EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs J Gardner	AND	Highways England Company Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 20 October 2021
By Cloud Video Platform

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Ms E Hodgetts of Counsel

JUDGMENT

The judgment of the tribunal is that:
1. The claimant did not do any protected acts, and her claim for victimisation is dismissed; and
2. The claimant's claims for constructive unfair dismissal, disability discrimination, and discrimination on the grounds of part-time worker status were all issued out of time and are all dismissed; and
3. The claimant's application to amend her claim to include a claim of discrimination on the grounds of age is dismissed on withdrawal by the claimant.

RESERVED REASONS

1. In these proceedings the claimant brings three separate categories of complaint: first, constructive unfair dismissal; secondly, disability discrimination consisting of indirect discrimination, failure to make adjustments, harassment and victimisation; and thirdly, detriment on the ground of being a part-time worker. This is the judgment following a Preliminary Hearing to determine the following three preliminary issues: (1) whether the claimant did a protected act (for the purposes of her victimisation claim); (2) whether or not the claimant's claims were presented in time; and (3) to determine an application by the

claimant to amend her claim (to include a new claim of discrimination on the ground of age).

2. I have heard from the claimant who gave evidence. I have heard from Counsel on behalf of the respondent. Where I made findings of facts below, I found them to have been proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to any factual and legal submissions made by and on behalf of the respective parties.
3. I deal with each of the three preliminary issues in turn.
4. **Whether the Claimant Did a Protected Act:**
5. The claimant brings a claim alleging discrimination because of her disability under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant's claims include one of victimisation.
6. The definition of victimisation is found in section 27 of the EqA. A person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. Under section 27(2) each of the following is a protected act, namely bringing proceedings under the EqA; giving evidence or information in connection with proceedings under the EqA; doing any other thing for the purposes of or in connection with the EqA; and making an allegation (whether or not express) that A or another person has contravened the EqA. Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
7. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides in section 136(2) that 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. However, by virtue of section 136(3) this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
8. I have been referred to and I have considered the following cases: Waters v the Commissioner of Police of the Metropolis [1997] ICR 1073 CA; Durrani v London Borough of Ealing UKEAT/0454/2012 and Fullah v Medical Research Council UKEAT/0586/2012. It is clear from Waters that an allegation relied upon (as a protected act) need not state explicitly that an act of discrimination has occurred and all that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer. In Durrani, Langstaff P confirmed that there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the EqA applies. In Fullah, the EAT confirmed that the person on the receiving end of a complaint of victimisation ought to be able to identify what protected characteristic it is in respect of … In the absence of any evidence of reliance on a protected characteristic, buttressing the complaint of victimisation or discrimination, it cannot be said that there was a protected act.
9. In reply to a previous case management order, the claimant has particularised her protected acts as follows. There are effectively seven protected acts relied upon, referred to below as PA1 to PA 7 respectively, and the alleged protected acts and my findings for each of them are as follows.
10. PA1: "Something said in the meeting on 27 November 2020" (which is a misprint for 2019). There was an informal meeting to air grievances on 27 November 2019, and the minutes of that meeting were approved by the claimant after she had been given the opportunity to make amendments. The passages relied upon by the claimant do not assert or allege that the respondent has contravened the EqA. The claimant does say that she was feeling unwell and that she went on sickness absence and she says she may have implied that this was because of the respondent's actions. On one occasion the claimant suggested that Nicky Booth had "undermined us and affected our well-being" but this was after the claimant had conceded that she had been supportive with the claimant's illness. There is no allegation of disability discrimination. Later on during that meeting the claimant suggested that the episode which had happened two years ago (when the claimant was

subject to a grievance) had affected her mental health and that now she was going to take early retirement, the catalyst for which was the alleged erosion of authority and loss of her job role. The claimant accepted in cross-examination that no stage during this meeting did she allege that there had been disability discrimination and/or a breach of her rights under the EqA.

11. For these reasons I find that none of the claimant's comments at this meeting amounted to a protected act.
12. PA2: "Something said in the email dated 21 November 2020" (which again is a misprint for 2019). This was an email dated 21 November 2019 which the claimant sent to Ms Louisa Fletcher of the respondent. In this email the claimant suggested: "I'm so worn out by the last two years of mental illness brought on by events at work that I've been keeping a low profile … I was going to go quietly and not make a fuss about my job disappearing but frankly I've had enough of being a nice guy. Without some professional advice I don't know what to label this but I suspect it's either redundancy or constructive dismissal." The claimant also attached to that email a one page document which was prepared by the claimant and her colleague Mrs Shears giving feedback about how they felt their job role had been subsumed without prior consultation or discussion. This suggested that they both felt "squeezed out, undervalued, unappreciated and angry" and that this had contributed to the claimant's depression and decision to retire early. The claimant conceded in cross-examination that none of these comments were labelled as discrimination, and neither did they allege any breach of the EqA.
13. For these reasons I find that none of the claimant's comments in this email or its attachment amounted to a protected act.
14. PA3: "Something said in the amendments to the notes of the meeting on 27 November 2020" (which again is a misprint for 2019). The claimant accepted today that this refers to the minutes of the meeting dealt with under PA1 above, and a duplication of the same.
15. PA4: "Louisa Fletcher's response to the claimant and Mrs Shears on 15 February 2021" (which is a misprint for 2020). This refers to an email from Ms Louisa Fletcher to the claimant and Mrs Shears dated 14 February 2020, and her subsequent comments. The claimant accepted today that any comments in an email from Ms Fletcher could not amount to a protected act done by her (the claimant), and that she therefore no longer relies upon this alleged protected act.
16. PA5: "Something said in the claimant's email to Mrs Shears on 24 February 2020". This refers to the claimant's email to Mrs Shears about Louisa Fletcher's response on 14 February 2020. However, there was no such email in the agreed bundle of documents for today's hearing and the claimant was unable to adduce the same, or to refer to the contents of the email upon which she wished to rely. For these reasons I cannot accept that the contents of this email amounted to a protected act.
17. PA6: "Something said in the claimant's written grievance on 29 February 2020". In accordance with the respondent's pro forma, the claimant gave a brief outline of the nature of her grievance which consisted of: "Lack of consultation and communication about major changes to my role … Inadequate leadership and communication skills and experience in my line management chain that has had a detrimental effect on my mental health and given me no option other than to resign … Actions and inactions since restructure that have made me feel that I'm no longer a valued employee and wanted in the team and my skills and experience are also not valued. Ditto the effect on my mental health. I believe that the business case for the recently advertised and filled PB6 discriminates against me as a part-time worker."
18. The claimant accepted during cross-examination that although there was an express allegation of discrimination on the grounds of part-time worker status, at no stage in the grievance document or in the grievance did she allege that she had been discriminated against as a disabled person, and she accepted that she never said that she had been discriminated against for this reason.
19. For these reasons I cannot find that the claimant did a protected act in the context of this grievance.

20. PA7: This refers to four emails or documents which supplemented the claimant's grievance which were the grievance pro forma and attachments of 29 February 2020; the email outcome of the grievance on 2 September 2020; the outcome letter on 2 September 2020; and a report on 2 September 2020 which upheld part of the grievance. None of these emails or documents are now relied upon by the claimant who withdrew these as potential protected acts during the course of this hearing.
21. In conclusion, there is no evidence that the claimant had brought proceedings under the EqA; had given evidence or information in connection with proceedings under the EqA; had done any other thing for the purposes of or in connection with the EqA; or made any allegation (whether or not express) that anyone had contravened the EqA. I therefore find that the claimant did not make any protected acts for the purposes of section 27 EqA, and I dismiss her claim for victimisation.

22. Whether the Claimant's Claims were Presented Within Time:

23. The claimant has presented three claims: namely, for constructive unfair dismissal; for discrimination on the grounds of disability; and for discrimination on the grounds of part-time worker status.
24. For the unfair dismissal claim, the relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
25. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the EqA. Section 120 of the EqA confers jurisdiction on claims to employment tribunals, and section 123(1) of the EqA provides that the proceedings on a complaint within section 120 may not be brought after the end of – (a) the period of three 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. Under section 123(3)(a) of the EqA conduct extending over a period is to be treated as done at the end of that period.
26. There are similar provisions for the part-time worker discrimination claim. Regulation 8(2) of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provides: "Subject to paragraph (3) an employment tribunal shall not consider a complaint under this regulation unless it is presented before the end of the period of three months … Beginning with the date of the less favourable treatment or detriment to which the complaint relates or, where an act or failure to act is part of a series of similar acts or failures comprising the less favourable treatment or detriment, the last of them." Regulation 8(3) provides: "A tribunal may consider any such complaint which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so."
27. With effect from 6 May 2014 a prospective claimant must obtain an early conciliation certificate from ACAS, or have a valid exemption, before issuing employment tribunal proceedings.
28. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision"). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (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 a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision 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) Where an employment tribunal has power under this Act to extend a time limit set by a

relevant provision, the power is exercisable in relation to the time limit as extended by this section.

29. The respondent named in these proceedings is Highways England Company Ltd, which has since changed its name to National Highways Limited. The claimant Mrs Jennifer Gardner commenced employment with the respondent on 1 February 1985, and she worked in Exeter. More latterly she had a job share with her colleague Mrs Lynn Shears. The claimant suffers from depression, and the respondent has conceded that the claimant was a disabled person by reason of this impairment, and that it knew of the same, from November 2018.
30. The claimant asserts that her mental health deteriorated after an event in late 2017 when a grievance was raised against the claimant in connection with both her performance and an allegation of theft. This event and grievance took until September 2018 to resolve, and the claimant's first allegations of disability discrimination arise from these events. The claimant has not made clear whom she alleges to be the perpetrators, but the claimant was supported by Ms Louisa Fletcher during this process.
31. During the summer of 2018 the respondent then required the claimant's team to move, and a restructure of her team commenced in the autumn of 2018. The claimant asserts that her responsibility for leadership of the Property Management team was removed at this time. Further allegations of disability discrimination arise from these events, but again the claimant has not made clear whom she alleges to be the perpetrators.
32. The claimant asserts that in January 2019 a new Band 6 role was created which she complains introduced a new level of management above her own role. Ms Booth then became one of the claimant's managers, and the claimant complains of Ms Booth's conduct in March 2019 to the extent that her role and authority had been undermined, and during May 2019 (and in particular at a meeting on 8 May 2019) that Ms Booth dealt with that meeting in an allegedly discriminatory manner which had a detrimental effect on the claimant's mental health. This is followed by a period of certified sickness absence during the middle of 2019.
33. The claimant asserts that she saw the job description for the Band 6 role for the first time in October 2019, and that this prompted her resignation on 9 October 2019. Her resignation was on notice which ran until 29 February 2020, on which date her employment with the respondent terminated. The claimant asserts that her resignation should be construed as her constructive unfair dismissal, but she does not assert that this alleged dismissal itself was discriminatory.
34. The claimant raises further allegations of discrimination at the start of her notice period. She alleges that she was not notified that property certificate work would be cancelled without consultation on 1 November 2019. Ms Booth is a named perpetrator.
35. During November 2019 the claimant also made it clear to the respondent that she was dissatisfied with the position and that she considered that the respondent's conduct might amount to constructive unfair dismissal, and so she was clearly aware of the nature of the concept as at that time.
36. The above allegations of discrimination are relied upon as indirect disability discrimination under section 19 EqA. The claimant also brings a claim of harassment said to have been perpetrated by Ms Booth on five occasions between March 2019 and October 2019. There is also a claim in respect of the alleged failure by the respondent to make reasonable adjustments during this period which is very vague, but suggests that the respondent is a publicly funded body which failed in its duty to carry out an impact and equality assessment during the above changes. This is said to have been a Provision, Criterion or Practice (PCP) which caused the claimant substantial disadvantage. The claimant also presented a claim for victimisation, which has now been dismissed for the reasons set out above.
37. The claimant's claim for less favourable treatment on the grounds of being a part-time worker is particularised as follows: (i) proposing the new Band 6 post in January 2019 using the wording "ensuring the correct level of line management and team oversight is maintained across the wider team full-time"; (ii) failing to ask the claimant if she would change her working days to provide more cover; and (iii) failing to advertise that the new Band 6 post was open to part-time and job share workers.

38. As at this stage therefore the latest allegations of discrimination (on the grounds of both disability and/or part-time worker status) are in November 2019. The allegations of unfair constructive dismissal, (which rely on alleged breaches of the express contractual terms of the claimant's employment contract and the implied term of mutual trust and confidence), arise on the termination of the claimant's employment on 29 February 2020. There is no allegation that the dismissal was an act of discrimination.
39. The events continued to unfold as follows. The claimant attended an informal grievance meeting on 27 November 2019 (which is referred to above in the analysis of the alleged protected acts). She raised a formal grievance on the last day of employment namely 29 February 2020. There was a delay in resolving that grievance which involved a change of the manager responsible and the grievance outcome was communicated on 2 September 2020.
40. The claimant obtained legal advice on 17 September 2020. She appealed the grievance outcome on 21 September 2020. On the same day she made contact with ACAS to commence the Early Conciliation process. This was on 21 September 2020 (Day A), and the Early Conciliation Certificate was issued on 12 October 2020 (Day B). This claim was then presented on 21 October 2020.
41. The claimant's explanation and reasons for the delay in issuing proceedings have developed during the course of her own witness statement, her written response to the respondent's skeleton argument, and her evidence at this hearing. Effectively she now relies on two grounds. The first is a combination of her inability to take legal advice and a misunderstanding of the ACAS procedures, and the second relates to her ill-health. I deal with each of these in turn.
42. The first reason for delay relied upon is that the claimant misunderstood the information which she had obtained from the Internet relating to the ACAS Early Conciliation procedures, and in particular that it was necessary to resolve her internal grievance before issuing proceedings. She has adduced extracts from the ACAS website to the effect that it was advisable to resolve the grievance before issuing proceedings, and that failure to do to do so might affect potential compensation. However, the claimant's extracts were selective. It is clear from the fuller extracts adduced by the respondent from the Government's Gov.uk website; the ACAS website; and the CAB website that there are suggestions that employees might prefer to resolve a grievance before resorting to litigation, but that there are strict time limits of three months for unfair dismissal and discrimination claims, which might be extended by Early Conciliation, and that potential claimants must ensure that they issue proceedings within these time limits failing which the claims might be rejected.
43. In any event, the claimant's assertions appear illogical. On the one hand she suggested that she thought that she had to exhaust the respondent's internal grievance procedure before issuing proceedings. On the other hand, she asserts that she understood that if the claim was successful than an award could be substantially reduced if the grievance procedure was not followed. These are inconsistent arguments and the second allegation that the award would be reduced if the grievance was not pursued demonstrates that it is possible to present a claim without pursuing a grievance. The claimant also initiated ACAS Early Conciliation on the same day that she appealed her grievance outcome, and she presented her claim before the appeal outcome was received. This demonstrates that she knew that the grievance procedure did not have to be completed before issuing proceedings.
44. For these reasons I do not find that the claimant was in any way precluded from issuing proceedings because of an alleged misunderstanding of the relevant provisions, nor because she was misled by the ACAS website which she admits to having researched. In short, I find that the claimant preferred to await the outcome of her grievance, and chose to do so, before subsequently deciding to issue these proceedings.
45. I also reject the claimant's assertion that she was unable to obtain advice during this period. The respondent asserts that her partner Mr Field was previously a trade union representative or officer. The claimant appears to dispute the exact nature of his status, but the claimant was previously represented at work by a trade union representative and

either Mr Field and/or her previous representative must been available to assist the claimant in directing her to appropriate advice during the relevant time limits. In addition, it became clear at this hearing that the claimant's daughter is a Solicitor, and although not said to be a specialist in employment law, nonetheless was clearly in a position to direct the claimant to appropriate legal advice during the limitation period.

46. With regard to the claimant's ill-health, I accept the claimant's evidence that she was suffering from depression (and the respondent has conceded that she was a disabled person by reason of this condition). I accept her evidence that there were days upon which she was unable to function fully as a result of this condition. However, this is not a case where I can find that the claimant was precluded or prevented from issuing proceedings because of her ill health. During the relevant limitation periods the claimant was clearly well enough to attend informal and formal grievance hearings and to debate and pursue her objections and her complaints. On occasions these were set out in writing in some detail, and in particular this occurred during the grievance process and within the limitation periods. The claimant has not adduced any medical evidence to suggest that her condition rendered her incapable of doing so during the limitation periods. This is not a case where the claimant was prevented by ill-health from undertaking research into her rights, nor in pursuing them.
47. I have been referred to and have considered the following cases, namely: Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; Cullinane v Balfour Beattie Engineering Services Ltd UKEAT/0537/10; Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT; British Coal v Keeble [1997] IRLR 336 EAT; Robertson v Bexley Community Service [2003] IRLR 434 CA; Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640; Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA; London Borough of Southwark v Afolabi [2003] IRLR 220 CA; Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23.
48. Unfair Dismissal:
49. In this case the claimant's effective date of termination of employment was 29 February 2020. The normal time limit of three months therefore expired at midnight on 28 May 2020. The claimant commenced the Early Conciliation process with a curse on 21 September 2020 (Day A), and the Early Conciliation Certificate was issued on 12 October 2020 (Day B). This claim was then presented on 21 October 2020, some five months out of time.
50. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are set out above, namely (i) a combination of being unable to obtain advice, and misunderstanding the ACAS website about completing an internal grievance before issuing proceedings; and (ii) ill-health.
51. The question of whether or not it was reasonably practicable for the claimant to have presented his claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
52. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike,

or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-

53. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
54. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) concluded that "reasonably practicable" does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like "reasonably feasible".
55. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204).
56. Underhill P as he then was considered the period after the expiry of the primary time limit in Cullinane v Balfour Beattie Engineering Services Ltd (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
57. In my judgment the reason why the claimant delayed in issuing these proceedings was because she initially chose to pursue a grievance before doing so. There was no physical impediment or barrier to her issuing proceedings, such as illness. The respondent had not misrepresented any matter, and it cannot be said that the claimant had been wrongly advised by any adviser or website. I am satisfied that the claimant had access to advice if and when needed, through any of her partner, her daughter, or the relevant websites.

58. In the circumstances I conclude that it was reasonably practicable for the claimant to have issued her unfair dismissal claim within the relevant time limit, and that she failed to do so. Accordingly, her unfair dismissal claim is presented out of time, and it is hereby dismissed.
59. Discrimination Claim
60. The grounds relied upon by the claimant for suggesting that it would be just and equitable to extend the time limit are set out above, namely (i) a combination of being unable to obtain advice, and misunderstanding the ACAS website about completing an internal grievance before issuing proceedings; and (ii) ill-health.
61. I have considered the factors in section 33 of the Limitation Act 1980 which is referred to in the Keeble decision. For the record, these are the length of and reasons for the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the parties cooperated with any request for information; the promptness with which the claimant acted once the facts giving rise to the cause of action were known; and the steps taken by the claimant to obtain appropriate professional advice.
62. However, it is clear from the comments of Underhill LJ in Adedeji, that a rigid adherence to such a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37: “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 … “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.”
63. This follows the dicta of Leggatt LJ in Abertawe Bro Morgannwg University Local Health Board v Morgan at paragraphs 18 and 19: “[18] … 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, section 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 the circumstances to put a gloss on the words of the provision or to interpret it as if it contained such a list … [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).”
64. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that 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". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA.
65. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan (at the EAT) before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.
66. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention

to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

67. With regard to the length of, and the reasons for, the delay, the latest allegations of discrimination are in early November 2019. The normal time limit of three months therefore expired in early March 2019, and there was a delay of seven months before the claimant issued these proceedings. The reasons relied upon by the claimant for that delay are (i) a combination of being unable to obtain advice, and her misunderstanding the ACAS website about completing an internal grievance before issuing proceedings; and (ii) her ill-health. However, for the reasons set out in detail above, I do not accept the claimant was prevented or precluded from issuing these proceedings within time for either of these reasons.
68. The claimant has not presented any effective argument that it would be just and equitable to extend time. With regard to the balance of prejudice, if an extension is not granted the claimant will be prejudiced to the extent that she will be unable to pursue her claims. However, to allow an extension of time also gives rise to considerable prejudice to the respondent. The claimant accepted in cross-examination that her allegations are in some instances historical and stale, and they will rely upon the Tribunal having to make findings of fact relating to disputed and unrecorded conversations, some of which arose at least four years ago. The claimant accepted under cross-examination that it is a matter of common sense that the allegations raised are both historical and often dependent on witnesses trying to recollect what happened some years ago. There is therefore considerable prejudice to the respondent in having to defend these potential proceedings. The balance of prejudice cannot be said to favour the claimant such that an extension of time is just and equitable.
69. In my judgment for all the above reasons the claimant has not discharged the burden of proof that it is just and equitable to extend time. The claimant's claim for disability discrimination and discrimination on the grounds of her part-time worker status were therefore presented out of time, no extension is granted, and accordingly they are hereby dismissed.

70. <u>The Amendment Application:</u>

71. This application to amend these proceedings was withdrawn by the claimant at the end of this hearing, and the application to amend is therefore dismissed on withdrawal by the claimant.

Employment Judge N J Roper
Date: 21 October 2021

Judgment sent to Parties: 15 November 2021

For the Tribunal Office