



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondents

Ms A Kinlay

Bronte Film & Television Limited

Heard at: London Central Employment Tribunal

On: 28, 29 June 2021 (30 June in chambers)

Before: Employment Judge Adkin
Mr P Brione
Mr B Furlong

Representations

For the Claimant: Mr P Epstein QC, Counsel

For the Respondent: Mr M Palmer, Counsel

JUDGMENT

- (1) The Tribunal finds it just and equitable to extend time for presentation of the under section 123 section 123(1) (b) Equality Act 2010 ("EqA").
- (2) The claim of pregnancy discrimination brought under section 18(2)(a) and 39(1)(c) of the Equality Act 2010 ("EqA") succeeds.
- (3) The Respondent shall pay the Claimant:
 - a. £4,370.75 for financial loss.
 - b. £6,000 injury to feelings.
 - c. £336.73 for interest on financial loss, calculated at 8% for half of 703 days.
 - d. £924.49 for interest on injury to feeling, calculated at 8% for 703 days.

REASONS

Procedural matters

1. This hearing was conducted remotely using video (CVP) technology.
2. There were no procedural matters arising at the outset of the hearing. The legal representatives in this matter happily seem to have cooperated in the preparation of the case. The hearing itself was conducted with courtesy and good humour.

The Claim

3. The Claimant presented her claim on 23 January 2020.
4. An agreed list of issues is attached as an appendix to this claim.

Evidence

5. We heard live evidence from the Claimant and Polly Kemp for the Claimant. We receive witness statements that were not challenged by the Respondent from the following:
 - 5.1. Charlotte Riley,
 - 5.2. Jessica Raine,
 - 5.3. Lauren Crace,
 - 5.4. Annabel Scholey,
 - 5.5. Jenny Hulse.
6. For the Respondent we heard evidence from:
 - 6.1. Ruth Kenley-Letts,
 - 6.2. Jackie Larkin,
 - 6.3. Gary Davy.
7. We found that all witnesses for both sides were trying to do their best to recall matters honestly and to the best of their ability. This was not a case that turned on findings of credibility.

Findings of fact

Background

8. The Claimant is an actor. The Respondent is a television production company.
9. On 25 January 2017 Claimant, started to play Sarah Shadlock in a TV detective series called The Strike Series, produced independently by the Respondent to be shown by the BBC. This was based on a series of novels.
10. The role of Sarah Shadlock (“SS”) was very minor role in ‘The Strike Series: Career of Evil’. The Claimant appeared on screen for approximately 30 seconds.

Lethal white

11. The Respondent began to produce the next series based on the novels. This was called “Lethal White”.
12. The process of “pre-production” start approximately 12 weeks before filming commences. In this case filming was due to start on 16 September 2019 with 60 days’ shooting to be completed by 12 December.
13. On 24 June 2019 a cast list was drawn up in which Claimant was described as being one of the “returning” actors – marked against the role Sarah Shadlock. It was envisaged that all of the actors from Career of Evil would reprise their roles in Lethal White. Mr Gary Davy of Gary Davy Casting assisted with the process of casting.
14. In July 2019 the Claimant’s agent Mr John Setrice of MacFarlane Chard Associates Ltd received a call about the possibility of the Claimant reprising the role of Sarah Shadlock. The role in Lethal White was still fairly minor, but was slightly larger than in the previous series. Significantly, the role was more pivotal to the plot. In summary Shadlock, although herself engaged to be married, becomes romantically involved with Matthew, the new husband of Robin, who is the female lead character. The character is described as “glamorous”. She works in a London auction house. By implication she dresses in a sophisticated way.
15. It is common ground between the parties that at this stage in the plot it would not be appropriate for this character to appear to be pregnant, which would cause confusion in the mind of the viewer, and is inconsistent with the novels which the TV series very closely follows.
16. On 15 July 2019 Ava Jade Morgan at Gary Davy Casting wrote an email to Jackie Larkin, producer of Lethal White:

“Just to let you know we have touched base with the below returning cast and asked them to pencil the overall dates and keep us in the loop if anything comes in over the period. Antonia Kinlay - SARAH SHADLOCK - she’s keeping it quiet at the moment, but the agent has informed us that she is currently 12 weeks pregnant,

due mid-January. Thought it best to pass this on asap. She is also in theatre in Sept, but her last performance is on Monday 16th Sept.

17. Ms Larkin, a freelance producer engaged by the Respondent replied the following day:

“Many thanks for this and apologies for the delayed response but I was away yesterday. Good to have the heads up on Sarah. It will have an impact on when we shoot with her so we can start planning now!”

18. It seems to the Tribunal most likely that Ms Larkin was working on the assumption that it would be possible to work around the Claimant being pregnant and suggested a degree of potential flexibility about the timing of the shooting.

Meeting 29 July 2019

19. On 29 July 2019 there was a meeting at which the decision not to cast Claimant in the role of Sarah Shadlock (“SS”) was taken. Although the Respondent witnesses were not able to pinpoint precisely why they think it was this date, this was shortly before communication was made to the Claimant’s agent. On the balance of probabilities we find that the meeting did occur on this day.
20. In attendance at this meeting, there were Ruth Kenley Letts, executive producer and Chief Executive of the Respondent, Susan Tully, director, Jackie Larkin, Kelly Duffell, Line Producer and Jess Cameron Lewis, Head of Production at the Respondent.
21. It was the belief of Ms Kenley Letts, in her oral evidence that there had been earlier discussions between the director and the producer about the Claimant’s pregnancy. There are no notes of this meeting taken by anyone. The best evidence we have as to the content of this meeting is set out in the letter dated 23 October 2019, nearly three months later which is set out below.
22. In the days that followed this meeting Mr Davy the casting director informed the Claimant’s agent that it was not intended to cast her.
23. On 6 August 2019 the Claimant was reassured by a fellow actor that there were scenes involving the character SS in the script. The Claimant plainly had concerns which she expressed in a text message “I’ve got it into my head that they might write my character out because of bump”.
24. On 8 August 2019 Ms Larkin the producer called by telephone then confirmed in an email to the Claimant’s agent John Setrice the decision not to cast the Claimant.

Booking of filming venues

25. The venue for the wedding scene, which was filmed on 1-2 October was booked during August, as was the venue for a house party which was filmed on 19 November.

Claimant learns of decision

26. Somewhat surprisingly, it was not until 28 August 2019, almost a month later, that the Claimant's agent Mr Setrice wrote to her explaining that the script was being rewritten and "at the moment you are not in the next episodes".
27. We accept that this is the first time that the Claimant became aware that she was not going to be cast in the role. Mr Setrice, notably, did not suggest that pregnancy was the reason in this communication. In fact he said very little. The tone of the email exchange was friendly and chatty. He did not make clear whether the part was being written out or offered to another actor.
28. In around August or September 2019 the Claimant telephoned Cathy Sweet at Equity, the actors' Trade Union. She was told that Equity would look into the matter on her behalf.
29. On 5 September 2019 the Respondent entered into a contract with another actor for the sum of £9,555 to play the role.
30. On 6 September 2019 there was a read through of the Lethal White script, following which the Claimant received a call from cast member to say that SS's character elements had been reduced and that an actor who looked very much like the Claimant was now playing her role.
31. On around 11 September 2019 the Claimant began to have discussions with Ms Polly Kemp of Equal Representation for Actress 50:50, which is an organisation that aims to implement gender equality on stage and on screen and provides support to female actors who have suffered from discrimination.
32. On 27 September 2019 the Claimant attempted to communicate with Jennifer Smith the head of diversity and inclusion at the British Film Institute.

Filming – wedding scene

33. On 16 September 2019 the 60 day period of filming Lethal White commenced.
34. On 1 and 2 October 2019 Robin and Matthew's wedding scene was filmed at Ruston Hall in Kettering with both outside and inside filming. We understand that this was filmed toward the earlier part of the filming window in the hope of better weather. Filming took place with 3 cameras in different positions filming simultaneously during the outdoor filming, one of which was a handheld steady cam.
35. The SS character is seen quite far in the background and out of focus outside the country house as a backdrop to a conversation between the two main protagonists, the female character in a wedding dress. In another shot SS is

again in the background with Strike the male lead character in the foreground looking back toward her. There is a much closer head and shoulder shot of SS standing outside in which any bump would not be visible.

36. There is a scene inside at which SS is seated at a table at the wedding reception. Only her head and shoulders can be seen.
37. At this point the Claimant was 23 weeks (just under 5 ½ months) pregnant.
38. There was also an additional scene, which was not ultimately broadcast, in which the SS character danced with the groom at the wedding. The Respondent says that this would have been difficult to film to conceal the pregnancy given the amount of movement going on in it. The Claimant says that this scene lent itself to using other actors, including the groom in particular, to hide the bump. There are some stills from around the time of the first dance (which were not included in the final programme).
39. The Claimant can be seen in one shot from behind in the middle of the shot but not right in the foreground. The lighting is low. We understand from the Ms Kenley-Letts that it would appear somewhat brighter when broadcast. There is another shot in which she can be seen walking toward the camera, somewhat behind a male protagonist character. Again the lighting is low.

Filming – auction house scene

40. The same week, on 6 October 2019 filmed scene at a London auction house, which is where SS works.
41. The establishing shot shows SS from some way away looking through the office from a distance. The next shot is somewhat closer up, and she is still seated at a desk which would conceal a bump. She is wearing a leopard print dress with a fairly low neck line. There then follows a confrontation, when she stands behind her desk and then ultimately walks to a position where she is stood facing the male and female protagonists. She can be seen from the front from head to ankle. The image is shot from behind the shoulders of the two protagonists, who can be seen silhouetted in the foreground.
42. At this point the Claimant would have been 23/24 weeks (5 ½ months) pregnant.

Respondent's confirms that pregnancy the reason for not casting

43. On 23 October 2019 there was a discussion between Ms Kenley-Letts and Cathy Sweet at Equity. Ms Kenley-Letts followed this up with an email, to confirm the content of that conversation. The email said that role been recast explaining that the reason was pregnancy:

“When we carried out an initial availability check for Antonia for Series 2, we were informed that she was pregnant. We had a discussion with our creative team (Sue Tully, director, Jackie Larkin, Kelly Duffell, Line Producer and Jess Cameron Lewis our Head of Production at Bronte) about how this might work, given

that Antonia would be visibly pregnant by the time we shot with her. (She appears in 3 different locations across the series with a few weeks apart for each). We were concerned given the nature of the storyline, that it might appear that the character was pregnant and that this would therefore raise questions with the audience as to whether Matthew was the father as well as sleeping with his best friends fiance . We made the decision to re-cast the role to avoid this complication which is not in the book. One of our remits is to stay close to JK Rowlings novels and this would have changed significantly what JKR wrote.”

44. This email was forwarded to the Claimant on 25 October 2019.

Equity's advice

45. On 31 October 2019 in a text message to Polly Kemp the Claimant explained that she “just spoke to Cathy at Equity” who confirmed to her that she did not have a claim because there was no contract in place.

46. The advice from Equity was that the lack of contract meant that there was no claim. While we do not have the full content of that advice, it seems that the Claimant was wrongly advised, given that there is a potential claim of discrimination under the Equality Act irrespective of the contractual position. We have concluded based on the wording of this text that the Claimant must be mistaken in her claim and witness statement that this advice from Equity came to her earlier.

Filming – house party scene

47. On 19 November 2019 the final scene involving SS was filmed which was a house party at Robin & Matthew's house in a kitchen. The scene is quite dark, lit from behind by lights under the kitchen units. SS is wearing a black sleeveless dress. SS can be seen leaning against the sink, from elbow up with her arms folded slightly out of focus behind Robin. SS can then be seen in the same position but with her arms held down in front of her turning to her left away from the camera to engage in conversation.

48. In this stage the Claimant was 30 weeks pregnant (nearly 7 months).

Discussions with solicitor & ACAS process

49. On 23 November 2019 Ms Kemp had a breakfast meeting with a lawyer at Joelson, a firm of solicitors. Joelsons were at a later stage instructed to bring these proceedings. Ms Kemp was subsequently put in touch with someone in the employment team. By 'Late' November 2019 Ms Kemp and presumably the Claimant were aware in late November 2019 that in order to proceed with a Tribunal claim, that the Claimant would have to first contact ACAS in relation to Early Conciliation

50. On 6 December enquiries were made of Equity to find out whether an ACAS notification had already taken place.

51. Also on 6 December 2019 the Claimant commenced the ACAS Early Conciliation process. According to Polly Kemp, she and the Claimant received information from Joelsons. Ms Kemp told us in her oral evidence that they received an email suggesting that the Claimant was “suddenly beginning to hit a deadline – in their view, which we thought was from the time of the 25 October 2019 letter”.
52. On 11 December 2019 the ACAS Early Conciliation period expired. On this day, according to a contemporaneous text message, the Claimant appears to have had a conversation with ACAS in which they told her that because she is self-employed she has to go to the County Court and not the employment tribunal. Understandably she was at this stage confused and disheartened.

Presentation of the claim

53. The Claimant met with Joelson’s solicitors for the first time on 8 January 2020. It is somewhat surprising in the circumstances that it took until 23 January before the claim was presented.
54. The matter that prevented the Claimant from initiating litigation was funding. We have not received evidence about how the litigation is being funded and when these funds were obtained. Nevertheless we do accept that lack of funding was a difficulty at this stage, which caused some delay. The Claimant believed that she needed to instruct a firm of solicitors to present the claim. It does not seem to have occurred to her that she could have presented a claim herself.
55. On 20 January 2020 the Claimant formally instructed solicitors Joelsons
56. On 23 January 2020 was presented.

Cost of concealing pregnancy

57. The parties have presented competing views on the likely cost of concealing the Claimant’s pregnancy, had she been cast in the role of SS.
58. The Respondent did not actually consider cost in these terms as part of its decision process in July 2019, but says, based on quote from a firm called DNEG who reviewed the still images, that the cost of removing a “bump” digitally at the postproduction stage would be £25,000.
59. The Claimant says, relying on the witness statements of a variety of TV actors with experience of playing roles whilst pregnant that it is possible to avoid the need for postproduction work entirely. This included evidence of actors who were at their most pregnant 7 ½ months, 6 months, 8 ½ months, 6 ½ months, 6 ½ months and 8 months pregnant. This included a variety of roles, including action shots and intimate romantic scenes. The pregnancies were disguised through a variety of measures including costume choices, camera angles and strategically placed props.
60. The Claimant relies on this evidence and suggests that props such as handbags and positioning other characters (e.g. the groom, SS’s dance partner

in the wedding dance scene) could used to conceal her pregnancy at the point of filming.

61. The Claimant's primary case therefore is that no budget would have been required at all for post-production.
62. We are conscious that the Claimant's witnesses are all giving evidence from the perspective of actors rather than directors or producers. The Respondent did not challenge the evidence given, but makes the point that in each case the actor was either the leading lady or very significant role and in any event a more significant role than that being carried out by the Claimant.
63. The Claimant's alternative argument is that the Respondent's quote for postproduction work is at the high end. She has provided a quote from Artisan VRX which totals £6,500. We do not accept the Respondent's criticism that this relates only to still work. The three shots provided for the purposes of obtaining the quote clearly contain details of the length of the shot and the dynamic movement within them.
64. Ultimately, we have come to the conclusion, that in the case of all of the scenes being filmed by the Claimant, bearing in mind that she would have been between 5 ½ months to just under 7 months pregnant, it would have been possible to conceal her pregnancy through the use of costume, camera angle, props, the positioning of other actors and make up if appropriate. To the extent that this might constrain a director, we take the view that directors and directors of photography are subject to all sorts of practical constraints in practice, such as budget, the weather, unavailability of cast members, the geographic layout of the location.
65. Looking specifically at the four scenes we find that all of the scenes could have been filmed in some way to conceal the pregnancy. We find that of the four scenes the confrontation in SS's office probably poses the most challenge. We find that, had a combination of costume choice, camera angle and props not concealed the pregnancy, or alternatively had the director been insistent that the costume and staging reflected exactly that seen in the stills, a budget for postproduction work to conceal the pregnancy may have been required. We do not accept that the amount of postproduction work suggested in the Respondent's quote would be required. Had a director been working with a pregnant actor we find, pragmatically, that they would have filmed in a way that minimises the degree of postproduction required.
66. On balance, having considered the evidence put forward by both parties on this point, we find that if any postproduction work was required it would be in the range £5,000 – £8,000. This is on the basis that (i) we find it was only a single scene where it was likely to be necessary and (ii) the two quotes provided suggest that the quote obtained by the Respondent appears to be at the higher end.

LAW

67. Both Counsel made written opening submissions, which were supplemented with concise oral submissions at the conclusion of the second day of evidence.

Time

68. Relevant to *time limits*, section 123 EqA provides:

123 Time limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) then P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

69. In *Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, the Court of Appeal held that when employment tribunals consider exercising the discretion under [what is now] S.123(1)(b) EqA, ‘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 the discretion is the exception rather than the rule.’

70. *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 EqA (‘such other period as the employment tribunal thinks just and equitable’) that Parliament chose to give employment tribunals the widest possible discretion and it would be wrong to put a gloss on the words of the provision. At paragraph 18-19 Leggatt LJ said:

"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 s 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 s 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 [2003] EWCA Civ 15, [2003] IRLR 220, 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 All ER 381, para [75].

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)."

71. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, [2021] ICR D5, Underhill LJ said:

"The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) the length of, and the reasons for, the delay. If it checks those factors against the list in *Keeble*, well and good; but I would not recommend taking it as the framework for its thinking."

Substantive claim of discrimination

72. Section 39 of EqA provides:

"39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

...

(c) by not offering B employment.

Occupational requirement

73. Paragraph 1 of sch.9 to the EqA provides an exception to this provision as follows:

“1(1) A person (A) does not contravene a provision mentioned in sub-paragraph (2) by applying in relation to work a requirement to have a particular protected characteristic, if A shows that, having regard to the nature or context of the work—

(a) it is an occupational requirement,

(b) the application of the requirement is a proportionate means of achieving a legitimate aim, and

(c) the person to whom A applies the requirement does not meet it (or A has reasonable grounds for not being satisfied that the person meets it).

74. The burden is on the Respondent to establish this exception.

75. As to the operation of the ‘occupational requirement’ exception, the Equality & Human Rights Commission Statutory Code of Practice issued in 2011 (“the Code”) provides the following guidance:

13.1

The Act contains a number of exceptions that permit discrimination that would otherwise be prohibited. Any exception to the prohibition on discrimination should generally be interpreted restrictively.

(emphasis added)

76. We have also derived some assistance from paragraphs 4.25-4.32 of the Code, which are given in relation to indirect discrimination, but are of some assistance in understanding the justification defence. It appeared not to be in dispute before us that the case law on proportionate means and legitimate aim in other contexts under the Equality Act (e.g. section 19 claims) provide assistance in considering justification.

Proportionate means

77. The case law on justification in the context of indirect discrimination suggests that proportionate means must be “appropriate” and “necessary”. In this context, following the guidance of the Supreme Court in *Chief Constable of West Yorkshire Police v Homer* 2012 ICR 704, SC and *Hardy and Hansons plc v Lax* 2005 ICR 1565, CA “necessary” is to be read as “reasonably necessary”.
78. The employer does not have to demonstrate that no other proposal is possible. The employer has to show that the relevant proposal, is justified objectively notwithstanding its discriminatory effect. The tribunal has to make its own judgement, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the discriminatory proposal or measure is reasonably necessary. This is stricter than "range of reasonable responses" test and does not allow for a margin of discretion or margin of appreciation. This requires an employment tribunal to take into account the reasonable needs of the employer’s business.

CONCLUSIONS

Time limits/jurisdiction

79. The Claimant accepts that the claim is brought out of time.
80. It is not contended that there was conduct extending over a period. There was a single decision not to allow the Claimant to reprise her role.
81. It has been suggested on behalf of the Claimant that the clock starts to run from 25 October 2019 when the Claimant became aware of the Respondent’s admission that pregnancy was the reason for their decision.
82. The Tribunal finds that the clock runs from 29 July 2019. This was the date on which the discriminatory decision was taken. The fact that the Claimant was not aware of it at the time does not have an impact on the limitation period, although it is a consideration for the “just and equitable” extension.
83. It follows that the Claimant ought to have been presented, or at least ACAS conciliation started by 28 October 2019. This was three days after the Claimant became aware of the reasoning of the Respondent for not offering her the part. In fact the claim was presented on 23 January 2020, nearly three months later.
84. The reasons for the delay in this case are as follows:
85. Initially, for nearly the entire three months limitation period from 29 July 2019 to 25 October 2019, the Claimant was not aware that the Respondent admitted that her pregnancy was the reason for the decision not to cast her (although she did have some suspicion).
86. Even when the Claimant became aware on 25 October 2019 that her pregnancy was the reason for the decision, we find she did not know the date on which this decision was taken. The Respondent’s letter of 23 October did

not refer to the date of the meeting. The Claimant's agent did not tell her that he had sat on the information about the non-casting for several weeks. From the Claimant's perspective she only learnt of the decision not to cast her on 28 August 2019. Logically, from her perspective, the last possible date on which this decision could have been taken was 28 August. In fact the decision had been taken almost a month earlier. On the basis of what the Claimant knew at that time, she would not have any way of knowing that the deadline expired on 28 October.

87. On 31 October 2019 the Claimant was given wrong advice from her trade union that she did not have a claim due to the lack of contract.
88. Ms Kemp, who was assisting the Claimant, assumed that time ran from the letter of 25 October 2019. She seems to have been under that impression until Joelson's solicitors explained that in late November 2019 the Claimant was "begin to hit a deadline". Until it became clear that the agent delayed by nearly a month, it would very likely have appeared that limitation ran from 28 August 2019, the date on which the decision not to cast the Claimant was communicated to her.
89. On 11 December 2019 the Claimant was, it seems, wrongly told by ACAS that she should bring a claim in the County Court.
90. The Claimant did not herself have a meeting with a lawyer at Joelson until 8 January 2020.
91. We accept in general terms that obtaining funding for litigation caused delay in January 2020.
92. The "just and equitable" provision in section 123 of the EqA gives the Tribunal a broad discretion, albeit that the onus is still on the Claimant to show why time should be extended. We have account of her initial lack of knowledge of the stated reason that she was not cast for almost the entire limitation period, followed by the plainly wrong information she was given both by Equity and ACAS.
93. As to "forensic" prejudice, i.e. the extent to which delay itself would cause the Respondent difficulty, we find, taking account of the agreed bundle of over 300 pages, and in particular the Respondent's letter of October 2019, which was sent within the limitation period, setting out the reasoning means that the delay between the end of the limitation period and the presentation of the claim we do not find has caused substantial prejudice. The Respondent was on notice that the Claimant was, via Equity at that stage, raising questions about the decision within the limitation period.
94. As to the merit of the claim, which may be considered as part of the exercise of discretion, we consider that there is merit in the claim, for the reasons given below.
95. For all of these reasons, we have exercised our discretion to extend time.

Pregnancy discrimination – unfavourable treatment

96. We find that the act of not offering the Claimant in the role of SS for a production in the second series of The Strike Series: Career of Evil was unfavourable treatment.
97. We have not received any evidence suggesting that any other cast members who were returning to reprise role were told that they would not reprise those roles. Although she had not signed a contract nor was there an 'option' in place, given that all enquiries had already been made about her availability, we consider that the overwhelming likelihood was that the Claimant would have gone on to reprise the role of SS had she not become pregnant. The Respondent has not advanced any good non-pregnancy related reason to think that the Claimant would not have been cast.
98. The decision by the Respondent not to cast her because of her pregnancy is admitted by the Respondent.

Occupational requirement

99. The Respondent relies on the genuine occupational requirement ("GOR") in paragraph 1 of Schedule 9 that having regard to the nature and context of the work required in relation to the role of SS that the actor performing in the above role would not be not visibly pregnant.
100. The Claimant agrees that the character could not be visibly pregnant but does not agree that is equivalent to a GOR that the actor playing the character not be visibly pregnant, given the number of ways in which a pregnancy can be readily concealed.
101. It is not disputed that it was a legitimate aim on the part of the Respondent that the character not appear visibly pregnant to viewers. The focus of submissions from both sides was on proportionate means.
102. The principal arguments relied upon by the Respondent were:
 - 102.1. The need to disguise the Claimant's pregnancy would unacceptably constrain the Director's creative vision;
 - 102.2. There is a risk of a pregnant actor being unwell or having a difficult pregnancy leading to additional costs;
 - 102.3. It would be disproportionate to set up or arrange the filming schedule to accommodate the Claimant's pregnancy;
 - 102.4. That the cost to the Respondent of disguising the Claimant's pregnancy through post-production visual editing would be disproportionate to the wage cost of casting her;
 - 102.5. Difficulties in obtaining insurance.

103. We have reminded ourselves that proportionate means are to be assessed by what is appropriate and what is reasonably necessary. The exercise for the tribunal is not to carry out a range of reasonable responses assessment or allow for a margin of discretion. We are to make our own judgement, upon a fair and detailed analysis of the working practices and business considerations involved.

Creative vision

104. We have not heard evidence from the director or the director of photography about their creative vision or the look they were trying to achieve. There is little detail on what was discussed in the meeting in July 2019. The best evidence we have of what it was they were trying to achieve are the stills from the broadcast show.
105. We have considered the evidence put forward by the Respondent but also the witness evidence from the Claimant's witnesses, and also the oral evidence given in the Tribunal. We find that there are inevitably a large number of practical constraints within which this creative process might take place. For outdoor filming in the autumn in the UK, the weather is unpredictable. We have heard evidence that the script was in a state of flux, with some changes being made even quite late on. We received evidence that although "major" in the venues such as the wedding location might be booked significantly in advance, other locations might be found relatively late on.
106. Where the Claimant is seen as distance in the outdoor wedding scene, we do not find that the constraint on the creative process was such that it was reasonably necessary to have a non-pregnant actor.
107. Based on our analysis of the different scenes, it seems to us that the biggest likely constraint would occur in filming the confrontation scene in SS's office in the auction house. We accept Ms Kenley-Lett's evidence that the director needed to be able to have the SS character stand in response to the confrontation to add creative tension. In her oral evidence she expressed the view that use of papers or some other prop to conceal the bump was "naff". It may be that the director took a similar view, although we do not have any direct evidence of that.
108. This is the scene in which, as it was filmed with the replacement actor, the character seen in the leopard print dress seen fully from the front. Were the Claimant to wear precisely the same clothing it seems likely that her pregnancy at 5 ½ months might have been noticeable. We find however that through a combination of costume choice, lighting, camera angle and (only if necessary) post-production digital image modifications it would have been possible to conceal the Claimant's pregnancy, without an unacceptable constraint on the director's vision.

Risk of unwellness/difficult pregnancy

109. Ms Kenley-Letts describes this as "potential issues in terms of being unwell or having a difficult pregnancy".

110. While we acknowledge this risk, we find it was minimal. It seems to the Tribunal that the principal risk affecting a pregnant actor's ability to perform would be morning sickness. The filming window in this case did not fall at the beginning of pregnancy where morning sickness typically occurs. The filming was not in the final two months of the Claimant's pregnancy where she might be expected to be physically struggling or likely to be very tired.

Disproportionate to set up or arrange the filming schedule to accommodate pregnancy

111. Ms Larkin discusses the practical difficulties in the situation that Robin the female would be pregnant.
112. Ms Larkin's witness statement says that it would have been disproportionate to have set up or adjusted the filming schedule (which is extremely complicated) around Antonia or adjust the filming schedule to accommodate her pregnancy. She goes on to say it would have been so complicated had Robin the female lead become pregnant that they would probably have delayed filming altogether.
113. By contrast however, we find that the SS character was a minor part who appeared in three scenes. We accept that it would not be proportionate to rearrange the entire filming schedule around the actor playing that part. We find however that this overstates the difficulty. The Claimant was only required in three different filming locations. The constraint in practical terms is that filming the Claimant at opposite ends of the 13 week filming window (i.e. mid September and early December) would risk giving rise to a continuity problem regarding her appearance. By August it was clear that the wedding scene, a major scene which needed booking earlier would be filmed on 1 – 2 October. The auction house scene was filmed less than a week later, which would have caused no continuity problem at all. In this context it would not have been ideal to film the house party scene too many weeks away as this might have presented continuity difficulties. In fact it was filmed on 11 November, a further six weeks' later, which was probably at the outer margins of what might have been desirable from a continuity perspective. We note that the filming schedule was 60 days filming within 87 days, which suggested some flexibility. We find that any continuity issues could have been mitigated either by filming this scene closer to the beginning of October, if necessary, or by the other methods for concealing pregnancy described elsewhere in our reasons.

Cost to the Respondent of disguising the Claimant's pregnancy through post-production visual editing would be disproportionate to the wage cost of casting her;

114. We do not have evidence that post-production costs was a matter that was given consideration at the time. There is no mention of this consideration in Ms Kenley-Letts' email of 23 October 2019. The costings have been provided as a *post facto* exercise. This does not mean that we should disregard it, but we accept the point made on behalf of the Claimant that this argument ought to be scrutinised carefully.

115. Considering what is proportionate or disproportionate requires the Tribunal to consider the commercial context. There is evidence that the overall budget for the show was £8.5m with approximate daily shoot costs in the range £80,000 – £100,000 [300]. We accept that the money given by the BBC does not cover the entire production costs. The Respondent must obviously manage its costs.
116. The Claimant's wage cost was £4,370. When the Respondent decided not to cast her, she was replaced with someone costing £9,555.
117. Had we accepted the Respondent's case that £25,000 was an inevitable and unavoidable cost of having the Claimant in the SS role, we would have accepted the Respondent's case that this was disproportionate to her wage cost of £4,370 and it would follow that it was reasonably necessary to find a non-pregnant actor.
118. We accept the Claimant's case, however that there are multiple ways that the need for post-production visual editing could be eliminated altogether, or at least the requirement for it significantly limited at little or additional cost to the Respondent.
119. Based on our finding that if any postproduction work was required it would be in the range £5,000 – £8,000, we do not find that this would be have disproportionate, in the context of the figures set out above. This range does not differ significantly from the additional cost that the Respondent actually incurred in casting someone else. Based on that this additional cost, and in the context of the figures considered above, we do not find it was "reasonably necessary" based on this consideration to discriminate against the Claimant for her pregnancy and cast someone else.

Insurance

120. Similarly we do not have evidence that insurance is a consideration that was given consideration at the time. There is no mention of this consideration in Ms Kenley-Letts' email of 23 October 2019. The costings have been provided as a *post facto* exercise. Again, this does not mean that we should disregard it, but we accept the point made on behalf of the Claimant that this argument ought to be scrutinised carefully.
121. It seems from Ms Kenley-Lett's evidence at paragraph 33 of her witness statement that neither she nor the acting head of production at the Respondent were particularly familiar with the insurance position regarding pregnant actors. The position appears to be, based on communication from the Respondent's insurance broker that pregnancy related problems would ordinarily be excluded as a risk.
122. Ms Kenley-Letts said in her witness statement:

"Given that we were focussing on casting Antonia on a creative basis, we did not go on to consider the practicalities of engaging a pregnant actor, such as whether she would have been covered by the production insurance. Had the circumstances been

different and the creative issues less relevant, my experience as a producer would have made sure that the actor was insured by the production insurance before moving forward with an offer of work”

123. By contrast the Claimant’s evidence was that in her experience actors in minor roles were frequently not insured.
124. The evidence of the Claimant’s witnesses about working while pregnant strongly suggests to us that insurance is not an insurmountable difficulty for pregnant women working as actors.
125. We are not satisfied that in reality the insurance position for an actor filming 4 days in the middle of her pregnancy would have been sufficiently prohibitive to mean that it was reasonably necessary to cast someone else.

Conclusion

126. We have reminded ourselves that the burden is on the Respondent, and that exceptions to discrimination based on GOR should be interpreted restrictively.
127. For the reasons set up above, We are not satisfied that the Respondent has shown that the occupational requirement for the actor playing the role SS not to be pregnant was reasonably necessary. The Respondent’s defence to the claim is not established.

Remedy

128. The financial losses in this matter was agreed subject to liability in the sum of **£4,370.75**.
129. As to *injury to feelings*, the Claimant has put forward her claim on the basis of an award in the Middle band of *Vento* and suggests a range of £15,000-20,000, i.e in the upper range of the middle band.
130. The Respondent proposes no more than £4,200 i.e. right in the middle of the lower band.
131. Mr Epstein in closing submissions, realistically, suggested that the appropriate level of the award should be somewhere between the two positions.
132. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive. It should be just to both parties.
133. We found it was to the Claimant’s credit that she was careful not to overstate her case in this respect. She has not sought to rely on medical evidence. We accept that the experience was very stressful and that it caused her anxiety. We accept that it caused her to feel low. We accept that it knocked her confidence, which plainly for an actor is particularly important.

134. On the other hand, we bear in mind that the nature of the case relates to 4 days' work. It is a one off decision. There is an absence of significantly aggravating factors. The Respondent did not, we find, act maliciously. When requested to do so a justification of sorts was provided in the email of 23 October. Ultimately we have found that the Respondent, in balancing the competing considerations of the Claimant's pregnancy and practical matters to do with filming, struck the wrong balance.
135. In our assessment the appropriate measure of damages is in the upper half of the lower Vento band. In our assessment the appropriate figure is **£6,000**.

Interest

136. Interest calculations are set out above.

Employment Judge Adkin

Date 18 July 2021

WRITTEN REASONS SENT TO THE PARTIES ON

.22/07/2021.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

AGREED LIST OF ISSUES

Introduction

1. By an ET1 claim form, presented to the Tribunal on 23rd January 2020, the Claimant brings a claim of discrimination because of pregnancy contrary to s. 18 and 39 of the Equality Act 2010 ('EqA 2010').

Jurisdiction

2. Does the Employment Tribunal have jurisdiction to hear the Claimant's complaints of pregnancy discrimination?
3. Was the Claimant's claim brought outside the ordinary time limit set down in s. 123(1) EqA 2010, as adjusted for early conciliation?
4. Do the incidents complained of in paragraph 4 of Claimant's statement of claim constitute conduct extending over a period, within the meaning of s. 123(3)(a) EqA 2010 or is the incident(s) of pregnancy discrimination complained of limited to the act(s) of the Respondent notifying the Claimant that she was not required to reprise the role of *Sarah Shadlock (SS)*?
5. If the Claimant's claim was not been brought in time, has she shown grounds under which it is just and equitable to extend time for the presentation of her claim?

Direct pregnancy discrimination

6. Did the Respondent discriminate against the Claimant during the protected period of her pregnancy by treating her unfavourably because of her pregnancy contrary to section 18(2)(a) and section 39(1)(c) of EqA 2010?

7. The act of unfavourable treatment relied upon is not offering the Claimant in the role of SS for a production in the second series of *The Strike Series: Career of Evil*. Did this act amount to unfavourable treatment?
8. The Respondent relies on the general occupational requirement in paragraph 1 of Schedule 9 that having regard to the nature and context of the work required in relation to the role of SS that the actor performing in the above role would not be not visibly pregnant.
9. The Respondent contends that this requirement in relation to the role of SS was (a) an occupational requirement; (b) its application of the requirement was a proportionate means of achieving a legitimate aim; and (c) that the Claimant did not meet the requirement (or the Respondent had reasonable grounds for not being satisfied that the Claimant would not meet it).

Remedy

10. Should a declaration be made as to the respective rights of the Claimant and the Respondent in relation to which the proceedings relate and if so in what terms?
11. What compensation, if any, should be awarded for:
 - a. Financial losses;
 - b. Injury to feelings.
12. What, if any, financial loss has the Claimant suffered?