EMPLOYMENT TRIBUNALS

Claimant: Ms Pamela McDonald

Respondent: Birmingham Community Healthcare NHS Trust

RESERVED DECISION
PRELIMINARY HEARING

Heard at: (in private; by Cloud Video Platform) **On:** 27 & 28 July 2021

Before: Employment Judge Dean

Appearances
For the Claimant: Mr Alex MacMillan of counsel

For the Respondent: Miss Sarah Bowen of counsel

JUDGMENT

The judgment of the Tribunal is that :

1. The claimant was not disabled by electromagnetic hypersensitivity syndrome or at all at the relevant time.
2. The claimant's complaints of unlawful discrimination related to the protected characteristic of disability related to Electromagnetic Hypersensitivity or at all are dismissed.
3. The respondent's application to strike out the complaints of direct discrimination and harassment because of her race in breach of sections 13 and 26 of the Equality Act 20210 does not succeed.
4. The respondent's application that the claimant be required to pay a deposit as a condition of proceeding to a final hearing does not succeed.

REASONS

Background

1. The claimant is a dietitian and has been employed by the respondent since 1996. Early conciliation began on the 18 March 2020 and ended on 2 April 2020. The claimant presented a complaint to the employment tribunal on 1, May 2020 alleging that she has been subject to unlawful discrimination because of the protected characteristics of disability and race.

2. The claimant, who is described in the particulars a claim as a black UK citizen of Africa Caribbean ethnicity has diagnosed herself as suffering from electromagnetic hypersensitivity. It is generally accepted by the parties that the condition is not one that healthcare professionals universally accept exists and those who accept it's existence do not necessarily agree whether it's cause is physical or psychological or both.

3. The claimant's complaints centre around an investigation and related suspension then reinstatement and informal review of performance of the claimant that occurred in and after August 2019. This Preliminary Hearing is to consider:

   3.1. whether the claimant is disabled by the condition of electromagnetic hypersensitivity at the material time;
   3.2. whether her complaints, or any of them should be struck out as having no reasonable prospects of success because of the time limits;
   3.3. Whether her complaints or any 9of them have little reasonable prospect of success because of time limits and if so should the claimant have to pay a deposit under Rule 39 of the Rules of Procedure.

The Preliminary Issues

4. The Preliminary Issues to be determined by me at this open Preliminary Hearing are as identified by EJ Camp at a case management preliminary hearing on 13 November 2020:
   4.1. "The further preliminary hearing is to deal with the following as preliminary issues (the "preliminary issues"):

4.1.1. was the claimant a disabled person under the Equality Act 2010 at all relevant times because of electromagnetic hypersensitivity, and, if not, should any part of her disability discrimination claim be struck out as having no reasonable prospects of success?

4.1.2. time limits, and whether the claim, or any part of it, should be struck out as having no reasonable prospects of success because of time limits;

4.1.3. does any part of the claimant's claim have little reasonable prospects of success because of time limits and, if so, should the claimant have to pay a deposit under rule 39 of the Rules of Procedure (and if so how much) as a condition of continuing with that part?

4.1.4. If the whole of the claimant's claim is not struck out, the Tribunal will make case management orders for the final hearing at the end of, or following, the further preliminary hearing.

The Relevant Law

Jurisdiction – time limits and continuing acts

5. Section 123 of the Equality Act 2010 provides:

123Time limits

(1) Subject to section 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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a)the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3)For the purposes of this section—

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

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

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

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

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

6. The provisions of s 140B of the Equality Act 2010 makes provision for the extension of time limits to facilitate conciliation before the institution of proceedings however that does not benefit a claimant where the primary limitation has already expired before the commencement of Early Conciliation.

7. The law provides that in respect of discrimination claims and detriment claims, if there is a continuing course of conduct it is to be treated as an act extending over a period. Time runs from the end of that period. The focus of the Tribunal's enquiry must be on the substance of the complaint that the respondent was responsible for an ongoing state of affairs in which the claimant was less favourably treated. The burden of proof is on the claimant to prove, either by direct evidence or by inference from primary facts, that the alleged acts of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs see Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA. in particular at para. 52 "The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."

8. If any of the complaints were not in time, the Employment Tribunal must consider whether there is nevertheless jurisdiction to hear them. In discrimination cases the test is whether it is just and equitable to allow the claims to be brought.

9. The statutory wording of section 123 of the EA10 is slightly different than in the SDA and RRA and, arguably, may be wider. However, for these purposes, we have assumed that the test it the same and that the well established principles apply.

10. When deciding whether it is just and equitable for a claim to be brought, the Employment Tribunal's discretion is wide and any factor that appears to be relevant can be considered. However, time limits should be exercised strictly and the Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable

to do so. The exercise of discretion is therefore the exception rather than the rule Robertson v Bexley Community Centre [2003] IRLR 434 . The guidance provides:

> *"An Employment Tribunal has a very wide discretion in deciding whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, time limits are exercised strictly in employment cases. When tribunals consider their discretion to consider a claim out of time of just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise discretion. On the contrary, tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. The exercise of this discretion is thus the exception rather than the rule."*

11. Case law provides that consideration of the factors set out in section 33 of the Limitation Act 1980 may be of assistance, though its requirements are relevant in considering actions relating to personal injuries and death and while a useful check list should not inhibiting the wide discretion of the Employment Tribunal. The Employment Tribunal should have regard to all the circumstances of the case, and in particular to the following:
    a. the length 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 steps taken by the claimant to obtain professional advice once he or she knew of the possibility of taking action.

12. In addition, when deciding whether to exercise its just and equitable discretion, the Employment Tribunal must consider the prejudice which each party would suffer as a result of the decision to be made (sometimes referred to as the balance of hardship test) British Coal Corporation v Keeble [1997] IRLR 336 EAT.

13. Most recently Lord Justice Underhill in his judgment in Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23 in the Court of Appeal, confirmed that the list of factors in s.33(3) Limitation Act 1980, which a civil court in a personal injury case is required to consider when deciding whether to extend time, does not constitute an obligatory checklist, or even necessarily a framework, for employment tribunals determining whether it is just and equitable to extend time in a discrimination claim. Previously, the EAT in British Coal Corporation v Keeble and ors [1997] IRLR 336, EAT set out that these factors may be relevant to the

consideration of whether it is just and equitable to extend time to allow a discrimination claim in the employment tribunal to proceed. Of particular import is the length of the delay and the reasons for it and whether delay prejudiced the respondent for example in preventing or inhibiting its investigation of the claim while matters are fresh.

14. Following Perth and Kinross Council v Townsley (EATS 0010/10) and University of Westminster v Bailey EAT 0345/09, tribunals should only extend time where the claimant's ignorance of rights is reasonable. There are three aspects of knowledge of rights required for a claimant (i) that a claim can be made; (ii) how that claim can be made (i.e. through an employment tribunal); (iii) time limits for those claims (see Wall's Meat Co v Khan [1978] IRLR 499). Reasonableness of such ignorance all depends on the circumstances.

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15. A number of authorities have suggested that reliance on incorrect advice should not defeat a claimant's contention that their claim should be heard, depending on the source of that advice See for example Chohan v Derby Law Centre [2004] IRLR 685 EA.

16. Additionally, the authorities say that the pursuit of internal proceedings is one factor to be taken into account. However, the fact that a Claimant defers presenting a claim while awaiting the outcome of an internal appeal process does not normally constitute a sufficient ground for the delay see Apelogun-Gabriels v Lambeth London Borough [2002] ICR 713.

17. In Virdi v Commissioner of Police of the Metropolis and anor [2007] IRLR 24, EAT it was held that the relevant date for rejection of an appeal for promotion is the date the decision was actually made.

18. If the issue is determined as a preliminary issue, it is appropriate for the Employment Tribunal to form a fairly rough idea as to whether the complaint is strong or weak Hutchison v Westward Television Limited [1977] IRLR 69 & Anderson v George S. Hall Limited UKEAT/003/05 .

Strike out and deposit applications

19. The statutory provisions in relation to applications for strike out of a complaint or response are set out in the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013 and in particular:

    Rule 37

    Striking out

    37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

    (a)that it is scandalous or vexatious or has no reasonable prospect of success;

    (b)that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

    (c)for non-compliance with any of these Rules or with an order of the Tribunal;

    (d)that it has not been actively pursued;

    (e)that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

20. The application made by the respondents is that the complaints have no reasonable prospect of success. I am guided in large part by the Court of Appeal in Ezsias v North Glamorgan NHS Trust 2007 ICR 1126 and the House of Lords in Anyanwu v South Bank Students Union 2001 ICR 391. Lady Smith expanded upon that guidance in Balls v Downham Market High School and College [2011] IRLR 217 stating that where strikeout is sought or contemplated, on the ground that the claim has no reasonable prospect of success, tribunal must first consider whether, on careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail. The test is a high test.

21. The test is high because of the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and that has been no opportunity for the evidence in relation to this fax to be considered. More recently the Court of Appeal in A v B and anor [2010] EWCA 1378CA concluded that there was a 'more than fanciful' prospect that the employer would not be able to discharge the 'reverse' burden of proof and a as a result the EAT had been right to decide that the employer had not succeeded in demonstrating that claims had no reasonable prospect of success.

22. For discrimination claims, the starting point regarding case-law is Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing.

23. I am also assisted by the case of Balls v Downham Market High School and College [2011] IRLR 217, in which Lady Smith held:

> *When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; 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 prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether there written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects.*

24. Mitting J in Mecharov v Citibank NA [2016] ICR 1121 EAT provided the following guidance at paragraph 14:

…the approach that should be taken in a strike out application in a discrimination case is as follows:

Only in the clearest case should a discrimination claim be struck out;

Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;

The claimant's case must ordinarily be taken at its highest;

If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,

A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

25. However, there are some caveats to the general approach of caution towards strike out applications. In Ahir v British Airways plc [2017] EWCA Civ 1392 CA, it was held that, when a tribunal is satisfied that there are no reasonable prospects of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

26. In relation to applications to Deposit order the rule is detailed at Rule 39:

Deposit orders

39.(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a)the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b)the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

27. In addition, tribunals are entitled to have regard to the likelihood of the party being able to establish the facts essential to his case and, in doing so, which provisional view as to the credibility of the assertions put forward – Van Rensburg v Royal Borough of Kingston-upon-Thames UK EAT/00954/07.
28. In considering the amount of any deposit to award, should the Claim be one that is considered to have little reasonable prospect of success, a tribunal must make sure that the order *"does not operate to restrict disproportionately of a fair trial rights of a paying party, or to impair access to justice"* Hemdan v Ishmail [2017] IRLR 228.
29. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a

deposit order.

30. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – Adams v Kingdon Services Group Ltd EAT/0235/18.

Disability

31. An individual is disabled for the purposes of the Equality Act if:

"6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities."

32. The statutory test is augmented by Sch 1 EqA 2010 and statutory Guidance ('Guidance')1 which provide (insofar as it is material):

32.1. sch 1, para 2(2) EqA 2010: "*If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur"*

32.2. s 212(1) EqA 2010: defines "substantial" as "more than minor or trivial".

32.3. para B4, Guidance: the cumulative effects of an impairment must be considered, specifically, "*An impairment might not have a substantial adverse effect on a person's ability to undertake a particular day-to-day activity in isolation. However, it is important to consider whether its effects on more than one activity, when taken together, could result in an overall substantial adverse effect".*

32.4. para A5, Guidance: an impairment may include conditions which are *"developmental, such as autistic spectrum disorders … learning disabilities … mental health conditions with symptoms such as anxiety … unshared perceptions … [or] mental illnesses, such as depression*."

32.5. para D3, Guidance: Normal day-to-day activities are "*are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone … walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following*

instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern"

32.6. Para D10 identifies that that "*many types of specialised work related or other activities may still involve normal day to day activities which can be adversely affected by an impairment. For example, they may involve normal activities such as : sitting down, standing up, walking, running, verbal interaction, writing, driving, using everyday objects such as a computer keyboard or a mobile phone and lifting or carrying everyday objects such as a vacuum cleaner."*

32.7. para D17, Guidance: in relation to how impairments have an adverse impact on normal day-to-day communication activities, "*they may adversely affect whether a person is able to speak clearly at a normal pace and rhythm and to understand someone else speaking normally in the person's native language. Some impairments can have an adverse effect on a person's ability to understand human non-factual information and non-verbal communication such as body language and facial expressions. Account should be taken of how such factors can have an adverse effect on normal day-to-day activities*".

32.8. Para D18 Guidance refers to "*a person's impairment may have an adverse effect on day to day activities that require an ability to coordinate their movements, to carry everyday objects such as a kettle of water, a bag of shopping, a briefcase, or an overnight bag , or to use standard items of equipment."*

32.9. D20 Guidance: *"Environmental conditions may have an impact on how an impairment affects a persons ability to carry out normal day to day activities. Consideration should be given to the level and nature of any environmental effectful. Account should be taken of whether it is within such a range and of such a type that most people will be able to carry out an activity without an adverse effect. For example whether background noise or lighting is of a type or level that would enable most people to hear or see adequately."*

32.10. In considering the effect on day-to-day activities, regard should be had to the time taken and manner in which activities are carried out (para B2 – 3, Guidance) , and coping strategies developed to avoid or reduce the impact of the impairment (B7 – 9, Guidance) . Particularly:

32.11. "*B7. Account should be taken of how far a person can reasonably be expected to modify his or her behaviour, for example by use of a coping or avoidance strategy, to prevent or reduce the effects of an impairment on normal day-to-day activities … even with the coping or avoidance strategy, there is still an adverse effect on the carrying out of normal day-to-day activities …*

32.12. B9. … It would not be reasonable to conclude that a person who employed an avoidance strategy was not a disabled person. In determining a question as to whether a person meets the definition of disability it is important to consider the things that a person cannot do or can only do with difficulty.

32.13. The Appendix to the Guidance provides a non-exhaustive list of factors that would be reasonable to regard as having a substantial adverse effect on normal day-to-day activities, which are of particular significance to the Claimant's case: Including difficulty entering or staying in environments that the person perceives as strange or frightening; Difficulty operating a computer, for example because of physical restriction in using a keyboard, a visual impairment or a learning disability.

33. Of particular further assistance is the recent decision of HHJ Tayler in Elliott v Dorset County Council UKEAT/0197/20/LA (V) where HHJ Tayler reflecting upon the classic guidance in earlier decisions previous Presidents of the EAT and of Morrison J in Goodwin v Patent Office [1999] ICR 302 and Elias J in Paterson v Commissioner of Police of the Metropolis [2007] ICR 1522 summarised:

"18. … Often the components can only properly be analysed by seeing them in the context of the provision, and statute, as a whole. This can be particularly important if some of the components are conceded, or not significantly disputed. It is necessary to consider the basis of any concession to be able to properly analyse the components that are in dispute …

22. The fact that a person can carry out such activities does not mean that his ability to carry them out has not been impaired. The focus of the test is on the things that the applicant either cannot do, or can only do with difficulty, rather than on the things that the person can do."

32 There is a statutory definition of the word "substantial" as "more than minor or trivial". The answer to the question of whether an impairment has a more than minor or trivial effect on a person's ability to carry out day-to-day activities will often be straightforward. The application of this statutory definition must always be the starting point. We all know what the words "minor" and "trivial" mean. If the answer to the question of whether an impairment has a more than minor or trivial adverse effect on a person's ability to perform day-to-day activities is "yes", that is likely to be the end of the matter …

59 [On the relevance of the Guidance] *On an overview of that part of the Guidance, it is clear that where a person has an impairment that substantially affects her/his ability to undertake normal day-to-day activities the person is unlikely to fall outside the definition of disability because they have a coping strategy that involves avoiding that day-to-day activity …"*

Evidence

34. I have had placed before me at the preliminary hearing an indexed bundle of documents extending over an excess of 344 pages in which I have been referred to specific documents in examination and in submissions. The claimant has submitted two witness statements to deal with the primary issues to explain the nature of her disability and its impact [74-82] and, in respect of her means for the purposes of a deposit order application [51-53] which have been taken as read and subject to cross examination and clarification. I have heard also from Dr. Erica Mallery-Blythe who has provided an Expert Report [251-336] in relation to the condition of Electromagnetic Hypersensitivity Syndrome ("EHS") (also known as Electro Magnetic Sensitivity ("EMS")) which is described by her as a chronic condition. Dr Mallery Blythe has relied upon her Report in respect of which she has been subject to cross examination and clarification.

Findings of fact

35. I have sought to limit my findings of fact to the limited issues before me. At the start of the hearing Ms Bowen invited me to determine first the issue of jurisdiction to hear the claimant's complaints to avoid the need to go on and determine the issue of the claimant's disability. I have declined to do so, Mr Macmillan suggests that the claimant's disability illness feeds into how the discretion is to be exercised and may be material in my determination of the issues. I have in reaching my findings of fact and the determination of the Preliminary Issues considered all of the evidence before reaching a conclusion on any of the findings of fact and conclusions that I do.
36. The relevant time for the purposes of this complaint is to consider whether the claimant was disabled by the condition from August 2019 and through the period of the alleged discriminatory treatment. The respondent asserts the alleged discrimination ended on 21 November 2019 when a final decision was taken to close the Performance and Management Capability Procedure to which the claimant had been subject. The claimant asserts that by their continued refusal to remove the reference to the Stage 1 Informal Review from the claimant's personnel record, despite closing the procedure on 21 November 2019 and failing to deal with her repeated requests to remove the record in February 2020 and in her grievance of 23 March 2020 there were plainly linked incidents continuing up to

18 March 2020 the date of commencement of the ACAS early conciliation and the date the complaint was presented to the Employment Tribunal on 1 May 2020.

Disability

37. The claimant in her evidence to the tribunal in her witness statement [74-82 para 6] describes that as early as 2003 she first noticed a sensitivity to electronic equipment when she used a mobile phone belonging to a friend and she noticed a burning pain in her ear. In 2004 she was given a mobile phone as a present by her family to use in case of emergencies and the claimant used it mostly to send texts, the claimant describes that she held the phone away from her head and used it on speakerphone. On the claimant's account if she used the phone holding it by her ear she says that she developed an immediate headache, burning pain in her ear and an uncomfortable feeling in her head and upper torso. The claimant describes it was more of discomfort and ache than searing pain. The claimant says that on those occasions the adverse effect would pass in half an hour.

38. The claimant's evidence was that in 2004 use of a mobile phone caused mild discomfort and that now, that is in 2021, the pain is severe. On the claimant's account she was given a 'smartphone' in around 2016 to use as part of her role and as soon as she switched the phone on it caused a pain in her ear came back so she stopped using it. In 2011 or 2012 the respondent Trust gave the claimant a laptop to use for work however on switching it on the claimant says that it caused her to suffer nausea and headache and pain in her torso and stomach and lower back so she stopped using it, locked it in a drawer and continued to use a desktop at work.

39. The claimant's account is that between 2012 to 2017 she avoided using the laptops and smartphones. In 2017 the claimant was reminded at work that she wasn't using her phone and that it was more efficient to take notes on a laptop to be able to remotely access patient records during meetings. The claimant, faced with the need to use technology, made her employer aware of her concerns about the effect of using technology had on her.

40. The account that the claimant has given leads me to find that in the period 2003 – 2017 the claimant had not suffered more than mild discomfort and dull aches when using technology and with reasonable avoidance tactics the claimant did not suffer any substantial adverse effects on her ability to undertake normal day to day activities as a result of her head aches, earaches and aches in her abdomen breasts and head whether caused by EHS or otherwise at all.
41. The claimant describes her history of experience of the effects of being around mobile electronic technology in her s6 witness Statement [74-82] and I find on the evidence before me and the claimant's account that with minor adaptations the impact of what the claimant has self-diagnosed as electro magnetic sensitivity upon the claimant was no more than minor or trivial in the period up to 2017 on her ability to undertake normal day to day activities.

42. The claimant describes [para 20 p77] the impact on her normal day to day activities as she has sought to avoid certain electronic equipment at home and at work since autumn 2017. On the evidence before me the claimant describes that on one occasion in Autumn 2017 when she found that the microwave was moved to the office she was working in, it caused her a headache and that she does not have a microwave at home and the microwave was returned to the kitchen in the office and the claimant avoids the kitchen when the microwave is being used. The claimant describes " *it would feel as if my brain was on fire and that my head was melting".* As a result the claimant says she tolerated the use of the microwave where it had been relocated to the room where the claimant worked and the next day she told her manger and the microwave was moved.

43. The claimant describes [w/s para 14-18] that in 2017 as she was told by management that it was more efficient to take minutes on a laptop in meetings where she would be able to access patient records so that her avoidance techniques were no longer as effective as they had previously been. The claimant explained to her managers her practice of moving away from colleagues who were using their laptops and mobile phones

44. The respondent made a referral to Occupational Health in September 2017 [83-85] to identify any support to be given to the claimant in the workplace. The claimant's

history reported to Occupational Health during a telephone consultation in September 2017 confirmed that she had not had seen her GP about the effects of what she felt through self diagnosis was a condition known as Electro Magnetic Sensitivity. Occupation Health confirmed that there was not a medical diagnosis of Electro Magnetic Sensitivity and, as there were people who reported similar symptoms to those of the claimant, it was recommended if it could be accommodated that the claimant continued to use the desk computer and to not use mobile devices.

45. The claimant describes using avoidance techniques she used in the period 2012-2017 and in her witness statement [para 14-25,at p77-78] the claimants evidence is that when she tried to use the laptop for work that she felt nausea and headache and torso pain and not using wi-fi and ethernet cables at home, at work where she could she avoided siting near colleagues who were using mobile phones and devices and laptops. By 2017 however at work the claimant was increasingly under pressure to actively use herself the work mobile phone and laptop as engagement with technology became inescapable.

46. Referring to the most contemporaneous accounts to Occupational Health in September 2017 the report confirms:

"I assessed Pamela by telephone. She informs me that she experiences dull aches in her abdomen, breasts and head when using mobile working devices. She explained that she has stopped using any such devices and uses a desk computer and non smart phone. since doing so she no longer experiences these symptoms. She explained that when she works near people who have these devices her symptoms return. so she avoids this as much as possible. Pamela informs me that she feels that she is suffering with Electro Magnetic Sensitivity. Pamela reports no underlying health conditions and she has not seen her GP about this.

I have informed Pamela there is no medical diagnosis for Electro Magnetic Sensitivity; however due to people reporting similar symptoms of which Pamela describes there is a claimed sensitivity to electromagnetic fields due to people working with this sort of equipment or in close proximity to it. Pamela reports not

having the symptoms when she is not working with the devices or in close proximity to them. Therefore if it can be accommodated I recommend that Pamela continues to use the desk computer to help support Pamela in the workplace and she does not use mobile working devices."

The only contemporary evidence to which I have been referred in considering the complaint is that in September 2017 at the Occupational Health review [84] she describes how she felt when using the devices was as "dull aches". The claimant at that stage had not seen her GP about the effects that she says she experienced and while the claimant adopted avoidance techniques there is no evidence that other than one occasion when near the microwave she had experienced pain.

47. The claimant also reported to Occupational Health that she was suffering from stress at work caused by her colleagues being on maternity leave and her being asked to take on extra patients. The report recommended if it could be accommodated that the claimant "*continues to use the desk computer to help support Pamela in the workplace and she does not use mobile working devices".* It is commendable that the respondent sought to make adjustments to enable the claimant to work without discomfort in the workplace however the effects on the claimant's ability to undertake normal day to day activity was not adversely impacted in anything more than a minor or trivial way in 2017. The claimant confirmed in cross examination that she was receiving no treatment for the effects of what she had self diagnosed and reported to be Electromagnetic Hypersensitivity Syndrome. The claimant acknowledged that she had not described to Occupational Health that the symptoms she experienced were painful in 2017. The claimant suggested in her evidence that she had previously told Occupational Health that she experienced pain however not evidence of any earlier reports have been brought to my attention.

48. The next Occupational Health referral that has been brought to my attention was on 23 October 2019, within the relevant time for my consideration of the claimants claim to be disabled by EMS.

49. At an occupational health review in October 2020 [86-88] the report states that the claimant reported when using devices such as mobile phones, laptops, i-Pads etc that she started to develop symptoms of burning sensation/pain in certain areas. The claimant reported that the symptoms "*will only appear if she is exposed*" and for the first time the claimant suggested to Occupational Health that she had since the early 2000s started to develop symptoms of a burning sensation/pain in certain areas after using devices. The devices to which the claimant referred did not include microwaves. The report referred to a World Health Organisation (WHO) statement 2005 with regards to Electromagnetic hypersensitivity:

> *"EMS is characterized by a variety of non-specific symptoms, which afflicted individuals attribute to exposure to EMF. The symptoms most commonly experienced include dermatological symptoms (redness, tingling, and burning sensations) as well as neurasthenic and vegetative symptoms (fatigue, tiredness, concentration difficulties, dizziness, nausea, heart palpitation, and digestive disturbances). The collection of symptoms is not part of any recognized syndrome.* "

The report from Occupational Health cited that the claimant was considered fit for work and that she did not require any medical restrictions subject to a DSE assessment and that management and the claimant were "*in the best position to sit and discuss best practices or working."*

50. The claimant describes in her witness statement [para 26 – 33 p78-80] how she reports the impact on her day-to-day activities. The account refers to the episode in Autumn 2017 when she feels that she was affected by the microwave in the room where she worked and her decision not to acquire a microwave at home tp replace one that had broken in 2001. There is an account that when in 2013 she had been offered a new Sky box with an ethernet cable she had experienced intense pain when it was switched on and she had reverted to use her old Sky box, this was in contrast to her account that she uses a PC with ethernet cable at home rather than wi-fi. Even going about her work visiting patients at home it tends not to cause problems on home visits however sometimes when she is visiting day centres or residential homes she is passed a mobile or cordless phone and she declines to use them and finds an alternative way to make a call.

51. The claimant's evidence is limited about the impact of her self diagnosed EMS on her normal day to day activities in the period 2017 until March 2020. I find that the impact of what the claimant has diagnosed to be EMS did not prior to February 2020 have a substantial adverse effect on her ability to undertake normal day to day activities. The claimant has not described any day to day activities she could not undertake, she was able to use computers, telephones, and television, albeit she chose not to use wi-fi connected devices.

52. The claimant describes that in January 2020 she first noticed changes. At Church the claimant sat away from people but noticed that as fellow church-goers made greater use of mobile devices in church, looking up bible passages on their devices, she noticed that she started to get ear pain. In March 2020 while at a McDonalds for food, she had the same experience of pain in her head and upper torso which she hadn't experienced there before which she thought might be because these places have got new equipment or her condition has changed.

53. The claimant was next referred to Occupational Health who reported on 4 June 2020 [89- 92] where the assessment of the claimant's condition records that the claimant :

" *reports symptoms of a burning sensation in her ears which also affects her upper torso plus she has symptoms of nausea and headaches. She told me that this happens when she uses her computer and a telephone in the workplace. She noticed that her symptoms began in January 2020. According to Pam, at that time there were software changes to the systems at work including an upgrade if the Wi-fi provision. She informs me that periods of up to one hour are manageable for her and, in addition, if she minimises the amount of time that she spends on the computer or the telephone this is a helpful measure.*

With regards to her functional ability she confirmed that she remains at work and that she is participating in all of her routine activities of daily living including her job tasks.

She is fit for work. She is fit to undertake her contractual hours. She is fit to participate in all of the responsibilities of her role.

Management is advised to undertake an appropriate risk assessment to identify any hazards and suitable control measures to manage the current difficulties."

The contemporary evidence leads me to conclude tht as at 4 June 2020 the claimant was reporting her symptoms began in January 2020 and that the claimant confirmed that she was participating in all her routine activities of daily living including her job tasks. I conclude that such impairment that the claimant had at that time were not substantially adverse on her normal day to day activities.

54. The claimant in her examination has observed in the last year or so if she sits too long in offices for example at offices of her GP or lawyers she feels pain coming on and she encounters pain when going about her work and visiting homes with video doorbells she experiences a momentary pain, as she does when she stands near people out and about in shops who are using mobile phones. At home the claimant avoids the more convenient technology of a laptop. At the hearing of this case the claimant has accessed the CVP hearing remotely from a building that does not rely on wi-fi connectivity.

55. Since January 2020 the claimant describes worsening of her symptoms. She describes a headache and unpleasant flutter and discomfort in her torso as soon as she switched on her desktop. Occupational health reports in August 2020 [93-94] confirmed that the claimant was referred to ENT services by her GP and she was seen by Dr Dezso on 6 October 2020 [96-97] who found no immediate physical cause of the claimant's left-sided ear symptoms and recommended a neurology referral.

56. Dr Ratti, Consultant Health Physician held a telephone consultation with the claimant on 13 October 2020 [98-99] and reported:

"The difficulty is obviously with her EMS as she has increasing sensitivity to the increasing technology used in the workplace. This itself does present a significant problem and is unlikely to significantly improve. She has made significant adjustments in her home in that she has no significant technology at home to try to

keep her symptoms under control. In terms of the workplace, she remains off work with a chronic ear pain, presumably secondary to the underlying EMS."

57. In responding to questions from Ms Bowen the claimant has explained that latterly at work she can work on her computer at work for a period of one hour and then needs to take a break. The claimant accepted that it is recommended good practice for all workers to take a break from screens after an hour, as indeed has this tribunal implementing by implementing strict ten minute screen breaks after an hour in a video hearing. The claimant has accepted that she remains at work and is fit to work and do her role at the time of this hearing. The claimant maintains however that in 2021 the limitations upon her are the pain and discomfort that she experiences.

58. The claimant's evidence about her normal day to day activities is limited in so far as '*these days'* in 2021 she tends to do her shopping on line as it helps her to avoid places which have radio equipment and members of the public on their phones. The claimant acknowledges that these days she is not a person who goes out a great deal and she will only socialise monthly or so and tends to sit outside because of smoking so, for various reasons, she avoids public areas and businesses. The claimant also acknowledged that in times of Covid-19 she has limited her encounters with people.

59. The claimant's evidence is that since January 2020 she has started getting symptoms from using a desktop computer at work and would get the headache and unpleasant flutter and discomfort in her torso when she switched the machine on. The claimant describes that since January 2020 when she used a landline at work she had experienced the burning pain in her ear and she has that pain in her ear now when someone used a mobile phone around her since March 2020 not just the symptoms in her head and torso that she had experienced before.

60. I have been referred to limited extracts from the claimant's medical records. It is evident that this was the first time that the claimant consulted with her GP about circumstances related to what she had self-diagnosed as EMS was on 14 March 2020 [115] shortly before she raised her grievance . Subsequently following a

consultation on 23 June 2020 the claimant was referred to be seen by ENT service and as a result Mr Takwoingi the Consultant ENT Surgeon in his report of the telephone consultation with the claimant on 23 July 2020 [141] referred to the claimants bi-lateral ear pain and confirmed that the claimant had told him that after problems in 2017 reasonable adjustments were made and:

> "*as a result of this gave you some significant improvement until January this year when it re-started."*

Mr Takwoingi commented:

> *" You were wondering whether this is due to electromagnetic radiation but I advised you that this is not a recognised cause of earache in ENT. It may well be as a result of referred otalgia."*

61. I have been referred to subsequent investigations and reports from Dr Ratti the Consultant Occupational Health Physician which referred to an underlying diagnosis of EMS which was made a number of years previously [98-99] in which Dr Ratti reviewing the claimants situation identified that the claimant:

> *" has increasing sensitivity to the increasing technology used in the workplace*". and referred to the fact that the claimant was off work with a chronic ear pain: "*presumably as secondary to the underlying EMS".*

62. A further face to face appointment with occupational health was held on 23 October 2020 [100-102] in relation to the deterioration in the claimant's response to exposure to electronic devices. An Access to Work assessment was undertaken on 22 December 2020 [103-107] which recorded the history given by the claimant and recorded that:

> *". Pamela finds that the combination of her symptoms can have a disabling impact on her ability to carry out work tasks and she has been on sick leave due to chronic ear pain since June 2020."*

Although various recommendations were discussed with the claimant none of them were agreed by the claimant. In answer to questions asked of her in this hearing the claimant explained that she refused the Access to Work recommendations in December 2020 because there was no guarantee that the recommendations would

stop the symptoms it was just reduction, the claimant explained that she was in such pain she wanted something that would 100% guarantee she would not have provoked symptoms at work.

63. It is clear that subsequently further reports were obtained about the claimant's condition Dr Basheer Consultant Occupational Physician on 12 February 2021 wrote [110-111] commenting upon the claimant's then absence of 8 months because of her chronic ear pain referred to EMS and described it as a controversial condition.

64. Subsequently the claimant obtained a report for this litigation from Dr Mallery-Blythe dated April 2021 [251- 336]. I have heard the evidence given by Dr Mallery-Blythe who confirms that she took a history and consulted with the claimant remotely by telephone in March 2021. The information available to the expert is outlined at the start of the report [252] and it is evident that not all of the Occupational Health reports prior to October 2020 were made available to her. Equally Dr Mallory-Blythe refers to some diary entries at the time of the so called " General deterioration and escalation of symptoms" in January 2020 when the history is reported as :

"Things massively changed for me at work. I thought I was going mad. I started getting symptoms from the desktop that I had been using for many years which were like the laptop"

65. The diary entries Dr Mallory-Blythe refers to were not disclosed to this tribunal and they all refer to events post January 2020. In the systems review section of the report [257-260] the claimant describes much of the impact as she has described to the tribunal of what she believed to be EMS related adverse effects on her ability to do things on a normal day to day basis. There is in addition reference in response to the leading question "*Do you get thought block/brain fog?* The claimant responded:

" When I was using the virtual campus this was very bad. But looking back I was actually having some issues with this almost every day at work – like a fuzziness in my head"

The claimant had made not reference to this effect in any Occupational Health referral nor in her impact statement or evidence to the hearing.

66. It is unfortunate that the instructions sent to the expert by those instructing her did not direct the expert to focus on an assessment of the claimant's condition at the relevant time for her claim before the tribunal, namely from August 2019 when the relevant time for these proceedings began continuing until November 2019 as the respondent claim or continuing until immediately before the referral to ACAS on 18 March 2020 and the claim presented on 1 May as the claimant suggests.. Dr Mallory-Blythe has in her report considered the claimant's condition through the lens of the claimant's condition and the effect on her ability to undertake normal day to day activities in March 2021. Dr Mallory-Blythe has confirmed that she has not practiced I clinical medicine since 2007 and that she is provides her expert advice having in the last 12 years researched the health effects of non-ionising radiation including a special interest in EHS Electromagnetic Hypersensitivity. Dr Mallory -Blythe considers that the claimants self diagnosis was later corroborated by a consultant ENT surgeon and then reinforced following assessment by Dr Ratti [263-264]. Dr Mallory-Blythe acknowledges that the diagnosis of EMS is a relatively unusual diagnosis at this time in the UK and that it is not yet formally recognised by Public Health England.

67. Dr Mallory- Blythe explains that her assertion that the EHS diagnosis was corroborated by an ENT surgeon by reference to the letter of Mr Attila Dezso [96-97] on 6 October 2020 in the heading of the letter identifying Diagnosis and outcome to be:

"Diagnosis: Electromagnetic sensitivity
Intermittent bilateral, predominantly left-sided otalgia, tinnitus
Lactose intolerance

Outcome: Microscopic ear assessment
Previous findings reviewed, hearing test discussed
MRI, CT scan, neurology referral recommended"

68. A diagnosis of a medical condition whether physical or psychological does not lead to an automatic assessment of the diagnosis being definitive of the impairment amounting to a disability within the Equality Act 2010. Dr Mallory -Blythe has identified that the claimant in 2021 had symptoms which are 'classic' of the syndrome and the claimant is disabled however the one does not automatically follow the other. In her report Dr Mallory-Blythe suggests that the claimant's physical impairment is moderate to severe [264]. On any view the assessment in March 2021 suggests that the severity of the claimant symptoms and resulting restriction on normal daily life activities which created severe restrictions on her ability to carry out normal day to day activities such that her occupation which is now completely inaccessible references the fact that because of ear pain the claimant ceased to attend work from June 2020 [115].

69. In identifying the Avoidance strategies the claimant employed [262] while the claimant identifies she would like a smart TV it is clear the claimant has a TV and has a computer and she uses the internet and telephones. The claimant is able to undertake these normal day to day activities and her discomfort in using particular types of the available technology does not I find amount to a substantial adverse impairment.

70. On the claimant's own account it was only after January 2020 that she found using the landline telephone in the office and her desktop required her to take breaks after an hour and to get a coffee at work. It is plain that the adaptations that the claimant was afforded by the respondent since 2017 were well within the range of modifications to behaviour to reasonably to be employed and that the effect of any impairment on the clamant was not substantial before January 2020. While the claimant has given an account of how after January 2020 she encountered more severe difficulty and had to employ modifications to her behaviour by not working at her desktop while at work for more than one hour at a time and took regular breaks she did not require medication to ease such pain as she encountered and it was not until March 2020 that she sought advice from her GP about her ear pain which the claimant had described as a new symptom that had developed in January 2020. In April 202 mas a result of the response to Covid-19 the office at which the claimant worked was shut down and staff who could not work from home, including

the claimant relocated to the Green Fields office where the claimant found when she switched on the computer she had ear pain which became a regular thing at work which led to an occupational health referral in June 2020 [89-92]. By 23 June 2020 the claimant's ear pain had become chronic in nature and was not improving and the claimant was certified unfit for work. I find that from 23 June 2020 the claimant's ear pain was such that she was no longer able to remain in the workplace and undertake her normal day to day activities. The impairment of the claimant's condition meant that she was, by virtue of a constellation of physical or psychological impairments provoked when around electronic devices including mobile and landline telephones in the office environment, subject to a substantial adverse effect on her ability to undertake normal day to day activities.

71. While investigations were undertaken by her GP and referral to ENT specialists in June 2020 it was not then apparent that the claimant's condition was one that was likely to last for the long term. Indeed, it was not until October 2020 that the claimant's self-diagnosis was apparently acknowledged by Mr Dezso [96] ENT Otologist ENT Surgeon.

72. The account given by Dr Mallory-Blythe of the claimant's history in March 2021 reflecting upon the escalation of the claimant reaction and pain encountered around electromagnetic devices and fields describes that the condition seen from June 2020 showed what was described as a classic progression of EMS. Whether or not a confirmed diagnosis of the claimant's condition of EMS was made in June 2020 it is clear that the claimant, who since 2017 showed discomfort and minor impairment when working near electronic devices, had progressed to a state where her response in the environment and her chronic ear pain was a physical or mental impairment that was then likely to last long term.

<u>Presentation of her complaint</u>

73. In considering the claimant's complaint and the question of timeliness of presentation of her complaints I have had regard to the evidence that the claimant gives on the issues which are not considered in her witness statements in relation to disability and her means. I have allowed Mr McMillan to lead evidence in chief in respect of the reasons why the claims were presented not earlier than they were.

74. The claimant has stated that at the meeting on 22 August 2019 when she was called to attend a Stage 1 Performance Management meeting she was shocked and surprised as she was trying to do the job as best she could and it not come to her mind at the time that it was discrimination because of her race and disability. The claimant says that she had explained to her manager that the reason she was not able to submit reports in a timely manner was not able to use a laptop computer to get reports in within 24 hours if it was the end of the week. The claimant was shocked and dismayed to be subject to the Stage 1 review.

75. The claimant suggests that in the period August to November 2019 she was in a low mood and felt humiliated that her work in the period was being checked by a junior employee and she was concerned that her employment was at risk as her performance was being monitored. Having received the RCA report on 19 December 2019 the claimant has suggested that she was expecting to hear from the respondent's and when she heard nothing from them she wrote to them on 20 February 202 asking for the record of the Stage 1 review being removed from her personnel record. I am mindful that the claimant had clearly been informed that the fact of the Stage 1 review would be recorded on her personnel file in November 2019, and she had not appealed against that decision at the time.

76. The preliminary issue before me is to consider whether the claimant's claim, or any part of it should be struck out as having no reasonable prospect of success because of time limits and alternatively whether the claims have little reasonable prospects of success because of time limits and if so should the claimant have to pay a deposit under Rule 39 as a condition of continuing with that part of the claim.

77. The background to this claim is that on the 18 July 2019 an incident report was filed regarding the expected death for patient with learning difficulties in a care home. On the 5 August 2019 the claimant was told she was being investigated in connexion with the sudden death and she was stepped down from clinical duties until further notice this suspension lasted from the 5 August to the 15 August 2019.

78.. On the 22 August 2019 claimant was asked to attend a meeting with her clinical team leader to discuss her performance in several areas she was placed on this stage one informal review within the capability procedure which was to be reviewed in November 2019. At a meeting on the 21 November the claimant was informed that there were no ongoing concerns however she was informed that the fact of the informal review of her performance would remain on her personnel file.

79. On the 19 December 2019 a Root Cause Analysis was completed in connection with the sudden death and no concerns were documented against at the dietetics team in which the claimant worked.

80. On 20 February 2020 the claimant wrote to the clinical team leader and asked for the Stage 1 informal review record to be removed from her personnel file particularly in light of the Root Cause Analysis report. No reply was received to that request and on 15 March 2020 the claimant followed up her request and it was not replied to. The claimant on the 23rd or 24th of March 2020 submitted a formal grievance citing race discrimination and on the 25th of March a 'continuation' of the grievance to add a claim of disability discrimination because she had been placed on a stage one of the Performance Management and Capability procedure and when her review period said concluded and she was released from stage one procedures on the 21st of November 2019 the respondents had not removed the recording of the fact of a stage one procedure having taken place from her personal record.

81. On 18 March 2020 the claimant commenced early conciliation through ACAS and on 2 April an Early Conciliation Certificate was issued. The claimant presented her complaint to the Employment Tribunal on 1 May 2020.

82. The respondent makes its application to strike out or in the alternative to require the claimant to pay a deposit as a condition of asserting her complaints on the basis that the claims are presented out of time and as a consequence at the final hearing there is no or little reasonable prospect that the claims will be found to have been presented in time, whether in the primary time limit or in such further period as is considered just and equitable to allow.

83. The claimant in in answer to questions in cross examination has confirmed that she first took advice from her trade union in August 2019 about the steps that the respondent had taken to suspend her. The claimant explained that she was very nervous about the investigation and her suspension and she spoke with her trade union before the meeting 22 August as she was very anxious to find out from union what should be happening. In the event the claimant made no complaint about the suspension nor about the fact that she was subject to the Stage 1 process. When the claimant was told that there were no ongoing concerns about her performance on 21 November 2019 and that the fact of the stage 1 process would remain on her record the claimant raised no immediate complaint.

84. The claimant having received the Root Cause Analysis ("RCA") report on 17 December 2019 has told the Tribunal that the reason she had not made a request that the stage 1 informal review record be removed from her personnel file until 20 February 2020 was because she was under the impression that her employer would approach her to discuss the findings of the report. The claimant explained that she considered the RCA Report led her to believe that she had been discriminated against because of her race as it was only she whose record had been reviewed. On 20 February 2020 the claimant wrote to the Clinical Team Leader asking for the informal review record to be removed from her file in light of the RCA report. The claimant received no reply.

85. On 15 March 2020 the claimant followed up her 20 February request and received no reply. Shortly after taking advice from solicitors the claimant made a reference to ACAS to commence Early Conciliation

86. The claimant did not seek advice from ACAS until she made contact with their offices for the purposes of early Conciliation. The claimant confirmed that she first took the advice of solicitors in March 2020 about the circumstances of her employment. The claimant made contact with ACAS to commence Early Conciliation on 18 March 2020.

87. The claimant in evidence has provided a witness statement in relation to her means in the event that I consider ordering her to pay a deposit [51-72]. Although the claimant at the time of the hearing remains unfit to work and her income is on half pay she has significant savings which it is not disputed provide her with the means to pay any deposit should I consider it appropriate to order one to be paid.

Argument

88. I am grateful that both counsel have submitted written submissions that have been supplemented by oral argument before me.

89. I turn first to consider whether or not at the material time namely between 5th August 2019 until the presentation of her complaint form on the 1 May 2020 she was disabled by the condition of electromagnetic hypersensitivity syndrome.

90. in reaching the conclusions that I do I have had detailed consideration of law and guidance to which I have referred above. Based upon my findings of fact I conclude that although the claimant from January 2020 began to experience the effects of the impairment which she describes as electromagnetic hypersensitivity syndrome it was not until March 2020 that she first attended her GP to describe the symptoms by which she has suffered pain and aches which he did not immediately I find call significant adverse effect on her ability to undertake her normal day to day activities. In June 2020 the claimants impairment meant that ear pain was then chronic and it interfered with her ability to undertake normal day to day activities tui substantial degree. With the benefit of hindsight when analysing the impairment and its effect in 2021 it was evident that the claimant had a reaction to exposure to electromagnetic fields which caused her a variety of symptoms the most significant of which was acute ear pain which by that time had become a chronic condition that was long term.

91. I conclude that the claimant's condition of Electromagnetic Hypersensitivity Syndrome was a disabling one from June 2020 and not before. In he circumstances of this complaint the claimant was not disabled at the relevant time and her complaints of unlawful discrimination because of the protected characteristic of disability are struck out.

92. I am asked to consider if the claims that the claimant has in relation to race discrimination should be struck out as they have no or little reasonable prospect of succeeding at the final hearing because they are out of time and that the Tribunal will not extend time to permit them on the basis they were presented in such period as is just and equitable to do.

Decision

93. The claim form was presented on 1 May 2020. The ACAS conciliation period was from 18 March 2020 to 2 April 2020. This means that acts were in time in relation to the primary limitation period if they took place on or after 19 December 2019 or continued into that period, unless they were brought into time by the other provisions of section 123.

94. The race claims presented are set out a paragraph 14.2 to 14.5 of the grounds of complaint [para 21 p21] in relation to the conduct referred to which took place in August 2019 and a decision taken on the 21 November 2019. The respondent asserts that there was no continuing act beyond that date and on the face of it the claimant does not benefit from the extension of time for ACAS early Conciliation. Ms Bowen that any alleged unlawful conduct after the 21st of November 2019 is not continuing act on the facts.

95. Mr MacMillan for the claimant refers to the fact that claimant will present evidence at the final hearing to the effect that the discrimination in relation to her race was discriminatory conduct extending over a period of time which included the treatment on the grounds detailed paragraphs 14.1 to 14.5 off the particular complaint. Following the publication of the RCA on 17 December 2019 the claimant was waiting a response from the respondent and when it did not materialise she pressed for the decision to leave a record of her Stage 1 review to be removed from her record and the respondent failure to respond to that request caused her to rase a grievance on 23 or 24 march 2020. Mr MacMillan distinguishes the circumstances of this case from Virdi v Commissioner of the Police of the Metropolis [2007] IRLR 24 which the respondent cites as authority to say that the relevant date for the rejection of an appeal for promotion is the date

the decision is actually made. Mr MacMillan suggests that Virdi is distinguished in this case as I this case after the decision was made the claimant asked for the decision to be reconsidered and that was ignored and despite continued requests the decision to be reconsidered and for her grievances to be herd no action was taken.

96. In the alternative Mr MacMillan asks that an extension of time would be allowed on the just and equitable grounds as the claimant was shocked and stunned by the respondent's decisions and after the RCA report was sent to her in January 2020 she began to be adversely affected by pain she associated with electromagnetic hypersensitivity and her ability to pursue her concerns about race discrimination was inhibited. They claimant took advice from solicitors in March 2020 and began early conciliation through the offices of ACAS on 18th March 2020, the claimant raised a formal grievance with the respondents on 23rd or 24 March 2020 citing race discrimination ask the cause of less favourable treatment towards her.

97. If the claimant is successful in persuading the tribunal at final hearing at that the respondent's discriminatory behaviour against her was a continuing act up to and including the treatment of her in relation to hey grievance the claimant's complaints presented on the 1 May 2020 will be found to be in time.

98. In the event that the claimant does not persuade the tribunal that the respondent's treatment of her was discriminatory conduct extending over a period of time the claimant will need to persuade the tribunal that it was in the circumstances just and equitable to extend time. Applying the appropriate consideration of exercising discretion to extend time a Tribunal hearing all the evidence will consider the length of the delay and the reasons for it and the balance of hardship and prejudice and the possibility of a fair trial. In the circumstances of the case the claimant having had sight of the RCA report saw more sharply the different treatment that she had mete out to her in August 2019 and subsequently and identified the different treatment to have been because of her race as well as what she perceived to be her disabling condition.

99. The claimant raised a request for the respondent treatment of her to be removed from her record in February and raised her formal grievance on 23 March 2020 when she felt well enough to do so. The claimant raises arguable points that her claim may be found to have been presented withing the primary time period if conduct was continuing over a period of time and that on the balance of hardship test the respondent were aware that the claimant raised concerns or race discrimination in relation to her different treatment and if not allowed to pursue her complaint of discrimination then the claimant's recourse against less favourable treatment would be prevented.

100. This I find is not a case in which it can be said that a Tribunal hearing the claimant's full evidence will say that her claim was plainly out of time or that her complaints evidently had little reasonable prospect of success and that if presented outside the primary time limit, her application that time should be extended on the basis that it was just and equitable to do so would fail.

101. For all these reasons I conclude that the respondent's application that the claims of race discrimination should be struck out as having no reasonable prosect of success fails. For the same reason I conclude that the respondent's application that the claimant should be required to pay a deposit as a condition of continuing to advance her complaints before the tribunal at a final hearing does not succeed.

Employment Judge Dean
18 November 2021