that he had drafted the ET1 claim form in the present case on his own, and without assistance from anybody. When I asked him about the terms of the respondents' ET3 response, at section 6, and the reasons given there for arguing that his claim in this case was significantly late, and that it was not just and equitable to allow him an extension of time, the claimant stated that he was aware of those reasons, but he had not dealt with them specifically in his witness statement prepared for this Hearing.

(f) I invited him to give me his comments on the 5 points advanced by the respondents' solicitor, Mr Young, in that ET3 response. In reply to my enquiry, the claimant stated that he did not accept that his claim was "***significantly late****",* but he accepted it was late, and he accepted the chronology of dates given between 2 May and 9 November 2019. He then stated that the period between those dates would not result in faded memory for the respondents' personnel, as what was asked in the interview was well documented, so there was, in his view, no way the delay in bringing the claim could impact on him or on the Council in having a fair hearing at the Tribunal.

(g) The claimant accepted that he was aware of the time limit for bringing a Tribunal claim, having become aware of that after lodging his claim against North Ayrshire Council in January 2019. He stated that he was allowed permission to proceed with that case, although it was late. He disputed the respondents' assertion that he "***pays no heed to time limits"***, and stated that the situation in this case was quite different from that earlier case, as in

this case, he was "***emotionally totally down"***, and there was "***no way I could have put in the claim."***

(h) Further, the claimant disputed the respondents' further assertion that he was "***familiar with the law in regard to the time limit***", and he further disputed their assertion that he had advanced "***vague reasons***", that, at best, only relate to the ordinary pressures of day to day life. He stated he had spelt it out, and given evidence about his diagnosis with anxiety and depression, and with insomnia, and panic attacks, and how he had been put on very strong medication which rendered him totally incapacitated , and he could not function on such drugs.

(i) Next, the claimant rejected the respondents' assertion that they were "***significantly prejudiced"*** if the claim were allowed to proceed although late. He stated that the interviews were well-documented, and every correspondence was through email, and phone calls referred to in those emails, so he felt matters were well-documented, and there is no way the time difference can relate to loss of memory of the facts of the case, and that the delay will not affect a fair trial of this case.

(j) The claimant also rejected the respondents' argument that prejudice to him is "***minimal".*** He explained that he had come to the Tribunal as he felt it is "***the best place to get justice",*** and he felt that this case not being heard at all would make him lose full confidence in the Tribunal, and hamper him to take it to a Tribunal to get an outcome of this case. He described it as having been an "***emotional trauma***" for him and his family, which he stated was "***so tough and unbearable***", so that he lost confidence in people, and it had made him question everything. He added that it had affected him badly, and also his whole family.

(k) Turning then to his own written personal statement for the Tribunal, the claimant stated that he had made several efforts to get legal advice, and a lawyer, but those attempts had not been fruitful, he having been to over 10

legal firms, which say on their websites they deal with employment cases, but, when he made enquiries, they told him they were not specialists in racial discrimination claims.

(l) When I asked him about his attempts to get advice / representation, the claimant stated that he had several appointments with the Citizens Advice Bureau, and that he tried, between November 2018 and June 2019, to get legal advice about his various claims. He thought it was around April 2019 that he had got the Ethnic Minorities Law Centre to act for him to do with the North Ayrshire Council case.

(m) Further, the claimant advised, he started seeing Tom McAuley at RAMH (Recovery across Mental Health), and he referred him to the CAB, sometime after May 2019, but the CAB could not get him a lawyer, but sent him to several lawyers' offices for advice. He added that he had legal representatives in some of his other cases, of which there were 6 claims against various companies and local authorities.

(n) When cross-examined by Ms Clements, solicitor for the respondents, the claimant was asked about paragraph 3 of his witness statement, and about being "***emotionally disturbed and distressed"***, and about having suicidal thoughts. In reply, he stated that he has such thoughts at any time he thinks about this case, although he added that he dies try, as much as possible, not to think about, but he still has these thoughts.. He stated that he had been referred to a mental health practitioner at Abbey Mill around August 2019.

(o) Asked about his reference to being diagnosed with anxiety and depression, the claimant stated that was in August 2019, rather than June 2019, and he had been certified as not fit for work between 15 and 22 August 2019, as per a sick leave certificate that he said had been produced for the North Ayrshire Council case. Whatever document he was referring to, it was not produced to this Tribunal.

(p) Further, the claimant stated that he did not have legal representation in this case, and he was trying to lodge a case against Renfrewshire Council, which meant him remembering what actually took place and that process, he explained, put him under a lot of pressure, and affected him badly, as all he wanted to do was to forget about it.. He further stated that he had no medical reports to lodge with the Tribunal, as that would have required him to pay for such a report, and he does not have the means to get a medical report. He added that he did not want to put his family in jeopardy. He stated that he had been on medication for depression, insomnia, and anxiety, and that medication made him sleepy.. He had produced pictures of his tablet boxes prescribed on 10 February and 5 March 2020 at the last Hearing on 19 March 2020.

(q) Between May and November 2019, the claimant stated that he was on medication for anxiety, depression and insomnia. He stated he had not been on medication at the time of his interview with the respondents, which was in April 2019. He recalled tablets first being prescribed from around June or July 2019, and stated that these were the same tablets as he had given the Tribunal pictures in March 2020. He further stated that there were costs involved for him to get medical evidence, and he had asked the Tribunal to order his GP to be a witness. He further stated that Dr Corfield's GP report of 4 February 2020, to the Ethnic Minorities Law Centre, was produced for another case, most likely the North Ayrshire Council case, but he was not sure.

(r) The claimant stated that while Dr Corfield's report says no diagnosis was given, when he went to see her on 24 June 2019, he had all those symptoms of anxiety, depression and insomnia, and he went to the GP after much pressure from his wife, whereas he had trying to be strong. He then stated that the GP receptionist had told him that if the Court required any information, the Court would get in touch. His lawyer in the North Ayrshire Council case had been funded by legal aid to get the GP report for that case.

(s) When asked about the late lodging of his ET1 claim form in this case, the claimant stated that "***my family is my utmost concern***", and that he needed to be strong for his family, and to give his wife necessary support. During the period from May to November 2019, he stated that he was supporting his wife, while she was studying, and he was trying his best for her and their children. He also stated that he was writing a dissertation, for his Environmental Health degree from the University of the West of Scotland. While he had written the bulk of it before November 2018, and he just needed to do interpretation of data, for it to be submitted when due in March 2019, he stated that he didn't do that, and it was not submitted until mid-September 2019, after he got 5 extensions to complete it, granted by the University on the basis of extenuating circumstances.

(t) When asked by Ms Clements why he had been able to apply for ACAS early conciliation on time, but not present his Tribunal claim, the claimant advised that the ACAS process is quite straightforward, and you don't need a thorough explanation of what has actually happened to you, but to put it down in writing, as the detail of his claim, was "***an emotional task"*** for him to do, and "***Cross my heart, I'd have loved to do it earlier, but I was in a very bad place, and it was affecting my family."***

(u) Further explaining his position, the claimant stated that ***"To keep my sanity, I needed to keep away from it. I was emotionally down, and I couldn't go through the case. I could hardly sleep, and not coordinated, and on medication, which incapacitated me for almost all day."*** While he stated he did not take the drugs every day, as it had effects, he would take his tablets when matters were serious, but throughout he was "***emotionally fragile".***

(v) Ms Clements then asked the claimant about the other Tribunal cases which are still current.. He agreed that all 6 were direct race discrimination claims, like this case, but he stated that they are all different cases, and not related to this one. January 2019, against North Ayrshire Council, was his

first case, and he thought it, most likely, that the other cases were lodged prior to April 2019. He agreed he had lawyers in other cases. He stated that he could not remember what Tribunal Hearings he had attended between May and November 2019, but he had the Ethnic Minorities Law Centre acting for him, against North Ayrshire Council he thought, but later clarified that it was maybe against Falkirk Council, and that McNeil & Wilson, solicitors, Paisley , acted for him against Stirling Council.

(w) In further explanation of his other Tribunal claims, in answer to Ms Clements' cross-examination, the claimant stated that he had withdrawn one of the 6 claims, and that his lawyer had contacted him to discuss those other cases, and he agreed that he had given his lawyer information and instructions about what he wanted them to do, and he had attended some Tribunal Hearings – he recalled attending the Tribunal in Glasgow, and also Edinburgh, for a case against the City Council there, and also against Falkirk Council. In those other cases, the claimant stated that the burden of preparing and presenting his case fell upon his lawyer, and not upon himself. He added that, if he had got a lawyer here, it would have been different.

(x) By way of further clarification of his position, the claimant then stated that thoughts came into his mind, and only he understood matters, and there was the "***emotional trauma"*** he went through each time, but it would be an injustice if he left matters unchallenged, as if left unchallenged that would be what his children would face in the future.. He added that "***this is not made up stuff, but a common picture that needs not to go on"***, where he feels disenfranchised just because of the colour of his skin. He further stated that he felt it was high time someone did something about it, and he was motivated to stand up and fight.

(y) Overall, I found Mr Odigie to be a plain-speaking witness, who spoke clearly, but softly, to the terms of his witness statement. He did not seek to embellish what was in his witness statement, and he did not evade questions asked of him in clarification by myself, or in cross-examination by Ms

Clements. That said, his evidence about his other Tribunal claims was vague, and being given from memory, and as such I could not be sure how reliable that part of his evidence actually was, there being no documentary productions before the Tribunal, from either party, about those other Tribunal claims.

(z) Subject to that caveat about the reliability of his evidence, I found him to be a credible witness, who spoke convincingly about how events post 2 May 2019, when he was advised by the respondents that he was unsuccessful in the post applied for, had "***emotionally disturbed and distressed"*** him, and why it was only on 9 November 2019, almost 3 months after he had obtained his ACAS early conciliation certificate, that he was finally able to manage his emotions, compose himself, and put forward his case by presenting his ET1 claim form to the Tribunal

(3) **<u>Medical Evidence before the Tribunal</u>**

(a) As detailed earlier in these Reasons, the claimant did not provide any further medical evidence to what he had produced at the Case Management Preliminary Hearing held on 19 March 2020, being Dr Corfield's GP report of 4 February 2020, and the set of photographs and labels for his medication as at that time. It is of note that the GP's report, reproduced above at paragraph 20 of these Reasons, although dated 4 February 2020, only refers to the claimant having sought medical assistance from the surgery on 24th June 2019, and nothing at any later date, in the period up to 9 November 2019, when his ET1 claim form was lodged with the Tribunal.

(b) That was so , despite the terms of paragraph 41 of my earlier written Note and Orders, issued to him on 31 March 2020, stating that if he sought to rely upon any medical evidence, then he should seek to obtain any supporting documentary evidence to support, and paragraph 20 of that same Note stated that, as regards his witness statement, it should contain all of the evidence in chief to be given by him relating to why his Tribunal claim was lodged on 9 November 2019, and not before, and should cross-refer, where appropriate,

to the page number in any Bundle of Documents which he appended to his witness statement, being any documents relied upon or to be referred to by him in connection with the time-bar argument.

(c) Despite that clear and unequivocal direction by the Tribunal, the claimant lodged no Bundle, and his witness statement referred to no documents, not even those provided by him on 19 March 2020 at the previous Hearing. He was, however, cross-examined on those documents by the respondents' solicitor, who specifically put them to the claimant, and asked him questions about them.

Closing Submissions for the Respondents

30. On 2 April 2020, Ms Clements intimated to the Tribunal, with copy to the claimant, as an unrepresented, party litigant, to give him advance fair notice of the factual and legal arguments being presented to the Tribunal by her as the respondents' representative, her outline written skeleton argument submissions, reading as follows:

Skeletal argument for the Respondent

The Respondent will argue that the Claimant's claim is time barred. The claim was lodged out-with the time limit set by ***section 123(1)(a) of the Equality Act 2010, as extended by section 140B(3) of the same Act.*** *In terms of* ***section 123(1)(b) of the 2010 Act*** *it is not just and equitable to allow the Claimant's claim to proceed. This is on the basis that:*

1. *The Claimant has had at least three other cases at Tribunal and as such, has knowledge of the timescales and the Tribunal process. Of particular relevance is the fact that the Claimant's other claims were lodged late. The Respondent will refer to paragraph 25 of* ***Robertson v Bexley Community Centre [2003] IRLR 434 CA,*** *in respect of the discretion that the Tribunal has to allow a late claim if it is just and equitable to do so and the fact that exercise of the discretion is the exception, not the rule. The Respondent will also refer to paragraphs 26 and 32 of* ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327*** *which provides that the burden of*

persuading the Tribunal to exercise its discretion to extend time is on the Claimant and that whether a Claimant has succeeded in displacing the statutory time limits is a question of fact and judgement.

2. *In terms of **section 123(1)(a) of the Equality Act 2010** (hereinafter "the 2010 Act") the claim was lodged late. The claim should have been lodged by 13 August 2019 and was not lodged until 9 November 2019. The Claimant has provided no sufficient justification for the claim being lodged late. The reasons advanced amount to, at best, the ordinary pressures of day-to-day life. The Respondent will refer to para 19 of **De Souza v Manpower UK Ltd [2013] EWCA Civ 1794** in respect of the adequacy of the reasons advanced by the Claimant.*

3. *There would be prejudice to the Respondent should the claim proceed as a result of the fact that, by the time the Claim is heard, it is likely that almost a year will have passed. This would hamper the Respondent's case presentation as a result of fading memories.*

4. *The prejudice to the Claimant if the claim were not to proceed is minimal on the basis that he has failed to advance a factual basis for the claim and accordingly, the claim is without merit. The Claimant has failed to disclose any basis upon which a Tribunal could conclude that he was treated less favourably as a result of his race. This is a claim for direct discrimination under **section 13 of the Equality Act 2010.** Accordingly, the burden of proof in such cases is underpinned by **section 136 of the Equality Act 2010**. In effect, there is a two-stage process in such claims. The burden of proof is firstly on the Claimant and then moves to the Respondent.*

*The Respondent will refer to paragraphs 55-58 of **Madarassy v Nomura International Plc [2007] I.C.R. 867** in respect of the burden of proof in actions such as this, specifically that the Claimant must establish a prima facie case that the respondent committed an act of unlawful discrimination. We will then refer to paragraphs 103 and 106 of **Ayodele v Citylink Ltd [2017] EWCA Civ 1913** in so far as it confirms the Court's interpretation in **Madarassy** and the proposition in respect of the burden of proof. We will also*

*refer to paragraphs 62 and 93 of the **Ayodele** judgement in respect of the proposition that in discrimination claims, the Claimant must be able to advance a prima facie case of discrimination before they can discharge the burden of proof.*

*The Respondent will then refer to paragraphs 19 and 20 of **Chandhok and another v Tirkey [2015] ICR 527** showing that a claim for discrimination can be struck out where there is time bar to jurisdiction or the claim form makes no more than an assertion of a difference of treatment and a difference of protected characteristic without more, sufficient material from which a tribunal could conclude that on the balance of probabilities, the respondent had committed an unlawful act of discrimination. The Respondent will refer to **Rule 37(1)(1)(a) of the Tribunal Rules** in this respect.*

31. Ms Clements also intimated a list of authorities for the respondents, as follows, similarly intimated to the claimant. She had previously provided hard copies of all of the above cases to the claimant in advance of the Case Management Preliminary Hearing held on 19 March 2020.

List of legal authorities

1. **Robertson v Bexley Community Centre [2003] IRLR 434 CA**
2. **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327**
3. **De Souza v Manpower UK Ltd [2013] EWCA Civ 1794**
4. **Madarassy v Nomura International Plc [2007] ICR 867**
5. **Ayodele v Citylink Limited [2017] EWCA Civ 1913**
6. **Royal Mail Group Ltd v Efobi [2019] ICR 750**
7. **Chandhok and another v Tirkey [2015] ICR 527**

32. In delivering her oral closing submissions to the Tribunal, at this Preliminary Hearing, after the lunchtime adjournment, Ms Clements did so by reference to her written skeleton, and her list of authorities, as well as addressing me on why, in her view, the two additional case law authorities, cited by the

claimant, could be distinguished. Although cited in the respondents' list of authorities, Ms Clements written submissions, as also her oral submissions at this Preliminary Hearing, made no reference to the Court of Appeal's judgment, delivered by Sir Patrick Elias, in **Efobi,** quoting from **Ayodele**, on the matter of the burden of proof. In particular, Ms Clements, speaking from her written skeleton, added some comments as she did so, but essentially she kept to her written submission. She invited me to (1) find it is not just and equitable to accept the claim though late, and (2) to strike it out as having no reasonable prospects of success, on the basis of time-bar.

33. She referred to the key dates in the chronology, and stated that the claimant accepts his claim is late, and, by his own admission, he was aware of the time limit from his other cases. She submitted that the reasons he has advanced are ordinary pressures of day to day life, and that some of his evidence at this Hearing had been contradictory as to his justification for failing to lodge his claim on time. She submitted his claim is without merit, and should be dismissed, any prejudice to the claimant being minimal, compared to the prejudice that the respondents would suffer if the case were allowed to proceed.

34. Having had the opportunity, over the lunch adjournment, to read the **O'Neill** judgment that I had referred both parties to, Ms Clements addressed me on the legal cases produced in her list, and submitted that the claimant accepts his claim is late, but he had failed to provide any medical evidence to vouch what he was saying, and how things had affected his ability to lodge his claim in time. She felt he had picked and chosen what things he was able to deal with, over the relevant period, and that he did so, knowing the 3-month time frame, when he could and should have lodged his claim. In her submission, the reasons advanced by the claimant do not justify an extension of time. To allow the claim, the respondents would be prejudiced, by having to meet a claim which would otherwise be defeated by a limitation defence, and with the passage of time, there was also prejudice to the respondents. As to the two cases cited by the claimant, she submitted that they be distinguished, as being on different facts and circumstances to the present case

Closing Submission by the Claimant

35. Having heard Ms Clements' oral submissions, I then invited the claimant to reply, and tell me what he wanted the Tribunal to do. In response, the claimant addressed me. He made the opening point that his case is not time-barred, and that he was emotionally down and unstable, having been diagnosed with anxiety, depression, and migraine. He could hardly sleep, and he was constantly having panic attacks, and he was under serious medication which made him incapacitated. He had presented evidence about his prescribed medication, and the February 2020 GP report. He denied the respondents' assertion that his other claims had been put in late, and described that as totally untrue. It was only the North Ayrshire case he stated. He addressed me on the two cases he had mentioned, and submitted that if the Tribunal were to find his claim time-barred, it would be just and equitable to extend time, as, contrary to the respondents' position, the length of time is not sufficient to warrant fading memories.

36. He added that as soon as he was able to manage his emotional trauma, and he submitted that it is evident the case will not be affected by delay. He had tried as much as he could to get a legal representative, but he could not do so, but as a result of the delay, he submitted a fair trial is still possible, and only one of his earlier cases had been put in late, the others being put in on time, a fact which, he suggested, "***should ring bells in the mind of the Tribunal"*** about his emotional trauma in this case. He stated he had got his ACAS early conciliation certificate, but due to his emotional state, he could not present his Tribunal claim. He referred to how he had been fighting voices to avoid suicide, and how that had had an effect on him, and only he could put in his claim. He asked the Tribunal to allow this case to move forward, and not dash his hopes, but ensure that justice prevails, and allow him to proceed with his case against the Council.

Clarification sought from the Respondents' Solicitor

37. Having heard both parties' closing submissions, I stated that I wished to clarify with Ms Clements what was the respondents' position about prejudice

to them if the claim was allowed to proceed, although late. In reply, she advised me that there would be "***actual forensic prejudice***", given the claimant's interview was on 18 April 2019, over a year ago. Further, while the claimant was correct in saying that the respondents have notes taken at the interview, and there was thereafter e-mail correspondence between the claimant and relevant personnel at the respondents, she submitted that that was "***not the whole story"***, and that people's ability to recall matters should be borne in mind, given over a year ago is a long time ago.

38. Ms Clements then stated that she could not comment on what steps the respondents had taken to capture the memory of the interview panel, as the original solicitor allocated to deal with the case went on maternity leave, and the file then passed to Mr Young, her line manager, and now she was acting for the respondents. In a frank and candid admission, Ms Clements stated that she had not taken any steps to precognosce the respondents' staff on the interview panel by taking a witness statement, as she was awaiting the result of this Preliminary Hearing on time-bar.

39. In these circumstances, Ms Clements accepted that her written submission point about prejudice to the respondents was an assertion based on purely over a year having passed, and she further accepted that it was an assertion she was making based on no enquiry of potential witnesses from the respondents. She referred to having had conversations with them, but not precognosing them, nor had she asked them for their recollection of the interview with the claimant. Her submission was, she clarified, based principally on the passage of time, and the fact that a year had passed.

40. Having noted Ms Clements' response, as just detailed, I asked the claimant if he had anything further to add, to which he stated he had nothing further to say. As such, I intimated that I was reserving Judgment, to be issued in writing, with Reasons, and I concluded proceedings.

Issues for the Tribunal

41. The issues before the Tribunal, for determination at this Preliminary Hearing, were whether or not the claim was presented late and, if so, whether or not

an extension of time should be granted to the claimant, to allow the case to proceed further, as also to consider whether the claim should be struck out, at this stage, as having no reasonable prospects of success.

Relevant Law

42. Ms Clements' written skeleton, and list of authorities for the respondents, cited certain statutory provisions, and referred to some 7 case law authorities, and the claimant himself referred me to two additional case law authorities. I have noted these above, earlier in these Reasons. He advised me that he had looked at the case law, and statutory provisions, but he had found it all "***a bit confusing***".

43. I explained to him that, as per **Rule 2** and the overriding objective, I had to ensure, so far as possible, that parties are on an equal footing, and that as Judge I had to apply the relevant law to the facts as I might find them to be, but he was entitled to comment on what Ms Clements had said in her submissions where, as a solicitor, she has a professional obligation to assist the Tribunal in identifying relevant law.

44. I have considered oral submissions, and case law authorities, cited by both Ms Clements and the claimant, and I have given myself a detailed self-direction on the relevant law, which I narrate in the following paragraphs of these Reasons.

Discrimination and Time-Bar / Strike Out

45. This claim proceeds against the respondents as a complaint of alleged unlawful racial discrimination. **Section 39 (1) of the Equality Act 2010** (Employees and applicants) provides that

> **"***An employer (A) must not discriminate against a person (B)—*
> *(a) in the arrangements A makes for deciding to whom to offer employment;*
> *(b) as to the terms on which A offers B employment;*
> *(c) by not offering B employment.*

46. Race is a **"*protected characteristic*"** under **Section 4.** Race, as defined in **Section 9(1)**, includes—(a) colour; (b) nationality; and (c) ethnic or national origins. The claimant here relies upon his black colour, and, as he indicated at the Case Management Preliminary Hearing on 19 March 2020, his complaint of race discrimination is also based on his Nigerian nationality, but not on his ethnic or national origins.

47**.** The claimant complains of direct discrimination, which is defined in **Section 13(1)** as where:

> *"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"*.

48. **Section 123 of the Equality Act 2010**, which specifies time limits for bringing employment claims, provides so far as relevant that:

> *"(1) … proceedings on a complaint … 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."*

49. The burden of proof is addressed at **Section 136**, which provides that:

> *(1)This section applies to any proceedings relating to a contravention of this Act.*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

50. **Section 140B** deals with extension of time limits to facilitate conciliation before institution of proceedings. It states as follows:

"(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4)If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5)The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section."

51. In considering whether it is just and equitable to extend time, the Tribunal should have regard to the fact that the time limits are relatively short. **Robertson v Bexley**

Community Centre (t/a Leisure Link) [2003] IRLR 434 is commonly cited as authority for the proposition that exercise of the discretion to apply a longer time limit than three months is the exception rather than the rule. At paragraph 25, Lord Justice Auld stated:

> *"25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."*

52. In **Chief Constable of Lincolnshire Police v Caston** [**2010] IRLR 327** Lord Justice Wall noted that the comments in **Robertson** were not to be read as encouraging Tribunals to exercise their discretion in a liberal or restrictive manner. The Tribunal should take all relevant circumstances into account and consider the balance of prejudice of allowing or refusing the extension. As succinctly stated by him, at paragraph 17:

> "…*the discretion under the Statute is at large. It falls to be exercised "in all the circumstances of the case" and the only qualification is that the EJ has to consider that it is "just and equitable to exercise it in the claimant's favour."*

53. When a claim is brought out of time and the Employment Tribunal is considering whether it is just and equitable to extend time, the relevant principles are as set out by the EAT in **British Coal Corporation v Keeble [1997] IRLR 336 EAT**:

> *"8. … It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have*

regard to all the circumstances of the case and in particular, inter alia, to –

(a) *the length of and reasons for the delay;*

(b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*

(c) *the extent to which the party sued had cooperated with any requests for information;*

(d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*

(e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action."*

54. However, as per Mr Justice Langstaff, a former President of the EAT, in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2014] UKEAT/0305/13/LA,** at paragraphs 49 to 52, those principles are to be read as guidance and not a statement of statutory requirements. It has, further, been held to be necessary for Tribunals, when considering the exercise of such a discretion, to identify the cause of the claimant's failure to bring the claim in time, as referred to by Mr Justice Langstaff at paragraph 52 in Morgan, reading as follows:-

"52. Though there is no principle of law which dictates how sparingly or generously the power to enlarge time is to be exercised (see Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298 at para 25, per Sedley LJ) a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to do so, and the exercise of discretion is therefore the exception rather than the rule (per Auld LJ in Robertson v Bexley Community Centre [2003] IRLR 434 CA). A litigant can hardly hope to satisfy this burden unless he provides an answer to two questions, as part of the entirety of the circumstances which the tribunal must consider. The first question in

deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

55. On the matter of time-bar, as the Employment Appeal Tribunal recognised in **Miller and others v Ministry of Justice [2016] UKEAT/003/15**, per Mrs Justice Elisabeth Laing DBE, at paragraph 12:

"….*There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses…"*

56. **Section 123(1)(b)** gives the Employment Tribunal a wide discretion to do what it thinks is just and equitable in the circumstances, as the Court of Appeal, per Lord Justice Leggatt held, at paragraphs 18 to 20, in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] IRLR 1050**, on appeal from the judgment of HHJ Shanks in UKEAT/0320/15, and not Langstaff J's judgment in the EAT in the other **Morgan** case (referred to above, at paragraph 50 of these Reasons):

"18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful

for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374; [2009] 1 WLR 728, paras [30]-[32], [43],[48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2; [2012] 2 AC 72, para [75].

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

20. The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle – for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see Robertson v Bexley Community Centre t/a Leisure Link [2003] EWCA Civ 576; [2003] IRLR 434, para [24]."

57. I referred both parties, using the chat room facility on CVP, to the judgment of His Honour Judge Auerbach, in the Employment Appeal Tribunal on 1 November 2019, in **O'Neill v Jaeger Retail Limited [2019] UKEAT/0026/19**, at paragraph 29, reading as follows:

> *"29. As to the guiding principles in relation to the just and equitable test, there is a well-established body of authority familiar to practitioners in the field. As I have noted, there is no dispute, as such, that the Tribunal correctly directed itself by reference to the key authorities. I for my part cannot improve on the overview given in a decision mentioned by Mr Gorasia, that of Elisabeth Laing J in **Miller v The Ministry of Justice** [2016] UKEAT/0003/15, which I gratefully adopt:*
>
> > *"10. There are five points which are relevant to the issues in these appeals.*
> >
> > *i. The discretion to extend time is a wide one: **Robertson v Bexley Community Centre** [2003] EWCA Civ 576; [2003] IRLR 434, paragraphs 23 and 24.*
> >
> > *ii. Time limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule (ibid, paragraph 25). In **Chief Constable of Lincolnshire v Caston** [2010] EWCA Civ 1298; [2010] IRLR 327 Wall LJ (with whom Longmore LJ agreed), at paragraph 25, put a gloss on that passage in **Robertson**, but did not, in my judgment, overrule it. It follows that I reject Mr Allen's submission that, in **Caston**, the Court of Appeal "corrected" paragraph 25 of **Robertson**. Be that as it may, the EJ in any event directed himself, in the first appeal, in*

*accordance with Sedley LJ's gloss (at paragraph 31 of **Caston**), which is more favourable to the Claimants than the gloss by the majority.*

iii. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "perverse", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence. No authority is needed for that proposition.

*iv. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET (**DCA v Jones** [2007] EWCA Civ 894; [2007] IRLR 128). The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "customarily" relevant in such cases (ibid, paragraph 44).*

*v. The ET may find the checklist of factors in section 33 of the **Limitation Act 1980** ("the 1980 Act") helpful (**British Coal Corporation v Keeble** [1997] IRLR 336 EAT; the EAT (presided over by Holland J) on an earlier appeal in that case had suggested this, and Smith J (as she then was) recorded, at paragraph 8 of her Judgment, that nobody had suggested that this was wrong. This is not a requirement, however, and an ET will only err in law if it omits something significant: **Afolabi v Southwark London Borough Council** [2003] ICR 800;[2003] EWCA Civ 15, at paragraph 33.*

*11.**DCA v Jones** was an unsuccessful appeal against a decision by an ET to extend time in a disability discrimination claim. The Claimant had not made such a claim during the*

limitation period as he did not want to admit to himself that he had a disability. At paragraph 50, Pill LJ said this:

"The guidelines expressed in Keeble are a valuable reminder of factors which may be taken into account. Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found. It is inconceivable in my judgment that when he used the word "pertinent" the Chairman, who had reasoned the whole issue very carefully, was saying that the state of mind of the respondent and the reason for the delay was not a relevant factor in the situation."

12. I should also say a little more about points 10(iii)-(v). There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses. As I understood their arguments, neither Mr Allen nor Mr Sugarman suggested that a lack of forensic prejudice to a Respondent was a decisive factor, by itself, in favour of an extension of time. But both argued, in slightly different ways, that the ET was bound in every case, in Mr Allen's phrase, "to balance off" the relative prejudice to the parties, and that, if the ET did not do so expressly, that was an error of law, even if there was, otherwise, no good reason to extend time.

*13. It seems to me that it is not necessary for me to deal with that bald submission, because, as I explain below, the EJ did, to the extent that he was required to, take into account prejudice to both sides. But if I had needed to, I would have rejected that submission. It is clear from paragraph 50 of Pill LJ's judgment in **DCA v Jones** that it is for the ET to decide, on the facts of any particular case, which potentially relevant factor or factors is or are actually relevant to the exercise of its discretion in any case. **DCA v Jones** also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much depend on the way in which the ET sees the facts; and the facts are for the ET. I do not read the decision of the EAT in **DPP v Marshall** [1998] ICR 518 (and in particular pages 527H-528G, which were relied on by Mr Allen and Mr Sugarman) as contradicting this approach; but if it does, I bear in mind that the observations relied on are from the EAT, and pre-date **DCA v Jones**."*

58. While my citation from **O'Neill** refers to **Keeble,** I pause here to note and record that the **Limitation Act 1980** to which **Keeble** refers does not apply in Scotland, the equivalent legislation being the **Prescription and Limitation Scotland Act 1973**. However, the 1973 Act does not offer an equivalent codified list of factors to be considered, **Section 19 A** simply stating:

> ***"19A Power of court to override time-limits etc.***
>
> *(1) Where a person would be entitled, but for any of the provisions of section 17, 18, 18A or 18B of this Act, to bring an action, the court may, if it seems to it equitable to do so, allow him to bring the action notwithstanding that provision."*

59. **Section 123 of Equality Act 2010** does not make reference to either the Limitation Act 1980 or the 1973 Act. It does not seek to define itself by reference to either statutory model.

60. Within the **Employment Tribunal Rules of Procedure 2013, Schedule 1,** the relevant provisions about Strike Out are to be found within **Rule 37** , while, clearly, the other Rule that is relevant is **Rule 2,** the Tribunal's "***overriding objective",*** to deal with the case fairly and justly. While both parties have cited some case law authorities for my consideration, as per their lists of authorities, detailed earlier in these Reasons, I have given myself this self-direction on the relevant law, as many of the usual authorities on Strike Out of a discrimination case were not cited to me by Ms Clements for the respondents, or by the claimant.

61. I make that comment as an observation, and not a criticism, and I also note and record here that there was no application by Ms Clements that, in the event her application for Strike Out was refused, then the Tribunal should consider making a Deposit Order under **Rule 39**. Under **Rule 39(1),** at a Preliminary Hearing, if an Employment Judge considers that any specific allegation or argument in a claim or response has "***little reasonable prospect of success***", the Judge can make an order requiring the party to pay a deposit to the Tribunal, as a condition of being permitted to continue to advance that allegation or argument.

62. In fact, it is fairly commonplace before the Tribunal for a party making an application for Strike Out on the basis that the other party's case has ***"no reasonable prospect of success"*** to make an application for a Deposit

Order to be made in the alternative if the '***little reasonable prospect'*** test is satisfied.

63. The test of '***little prospect of success'*** is plainly not as rigorous as the test of '***no reasonable prospect'***. It follows that a Tribunal accordingly has a greater leeway when considering whether or not to order a deposit. But it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim. Ms Clements' application before me was very much based on the claim being time-barred, and it not being just and equitable to extend time, and not anything else.

64. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances. Even if the Tribunal so determines, it retains a discretion not to strike out the claim. As the Court of Session held, in **Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly [2012] IRLR 755**, the power to strike out should only be exercised in rare circumstances.

65. A Tribunal can exercise its power to strike out a claim (or part of a claim) '***at any stage of the proceedings'*** - **Rule 37(1).** However, the power must be exercised in accordance with **"*reason, relevance, principle and justice":*** **Williams v Real Care Agency Ltd [2012] UKEATS/0051/11** (13 March 2012), **[2012] ICR D27,** per Mr Justice Langstaff at paragraph 18.

66. In **Abertawe Bro Morgannwg University Health Board v Ferguson UKEAT/0044/13, [2014] IRLR. 14**, the learned EAT President, Mr Justice Langstaff, at paragraph 33 of the judgment, remarked in the course of giving judgment that, in suitable cases, applications for strike-out may save time, expense and anxiety.

67. However, in cases that are likely to be heavily fact-sensitive, such as those involving discrimination, the circumstances in which a claim will be struck out are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence

gathering it is likely to be much clearer whether there is truly a point of law in issue or not.

68. Special considerations arise if a Tribunal is asked to strike out a claim of discrimination on the ground that it has no reasonable prospect of success. In **Anyanwu and anor v South Bank Students' Union and anor 2001 ICR 391,** the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination.

69. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126,** the Court of Appeal held that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. It stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

70. Lady Smith in the Employment Appeal Tribunal expanded on the guidance given in **Ezsias** in **Balls v Downham Market High School and College [2011] IRLR 217,** stating that where strike-out is sought or contemplated on the ground that the claim has no reasonable prospect of success, the Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success.

71. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

72. In **Balls,** at paragraph 4, Lady Smith emphasised the need for caution in exercising the power, as follows:

> "*to state the obvious, if a Claimant's claim is struck out, that is an end of it. He cannot take it any further forward. From an employee Claimant's perspective, his employer 'won' without there ever having been a hearing on the merits of his claim. The chances of him being left with a distinct feeling of dissatisfaction must be high. If his claim had proceeded to a hearing on the merits, it might have been shown to be well founded and he may feel, whatever the circumstances, that he has been deprived of a fair chance to achieve that. It is for such reasons that 'strike-out' is often referred to as a draconian power. It is. There are of course, cases where fairness as between parties and the proper regulation of access to Employment Tribunals justify the use of this important weapon in an Employment Judge's available armoury but its application must be very carefully considered and the facts of the particular case properly analysed and understood before any decision is reached."*

73. I recognise, of course, that the second stage exercise of discretion under **Rule 37(1)** is important, as commented upon by the then EAT Judge, Lady Wise, in **Hasan v Tesco Stores Ltd [2016] UKEAT/0098/16**, an unreported Judgment of 22 June 2016, where at paragraph 19, the learned EAT Judge refers to ***"a fundamental cross-check to avoid the bringing to an end of a claim that may yet have merit."***

74. **Rule 39(1)** allows a Tribunal to use a Deposit Order as a less draconian alternative to Strike Out where a claim (or part) is perceived to be weak but could not necessarily be described by a Tribunal as having no reasonable prospect of success. In the present case, however, there was no such application made to the Tribunal by the respondents.

Discussion and Deliberation

75. Having now carefully considered the evidence before the Tribunal, and both parties` written and oral submissions, along with my own obligations under Rule 2 of the Employment Tribunals Rules of Procedure 2013, being the Tribunal's overriding objective to deal with the case fairly and justly, I consider that, in terms of **Rule 37(2),** the claimant has been given a reasonable opportunity at this Preliminary Hearing to make his own representations opposing the respondents' written application for Strike Out of the claim

76. **Rule 37** entitles an Employment Tribunal to strike out a claim in certain defined circumstances, (a) to (e). Here, the respondents' submissions focus their application for Strike Out of the claim under **Rule 37(1) (a)** on the basis that the claim has no reasonable prospect of success.

77. After careful consideration of the competing arguments, taking into account the relevant law, as ascertained in the legal authorities referred to earlier in these Reasons, I am not satisfied that this is one of those cases where it is appropriate to Strike Out the claim, which I have decided should proceed to be determined on its merits at a Final Hearing. I have decided that it is appropriate in all the circumstances of the present case to grant the claimant an extension of time, and so, I have refused the respondents' application for Strike Out.

78. It is not disputed that the claim is late. The length of the delay is a relevant, but not a determining, factor. The reason for the delay is related to the claimant's mental state, and his inability to lodge a claim until he did so on 9 November 2019. The claimant referred to two judgments from the EAT. I have considered each of them : **Norbert Dentressangle Logistics Ltd v Hutton [2013] UKEATS/0011/13**, a judgment by Mr Justice Langstaff, then EAT President, and **Robinson v Bowskill & Others (p/a Fairhill Medical Practice) [2013] UKEAT/0313/12**, a judgment by His Honour Jeffrey Burke QC, also reported at **[2014] ICR D7**.

79. I agree with Ms Clements that the facts and circumstances of both these cases are different from the facts and circumstances of the present case, and I found them of little assistance to me in determining my decision in the present case. Instead, I relied upon the statutory provisions about extension of time, and Strike Out, and how they have been interpreted by the higher Tribunals and Courts, as discussed above under Relevant Law.

80. The obvious prejudice to the claimant, if his claim is struck out, is that his claim against the respondents will be stopped in its tracks, and there will be no evidentiary Hearing. Put simply, his claim will be at an end. The respondents will, in that event, also still have hanging over them, an allegation of racial discrimination, which they deny.

81. I am not satisfied that it is in the interests of justice to Strike Out the claim, without hearing evidence, when the respondents have not satisfied me that the claim has no reasonable prospects of success. The claimant's submissions, written and oral, as set forth earlier in these Reasons, have persuaded me that, in the exercise of my judicial discretion, I should not Strike Out the claim, but allow it to go forward to a Final Hearing, where evidence from both parties can be tried and tested. I regard as well-founded the claimant's arguments against a Strike Out.

82. Further, it seems to me to be not in the interests of justice, and thus inconsistent with Tribunal's overriding objective to deal with the case fairly and justly, that this case is brought to an end, and brought to an end now, and that is why I have decided to refuse the respondents' application for Strike Out, and instead decided to list the case for a full merits Hearing in due course.

83. In the written skeleton argument for the respondents, building upon the groundworks laid by Mr Young, in the ET3 response and its 5 points, Ms Clements founded upon the claim being lodged outwith the time limit, a matter not in dispute, given the relevant dates in the chronology of events in this

case, and why, in the respondents' view, it is not just and equitable to allow the claim to proceed. She wrote and spoke of "***prejudice"*** to the respondents, rather than the "***significant prejudice***" referred to by Mr Young.

84. She averred that: ***"The Claimant has had at least three other cases at Tribunal and as such, has knowledge of the timescales and the Tribunal process. Of particular relevance is the fact that the Claimant's other claims were lodged late***." While she referred to at least 3 other cases, they were not identified by the respondents, and the only information I had laid before me was what I managed to glean from the claimant himself, by asking him some questions to clarify the position about other Tribunal claims he had put before the Tribunals, as he had mentioned in paragraph 1 of his details of claim, and so try to clarify his knowledge of timebar, and what additional information Ms Clements gleaned from him in her later cross-examination. It was all very vague. In any event, it was clear from the claimant's own evidence that, in regard to the present case, he was aware of the 3-month statutory time limit, before he raised this claim.

85. Secondly, Ms Clements stated that: "… ***the claim was lodged late. The claim should have been lodged by 13 August 2019 and was not lodged until 9 November 2019. The Claimant has provided no sufficient justification for the claim being lodged late. The reasons advanced amount to, at best, the ordinary pressures of day-to-day life."***

86. She referred to paragraph 19 of **De Souza v Manpower UK Ltd [2013] EWCA Civ 1794** in respect of the adequacy of the reasons advanced by the claimant. I have considered that judgment, but the facts and circumstances of that case were markedly different from those in the present case. Again, I relied upon the statutory provisions about extension of time, and Strike Out, and how they have been interpreted by the higher Tribunals and Courts, as discussed above under Relevant Law, and applied that law to the facts as I found them to be.

87. The claimant in the present case was clearly in some turmoil, over the relevant period, as spoken to in his own evidence to the Tribunal and his graphic description of his inability to function normally, as supported by his wife's evidence.

88. There was joint reference by him and his wife to him seeking assistance from RAMH, and while there was no supporting, documentary evidence to vouch that, there was, for its worth, the GP's report produced to this Tribunal, but obtained for the claimant by his EMLC representative in another case. The absence of oral evidence from the claimant's GP is addressed, in part, by there being the written GP report produced at this Hearing, but while no other evidence from any medical practitioner, or RAHM adviser, or Abbey Mill, I am satisfied, on the basis of the oral evidence from the claimant and his wife, that the claimant's circumstances over the affected period, in particular his mental health state, prevented him from lodging his ET1 earlier than he did.

89. While Ms Clements founded on the fact that the claim should have been lodged by 13 August 2019, and by being lodged on 9 November 2019, it was late, it is not transparently clear why she, like Mr Young before her, when submitting the ET3 response, took the view that the claimant required to bring his claim to the Tribunal by 13 August 2019.

90. The respondents state that the claimant was "***turned down for employment***" on 2 May 2019. Rather than look at that date as the start of the usual 3-month period to bring a claim to the Tribunal, meaning a claim had to be lodged by 1 August 2019, subject to any ACAS early conciliation period, they both would appear to have added in the days spent on ACAS early conciliation, between 2 and 13 June, being Days A & B for the purposes of **Section 140B of the Equality Act 2010**, and by that route arrived at 13 August 2019 as the due date for a timeous Tribunal claim.

91. Thirdly, Ms Clements founds on: "***There would be prejudice to the Respondent should the claim proceed as a result of the fact that, by the time the Claim is heard, it is likely that almost a year will have passed.***

This would hamper the Respondent's case presentation as a result of fading memories."

92. In light of her clarifications to me, at the close of the Hearing, about what steps had been taken by the respondents, I am not at all satisfied that the respondents have shown any actual forensic prejudice. They have known, since at earliest, the claimant's email of 23 May 2019 that he regarded himself as having been subjected to racial discrimination. She did not dispute the claimant's assertion in submission that the respondents' personnel will have relevant paperwork from the interviews, so this is not a case where a fair hearing might be prejudiced by the absence of contemporary records. Nor am I satisfied that the cogency of evidence from either party is likely to be affected by the delay in bringing the claim.

93. When the respondents received the ACAS notification, about early conciliation, on or after 13 June 2019, they must have been alerted at that stage too, so while Ms Clements says it will be difficult for witnesses to recall what happened at and after the claimant's interview, on 18 April 2019, that is a matter which will likewise impact on the claimant, and his ability to recall matters. It is not a matter which, in my view, impacts in any greater way on the respondents than it does on the claimant.

94. Fourthly, Ms Clements also founds on: "***The prejudice to the Claimant if the claim were not to proceed is minimal on the basis that he has failed to advance a factual basis for the claim and accordingly, the claim is without merit*.**" It will be for a Tribunal, deliberating after a Final Hearing, to determine whether or not the claim has merit. I reject, as disingenuous, the respondents' suggestion that the prejudice to the claim if the claim were not to proceed would be "***minimal***." If the claim were to be struck out, that would be the end of the matter – that impact is fatal, rather than minimal.

95. To have struck out the claim now would have been draconian, and a barrier to justice for the claimant, where he has persistently argued that there is an arguable case against these respondents, and the claimant offers to prove that case, with a view to obtaining Judgment against these respondents.

While Ms Clements has identified, in her written and oral submissions for the respondents, that there are certain aspects of the claim as pled by the claimant, as an unrepresented, party litigant, which suggest to her that the claim has no reasonable prospects of success, those matters are best addressed by the leading of witness evidence in the case, from both parties, being tried and tested at an evidential enquiry conducted at a Final Hearing of the claim and response, after both parties have put all their cards on the table.

96. I have no doubt, based on the evidence of the claimant and his wife, at this Preliminary Hearing, that the claimant's mental health issues were severe and debilitating, and there was a very real mental health impediment to him pursuing his claim against the respondents at an earlier stage. He gave a full and candid explanation of what had happened on and after he obtained the ACAS early conciliation certificate on 12 June 2019, up to and including him presenting his ET1 claim form on 9 November 2019.

97. Having carefully considered that evidence, I am satisfied that all of the distractions of life spoken of by the claimant and his wife, related to their family life, and his mental health state at the time, are, in the particular circumstances of this case, sufficient to provide a good and sufficient reason to justify granting him an extension of time.

98. I can readily understand why the respondents' solicitors, in presenting their arguments to the Tribunal, may have felt sceptical about all of what the claimant has prayed in aid to support his application for an extension of time but, after careful consideration, I am satisfied that it is just and equitable to allow the claim to proceed to be determined on its merits.

99. I am satisfied that there is enough in the ET1 claim form to set out the broad basis of the claim, albeit the respondents may wish to seek further particularisation from the claimant. There being a blanket denial that the claimant has been discriminated against in any way by the respondents, and, in the absence of any detailed reply by the respondents to the specific complaints that the claimant makes about the recruitment and selection

procedure, including the interview, and feedback, there are undoubtedly significant disputed facts as between the parties.

100. On that basis, I take the view that the case should proceed to a Final Hearing. I am satisfied that there being a core factual dispute, the dispute between the parties in this Tribunal is best resolved at a full Merits Hearing where evidence is tried and tested. A Final Hearing will allow for there to be evidence led by both parties as to what was said and done, or not, by whom, when, and for what reason, at the times complained of by the claimant.

101. This case, in my view, is clearly a matter for proof, where the claimant can give his evidence as to why be believes he suffered unlawful racial discrimination, and the respondents can lead whatever evidence they feel is appropriate to resist the claim brought against them. In my view, this is not an issue that can be resolved on the papers and it is one which requires oral evidence to enable a proper judicial determination to be made, after hearing evidence led from both parties.

102. As the respondents lodged only a skeleton ET3 response, as they were invited to do by the Tribunal, their position is yet to be further particularised. There are many factors to be taken into account, and, it will be of assistance to the Tribunal, if the respondents set out in detail the recruitment and selection process followed in this job application process, identifying the claimant and successful applicant, and explaining why the successful applicant was appointed, but the claimant was not. A factual enquiry being for another day, at a Final Hearing to be fixed sometime in the proposed listing period of **October, November or December 2020**, I am of the view that this case is best addressed by both parties leading evidence, from relevant and necessary witnesses, at that Final Hearing.

103. By convening a Final Hearing, I consider that that Hearing will allow a full Tribunal to come to a judicial determination, with the benefit of evidence led by both parties, tried and tested through cross-examination in the usual way, any necessary clarifications of that evidence by the Tribunal, and both parties then making closing submissions to the Tribunal on the basis of the evidence

as led, and their submissions on the factual and legal issues arising in this claim.

104. The claimant may be assisted in this process if, as he indicated prior to this Preliminary Hearing, the students from Strathclyde University Law Clinic are able to act as his representatives going forward.

Further Procedure

105. Given my decision not to Strike Out the claim, there is now further procedure to be determined by the Tribunal.

106. Having refused the respondents' application for Strike Out of the claim, I have instead ordered that the case now be listed for a Final Hearing for full disposal, including remedy, if appropriate, before a full Tribunal on dates to be hereinafter assigned by the Tribunal, following the standard date listing process, further to receipt of completed date listing stencils from parties' representatives, those stencils being issued by the clerk to the Tribunal, along with this Judgment.

107. Further, I have ordered that both parties shall advise the Tribunal whether they are content for that Final Hearing to proceed by way of video evidence from both parties, again using the Kinly cloud video platform, and after the preparation and mutual exchange of witness statements prior to the start of that Final Hearing, or whether, instead, they seek to have an in-person Hearing at the Glasgow Employment Tribunal, and, if so, to clarify whether with or without the use of witness statements.

108. To allow the respondents to further particularise their grounds for resisting the claim, and to detail the recruitment and selection process used, and answer the claimant's concerns about the process, as identified in his particulars of claim, as also identify who was selected for interview, and who was appointed, and why, I have also ordered them, within 4 weeks, to lodge with the Tribunal, detailed grounds of resistance to the merits of the claim brought against them, by way of further and better particulars fully answering

the claimant's complaint, as set forth in the ET1 claim form, and so augmenting the ET3 response previously lodged with the Tribunal in skeletal form, denying the discrimination allegation, but otherwise only addressing the time-bar argument.

109. Finally, so that the respondents and Tribunal can be clear about what remedy the claimant seeks from the Tribunal, in the event that he is to be successful in his claim, and establish that he has been the subject of unlawful discrimination by the respondents, I have ordered him, within the same 4 week period, to lodge with the Tribunal, a detailed Schedule of Loss, and whether or not he still seeks a recommendation from the Tribunal. I have allowed the respondents, 2 weeks thereafter, to reply to whatever might be lodged by the claimant.

110**.** Any further procedure will be addressed by correspondence with the Tribunal, in the first instance. Should any other matters arise between now and whatever dates are to be assigned for that Final Hearing, then written case management application should be intimated, in the normal way to the Tribunal, by e-mail, with copy to the other party's representative, sent at the same time, and evidencing compliance with **Rule 92**, for comment / objection within seven days.

111**.** Dependent upon subject matter, and any objection / comment by the other party's representative, any such case management application may be dealt with on paper by me as the allocated Employment Judge, or a Preliminary Hearing fixed, either in person, or by telephone conference call, as might be most appropriate.

Employment Judge: I McPherson
Date of Judgment: 27 July 2020
Entered in register: 30 July 2020
and copied to parties