



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

5 **Case Numbers: 4106726/2020, 2201943/2021, 4109286/2021, 4109430/2021  
and 4109431/2021**

**Preliminary Hearing held remotely at Glasgow on 8 November 2021  
Deliberation: 18 and 22 November 2021**

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**Employment Judge D Hoey**

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**Claimant  
Represented by:  
Herself**

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**R1, R2, R3, R4, R5 and R6**

**Respondent  
Represented by:  
Mr Wilson  
(Counsel)  
Instructed by  
Messrs Brodies**

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## **PRELIMINARY HEARING**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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- 1. The claims raised in the claim form against R4 (lodged on 26 April 2021) were raised after the end of 3 months starting with the date of the final act to which the complaints related but the claims were raised within such a period that the Tribunal considered just and equitable and will be considered at a final hearing.**

5 2. The claims raised in the claim form against R5 (lodged on 12 May 2021) were raised after the end of 3 months starting with the date of the acts to which the complaints related but the claims were raised within such a period that the Tribunal considered just and equitable and will be considered at a final hearing.

10 3. The claims raised in the claim form against R6 (lodged on 12 May 2021) were raised after the end of 3 months starting with the date of the acts to which the complaints related but the claims were raised within such a period that the Tribunal considered just and equitable and will be considered at a final hearing.

### REASONS

15 1. This case has a long procedural history. The claimant brought claims against her then employer (an LLP). That claim was amended on a number of occasions. She had applied to add individuals to that claim but that had been refused. She then brought fresh claims against those individuals, which the respondent argued had been lodged late. At a case management preliminary hearing a number of preliminary hearings had been fixed. This preliminary hearing had been fixed to deal with jurisdictional issues arising in respect of R4, R5 and R6. The respondents argued the claims had been brought outwith the statutory time period and it was not just and equitable to extend the time limit. The claimant argued the claims were in time and if not, it was just and equitable to extend the time limit and allow the claims to proceed.

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30 2. The claimant and 2 individuals on behalf of the respondent gave evidence – R3 and R4. The 2 witnesses brought by the respondent were to give evidence in relation to discrete issues pertaining to the claims as the respondent wanted a finding to be made as to whether or not the acts alleged by the claimant had occurred.

3. An anonymity order is in place and it is important to ensure that is followed. That requires the names of the parties and witnesses to be kept confidential. The practice of using actual initials of the parties should be avoided and I shall use the numbering agreed between the parties only. The parties had agreed  
5 a chronology and productions running to 582 pages were produced.

4. Although the hearing only lasted one day, it has taken a great deal of time to carefully consider the evidence that was led and the parties' submissions. This has not been an easy case given the issues arising and I have carefully  
10 examined the matters brought before the Tribunal in reaching this judgment.

## **Facts**

### **The claimant and her expertise**

5. The claimant is a solicitor who qualified in Scotland in September 2005. She  
15 has in excess of 15 year's experience in corporate law. She moved to the respondent's employment in 2018. Part of her role as a solicitor involved her working under pressure and subject to tight deadlines.

6. Prior to joining the respondent she had experience of preparing and  
20 launching Employment Tribunal claims and conducting an Employment Tribunal which she had done on her own behalf, which included preparing and conducting an appeal to the Employment Appeal Tribunal (about liability of individuals under the Equality Act and adding parties to litigation). The claimant broadly knew and broadly understood the procedural rules  
25 pertaining to the Tribunal and was capable of researching and presenting her claim (and appeal). She understood the law (and procedure) pertaining to personal liability of individuals for discrimination claims. She was not an employment lawyer.

7. During the claimant's employment she had contact with R4, R5 and R6. The  
30 claimant had no contact with R5 and R6 after February 2020.

- 5 8. The claimant had been absent from work for a period of time in 2020 and confirmed, in November 2020, that she was fit to return to work. The claimant was capable of working from November 2020 and was capable of raising proceedings.

**First claim against employer – October 2020**

- 10 9. On 26 October 2020 the claimant raised a claim (when her employment was ongoing) against R1 having undertaken ACAS early conciliation from 27 August to 27 September 2020. Having ticked the box for sex discrimination in her paper apart (which runs to 46 paragraphs) she referred to claims of detriment on account of raising a protected and qualifying disclosure, sex discrimination and victimisation.

- 15 10. In that claim she argued that her employer had subjected her to unlawful sex discrimination (via acts of various individuals for which the employer was responsible). The paper apart contains detailed narrative in this regard with events stemming from 2019 up to 20 October 2020. She refers to having made complaints (internally) about alleged bullying and sex discrimination to a number individuals (including those whom she wishes now to proceed against). She argued that she had been subject to detriments by these individuals. Her claim is that the employer is liable for such actions.

- 25 11. The paper apart also narrates that there had been an ongoing course of conduct of direct sex discrimination and victimisation by individuals for whom the employer was liable. She gave examples of conduct she relied upon in this regard.

- 30 12. The response form denied the claim and alleged that some of the claims were out of time.

**Revisal to claim against employer to include more claims – January 2021**

- 5 13. On 12 January 2021 the claimant amended her claim (against the employer) which had gone from 46 paragraphs to 134 paragraphs. She had been dismissed by a letter dated 14 December 2020. In that claim she raised new claims of unfair dismissal and disability discrimination and reference is made to R4, R5 and R6 (for whose acts the now former employer was liable). The claims related to facts that were said have happened up to and including the claimant's dismissal. The types of legal claims raised in that claim form include the same type of legal claims that are in the separate claims now lodged in respect of R4, R5 and R6.
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14. The amended claim form refers to conduct by the individual respondents and referred to various authorities and was clearly well researched.
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15. The claim form referred to the letter of dismissal and the recommendation R4 had made with regard to the claimant. The claimant had sufficient information that allowed her to base the claims she raises against R4 from the dismissal letter (even although the claimant did not receive the actual review R4 did (in December 2020) until March 2021).
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16. The claim form that had been raised brought claims against her employer and then former employer. It did not include any claims against the individuals referred to personally.
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**January 2021 case management discussion allows amendment**

17. At a case management preliminary hearing held on 15 January 2021 the claimant's application to amend her claim to include new claims of disability discrimination (comprising claims for direct discrimination, failure to make reasonable adjustments and unfavourable treatment because of something arising in consequence of disability), all against the (former) employer, was
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granted. An issue had arisen as to the correct designation of the claimant's employer (since there was also a service company in existence which the respondent argued was the claimant's employer). It was agreed to include both entities (one being a service company) with the issue being resolved at a final hearing in due course.

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18. The Note issued following that hearing referred in detail to various Rules and case law, including the law on amendment and the law as to adding (or removing) parties to litigation.

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19. In a separate Note that was issued, the parties were given case management instructions. That Note set out some of the issues arising, including the position with regard to time bar and the legal issues that required to be considered in respect of the claims that the claimant had raised. That Note included reference to case law, for example in connection with time bar.

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**March 2021– claimant asks for individual respondents to be added to claim**

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20. A further case management hearing was fixed for 4 March 2021 to progress matters. At that hearing the claimant had applied to add 5 named individuals, including R4, R5 and R6, as respondents. She had done so by email that had been sent by her on 2 March 2021. The respondent had objected and it was agreed that the matter would be determined by the Employment Judge in chambers.

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21. The claimant's application had referred to the fact that the respondent was arguing the service company was her employer and if that was correct and she was successful she may be left without a remedy and so she argued it was in the interests of justice to add the individuals as a respondent to ensure she had a remedy for the acts of discrimination relied upon.

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22. She stated in her application that each of the individuals had undertaken key acts of discrimination against her as agents or employees for which their principal was responsible. She also noted that each individual was personally liable pursuant to section 110 of the Equality Act 2010. She said:  
5 “Accordingly there are issues between each of them and me (as an existing party) falling within the jurisdiction of the Tribunal. Each individual is a senior figure in HR or in the legal profession and it is certainly in the interest of justice that they be held accountable for their actions and that I receive a remedy for my claim in the event it is successful.”

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23. The application was opposed on the basis that the claimant was assured of a remedy given the financial position of the respondent. It was argued that adding the individual respondents was not an appropriate way to deal with solvency concerns. It was also argued that if the application was granted the specific claims would require to be fully particularised and time given to respond.  
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24. The Employment Judge decided to refuse the application to add the additional respondents, including R4, R5 and R6 and a judgment was issued accordingly. He considered that the balance of prejudice favoured the respondent. He concluded that it was not in the interests of justice to add those parties. The claimant had a remedy against the respondents in that claim. The application to add R4, R5 and R6 as parties to the litigation was therefore refused. That judgment was dated 26 March 2021.  
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#### **New claim presented against R4**

25. On 26 April 2021 the claimant lodged a claim against R4, ACAS early conciliation having been carried out from 12 March 2021 to 13 April 2021. She ticked the box for disability and sex discrimination and The claim form stated (at box 3.1) that the case should be heard with the clam against R1  
30 “as it pertains to the same facts and circumstances”.

26. In the paper apart the claimant explained that R4 is a senior manager of its HR team who was tasked with conducting an impartial review of her case. She noted that in its ET3 in relation to the original claim against the employer, the respondent advised it was R4 who recommended the claimant be dismissed.

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27. The claimant argued that R4 is an agent and may also be an employee of the employer and is therefore liable for her own actions and those of the employer.

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28. Under the heading "Discriminatory acts carried out by R4 contrary to the Equality Act" the claimant stated that R4 was told to carry out a review on 4 December 2020 which she did on 10 December 2020 in which she recommended that the claimant be dismissed for reasons argued to be in breach of the Equality Act 2010. The claimant stated that she had never spoken to R4 or knew about the review until 14 December 2020 when she was told the review had taken place. She did not see the actual review document until 3 March 2021 (albeit knew the broad content from the dismissal letter which set out the position).

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29. Under "claims in law" the claimant argued that R4 victimised her within that review by making recommendations. She also argued that the recommendation in the review amounted to a breach of sections 13, 15 and 20 of the Equality Act 2010.

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30. The claim raised is based on the actions of R4 that the claimant says happened on 10 December 2020, when R4 made the recommendation in her review. Although the claimant did not get a copy of the review at the time and although she was not involved in it or had notice of it when it was conducted, detailed reference is made to the review in the dismissal letter which the claimant received on 14 December 2020. Details of this are set out in the revised paper apart lodged by the claimant on 12 January 2021 at paragraphs 79 onwards. The claimant understood that a review had been

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5 conducted by R4 and that she had recommended the claimant's dismissal. The claimant had raised claims against the employer for R4's actions (comprising claims for sex discrimination and disability discrimination). This is supplemented in the further revisions to the claim form that were submitted on 14 April 2021.

31. The latest act relied upon therefore was on 10 December 2020 when the recommendation was made.

10 **New claim raised against R5**

15 32. On 12 May 2021 the claimant lodged a claim against R5, ACAS early conciliation having been carried out from 12 March 2021 to 13 April 2021. The claim form stated (at box 3.1) that the case should be heard with the clam against R1 "as it pertains to the same facts and circumstances". In the claim form she ticked the boxes disability and sex discrimination. There was a paper apart running to 21 paragraphs and included as a schedule the 160 paragraph paper apart in respect of the claims against the employer.

20 33. In the paper apart she asserted that R5, as one of the partners, was responsible for a course of conduct of discriminatory action as set out in the original claim. She noted that R5 is personally liable and she wished to hold him accountable.

25 34. She referred to acts occurring in the course of 2020, up to February 2020. She argued that there had been an ongoing course of conduct of direct sex discrimination and victimisation by R5.

30 35. With regard to disability discrimination it was argued that the actions of R5 in February 2020 amounted to an attempt to dismiss her because of her disability which was unlawful direct disability discrimination and a breach of section 15 of the Equality Act 2010. The paper apart stated that "R5's behaviour in attempting to dismiss me was part of a course of conduct of R1

which concluded on 14 December 2020. Further I was not given documents such as R5's statement and thus not informed of certain discriminatory actions until 3 March 2021. Accordingly my action is well within the time limit."

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36. The claims raised against R5 as an individual specifically focus on the alleged attempt to dismiss the claimant from her employment in February 2020 (a matter that is referred to in the claim against the employer).

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37. The claims that are being made are set out under the heading "claims in law". The claimant argues there had been a course of conduct by R5. At paragraph 15 she said the course of conduct included various acts which happened during her employment. The last act referred to in her pleadings under that heading was the alleged attempt to dismiss the claimant which occurred on 13 February 2020. She believed that the claimant's attempt to dismiss her on that date was unlawful.

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38. She stated at paragraph 16: "R5's attempt to dismiss me from my employment on 13 February 2020 was part of a course of conduct which concluded on 14 December 2020 when I was dismissed from my employment." It is not stated that R5 was responsible for or personally involved in the claimant's dismissal.

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39. She then argued that one reason R1 gave to dismiss her was that she could not return to her previous role which she believed amounts to an act of victimisation. Although unclear, it appears that the claimant is alleging the refusal by R5 to have the claimant back in the team was unlawful. It is not clear when the latter act (R5's refusal to allow the claimant back) is said to have taken place (if it did take place) but it must have happened no later than 10 December 2020 when the recommendation was made (which the claimant says is based on the action of R5). The claimant is not aware if the

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act took place since she was not present. She infers that such a discussion took place.

5 40. The latest act relied upon in the claim against R5 therefore took place on or before 10 December 2020.

41. While the claimant did not have all the evidence on which she relies to support her claims against R5, she was able to identify what the claims were prior to receiving the additional documents (in March 2021). Her claim for disability discrimination against R5 related to matters that she had stated  
10 amounted to disability discrimination in her claim against R1 (which was lodged in January 2021). The claimant therefore knew of the broad basis for her claims against R5 in January 2021.

15 **Claim raised against R6**

42. On 12 May 2021 the claimant lodged a claim against R6, ACAS early conciliation having been carried out from 12 March 2021 to 13 April 2021. She ticked the box for disability and sex discrimination and stated (at  
20 box 3.1) that the case should be heard with the claim against R1 “as it pertains to the same facts and circumstances”.

43. The claimant stated in the paper apart that R6 is an HR manager “and he may be employed by the company and certainly acts as its agent”. She  
25 argued that on 13 February 2020 R6 attempted to dismiss her from her employment in response to complaints she had made of sex discrimination and that he pressured her to leave her employment. She stated: “In an interview with the firm’s solicitors R6 claimed that it was his decision to attempt to dismiss me at that time rather than any of the partners.  
30 Accordingly R6 is responsible for a key act of discrimination which was part of a course of discriminatory conduct which ended with my dismissal on 14 December 2020.”

44. The claimant also argued that R6 was an agent of the respondent and is liable for each of the acts raised against the employer (as set out in the amended claim which was attached to the paper apart as a schedule).
- 5 45. She also stated that R6 is personally liable for each act of discrimination he has committed together with the employer. She noted R6 had worked for the firm for over 20 years and that he was aware of the alleged discrimination that took place.
- 10 46. Under a heading “Discriminatory acts carried out by R6 contrary to the Equality Act” the claimant referred to acts from 14 January 2020 to 17 February 2020. She stated that she raised a grievance in respect of R6’s actions (and others). She stated that R6 was interviewed as part of the employer’s solicitor’s review of the grievance. She said that “in his interview  
15 he claimed that it was his decision and his decision alone that he made to try and dismiss [the claimant] in the meeting on 13 February 2020.” She said that R6’s conduct was part of an unlawful course of conduct as set out in her claim against the employer which finished on 14 December 2020 when her employment was terminated. It is not suggested that R6 was responsible for  
20 the dismissal in December 2020.
47. Under the heading “claims in law” she argued that R6’s actions in trying to dismiss the claimant (in February 2020) was unlawful victimisation. She argued he was also personally liable for the acts of the employer. It was also  
25 argued that R6’s attempt to dismiss the claimant in February 2020 was a breach of section 13 and section 15 of the Equality Act.
48. Under the heading “Timing” the claimant stated that “R6’s behaviour in attempting to dismiss me was part of a course of conduct of the employer  
30 which concluded on 14 December 2020. Further I was not given documents such as R6’s statement and thus not informed of certain discriminatory actions until 3 March 2021. Accordingly my action is well within the time limit”.

5 49. The claim form raised against R6 relates to claims stemming from the alleged attempt to dismiss the claimant on 13 February 2020. There is no suggestion in the claim form that R6 did anything (on which she relies in her claim) occurring after that date.

10 50. While the claimant did not have all the evidence on which she relies to support her claims, she was able to identify what the claims were prior to receiving the additional documents (in March 2021). Her claim for disability discrimination against R6 related to matters that she had stated amounted to disability discrimination in her claim against R1 (which was lodged in January 2021). The claimant therefore knew of the broad basis for her claims against R6 in January 2021.

15 **Cases combined subject to time bar issues arising individually**

20 51. At the preliminary hearing that took place on 20 September 2021 the claims were formally joined and were to be heard together. The respondent had agreed to that subject to time bar issues arising being dealt with (a defence set out in each of the ET3s in response to the claims against R4, R5 and R6). It had been agreed to fix a hearing to deal with “jurisdictional time limits” in respect of the claims raised against R4, R5 and R6.

25 **Claimant requests documents**

30 52. The claimant had requested a number of documents from the respondent for a large number of months. An Order had been issued requiring the documents to be provided by 26 February 2021. The respondent provided documents on 2 March 2021. Those documents provided more detail in relation to the claims the claimant had. While the claimant believed the documents had concealed information, that was not correct. The claimant had sufficient information on which to base each of her claims as against

R4, R5 and R6. The information in the documents provided further information but did not disclose new claims as such.

**Issues pertaining to the claimant**

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53. The claimant believed that the claims raised against R4, R5 and R6 were in time. She believed that an agent was held responsible for all acts all for which the principal was responsible. In her view each respondent contributed to the wrongs and there was joint and several liability.

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54. The claimant had depression and anxiety. These mental impairments were particularly pronounced from December 2020 to March 2021. The claimant was upset by being dismissed which caused her stress and worsened the symptoms she encountered.

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55. While the claimant had a mental impairment, she was able to research the law, engage with the Tribunal and the respondent's agent and conduct Tribunal proceedings to progress her claims. The claimant also had to support her family and home school her child.

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56. The claimant considered it important that the individuals responsible for the discrimination she believes she encountered are held (personally) responsible. She believes it is a matter of public policy that those responsible are also parties to the proceedings.

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**Observations on the evidence**

57. One issue which arose was in relation to the evidence from R3 and R4. The respondent invited the Tribunal to reject the allegation the claimant had made in relation to R5 and R6 in the decision to dismiss the claimant. They argued that the position advanced by the claimant was not supportable; it was speculative at best and not a matter on which the claimant could give

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conclusive evidence. The respondent's agent invited the Tribunal to reject that such unlawful conduct occurred.

58. Having considered matters I have decided that it is not appropriate to make any findings in fact in relation to those matters. The purpose of the hearing had been to determine "jurisdictional issues". Having considered my notes of the hearing I am not satisfied that the claimant fully understood the consequence of this particular argument. The focus of the hearing was in relation to whether the claims were raised in time and if not whether or not it was just and equitable to extend the time. The additional factual issues raised by the respondent was not something which was fully understood by the claimant. That is not a criticism (of the claimant or the respondents) but an observation. The fact there are no submissions from the claimant in relation to this matter demonstrates that this was not a matter which the claimant had fully considered or appreciated. I appreciate the impact this has upon the witnesses who spent time in preparing their witness statement and in giving evidence but I require to consider what it is in the interests of justice and balance the respective positions. I concluded that it is not in the interests of justice to make findings in relation to those matters given the context. That is a matter on which evidence can be given at any final hearing. Given the witness statements have already been prepared, any adverse impact upon the individuals can be reduced.

59. In relation to the evidence the claimant gave, I was satisfied the claimant did her best to present a truthful account of the position. On occasion the claimant wanted to give information about matters that she felt assisted her case rather than focussing upon the question asked. It was put to the claimant that she was disingenuous on a number of occasions. An example of this was in relation to the claimant's assertion that she was unable to raise her claims as against R4, R5 and R6 because she was not aware of the claims until she received "key documents", which she received in March 2021. I considered there to be some merit in the point being made given the claimant was able to raise the claims from the information in her possession.

5 While she did not have “best evidence” she had sufficient evidence. I considered in parts the claimant was attempting to focus on areas she felt bolstered her case rather than on the specific issue being considered. However, I did not consider the claimant had purposively sought to misrepresent the position.

10 **Law**

Time limits

60. The time limit for Equality Act claims appears in section 123 as follows:

“(1) *Proceedings on a complaint within section 120 may not be brought after the end of –*

15 (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 ...*

(2) ...

20 (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”.*

25 61. The time limit therefore starts running from “the date of the act to which the complaint relates”. Elias, sitting as President of the Employment Appeal Tribunal in **Virdi v Commissioner of Police** [2007] IRLR 24 opined that the



5 legislation is clear in stating the time runs from the moment the act was done (and not any later date, such as when the decision is communicated). He disapproved of an earlier Employment Appeal Tribunal decision in **Aniagwu v London Borough of Hackney** [1999] IRLR 303 where the act was a refusal to accept a grievance, and the Employment Appeal Tribunal held the employee was not subjected to a detriment until he was notified the grievance was rejected. Elias P said it was difficult to see why, at least in a case where the grievance relates to a refusal to grant a benefit, the detriment was not suffered with the rejection of the grievance, whenever that is communicated and whether the employee knows of it or not. At paragraph 10 25 he said that while there is much to be said for time not beginning to run until an employee is made aware of the decision which confers the cause of action, that is not how the legislation has been drafted; the question is when the act is done, in the sense of completed and that cannot be equated with 15 the date of communication.

62. A continuing course of conduct might amount to conduct extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis** [2003] IRLR 96 which deals 20 with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52: “The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." 25 I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the 30 Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. 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."

5 63. The focus is on the substance of the complaints in question — as opposed to the existence of a policy or regime — to determine whether they can be said to be part of one continuing act by the employer.

64. **Robinson v Surrey** 2015 UKEAT 311 is authority for the proposition that separate types of discrimination claims can potentially be considered together as constituting conduct extending over a time. And in *Aziz v FDA* 10 2010 EWCA Civ 304 the Court stated that a relevant but not conclusive factor in deciding whether an act extending over a period exists is whether the same or different people are involved in the incidents.

65. In **Barclays v Kapur** 1991 ICR 208 the then House of Lords held that a discriminatory practice can extend over a period. The key issue is to 15 distinguish between a continuing act and an act with continuing consequences. The court held that where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where, however, there is no such regime, rule, practice or principle in operation, an act that affects an 20 employee will not be treated as continuing, even though that act has ramifications which extend over a period of time.

### **Relying upon acts of principal in extending time bar**

66. One legal issue of dispute between the parties is whether or not it is possible 25 in assessing time limits to rely upon acts of a principal where the agent was not involved in the act in question.

67. The claimant argued that where 2 or more people contribute to a delict there is joint and several liability. She relied on **Arneil v Paterson** 1931 SC HL 117. She submitted that **London Borough of Hackney v Silvanden** 2011

5 UK/EAT/75/10 is authority for the proposition that unlawful discrimination is a delict and so all wrongdoers must bear responsibility for the acts of agent and principal. As the time limit for a course of conduct ends when the final act occurs, she relies on her dismissal as the last act, bringing her claim in time.

10 68. The respondent argued that it is not possible to rely on acts carried out by others to extend the time limit. Having considered the position carefully the respondent's position is sound. The claimant is arguing that for the purposes of time bar the individual respondent should be personally responsible for his own actions but also those more generally for which the employer is responsible.

15 69. The claimant's analysis is not correct in law. Unlawful discrimination is not a delict in the common law sense. It is a statutory delict or wrong. The time limits that apply are those set out in the Equality Act. The time limits that are relevant are those that apply to the individual. Even although the claimant may be an agent, the acts of a third party over which the claimant had no control, cannot extend the time limit in respect of the claims the claimant brings.

20 70. Where the employer is an LLP and the claim is raised against the employer, it is the LLP which has liability. Individual liability can arise with regard to agents of the employer where the Equality Act 2010 confers personal liability. Sections 109 to 112 of the Equality Act 2010 set out the circumstances in which individuals are liable.

25 71. It is not permissible to hold an agent liable for acts of the employer without personal liability otherwise having been engaged pursuant to the Equality Act 2010. A claimant must prove the basis for individual liability, which is a separate claim to that against the employer

72. Section 123 refers to the “date of the act to which the complaint relates”. That must be each complaint against each respondent separately. Section 123(3) starts with “For the purposes of this section” – that section referring to the date of the act to which the complaint relates which I have set out  
5 above. The words “the complaint” are for each complaint against each respondent, not all complaints against any respondent. In carefully interpreting the legislation, Parliament did not intend litigants to be able to rely on subsequent acts in other complaints to determine time bar issues. Each “complaint” requires to be considered on its own (irrespective of  
10 whether the complaints are combined).

73. For completeness if the employer was a partnership, in Scots law the position would differ from that set out but as the respondents are LLPs the position as above is applicable.

74. **Arneil v Paterson** 1931 SC HL 117 (relied upon by the claimant) relates to  
15 statutory liability and not discrimination law and does not assist in dealing with liability under the Equality Act 2010. Further the reference to **London Borough of Hackney v Silvanden** 2011 UKEAT/75/10 shows that discrimination is a statutory delict – not a delict in the Scots common law sense. That distinction is important and underlines the need to ensure that  
20 the Tribunal applies the law as set out in the Equality Act 2010 which sets out the circumstances when a person can be held liable for unlawful acts. That does not allow an agent to be held liable for acts of the principal in respect of which the agent had no involvement in other complaints that were raised (other than being an agent of the principal who was directly or  
25 vicariously liable).

#### **ACAS early conciliation**

75. Since 6 May 2014, anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops

5 running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the claimant. Further, (and sequentially) if the certificate is received within one month of the time limit expiring, time expires one month after the date the claimant receives, (or is deemed to receive) the certificate. See section 140B of the Equality Act 2010 and **Luton Borough Council v Haque** 2018 UKEAT/0180/17. Early conciliation is of no consequence if  
10 commenced after the statutory time limit has expired.

Extending the time limit

76. Section 123 of the Equality Act 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal  
15 thinks just and equitable.

77. When considering whether it is just and equitable to hear a claim notwithstanding that it has not been brought within the requisite three month time period, the Employment Appeal Tribunal has said in the case of **Chohan v Derby Law Centre** 2004 IRLR 685 that a Tribunal should have  
20 regard to the Limitation Act 1980 checklist as modified in the case of **British Coal Corporation v Keeble** 1997 IRLR 336 which is as follows:

78. The Tribunal should have regard to the prejudice to each party.

79. The Tribunal should have regard to all the circumstances of the case which would include:

25 (a) Length and reason for any delay

(b) The extent to which cogency of evidence is likely to be affected

(c) The cooperation of the respondent in the provision of information requested

(d) The promptness with which the claimant acted once he knew of facts giving rise to the cause of action

5 (e) Steps taken by the claimant to obtain advice once he knew of the possibility of taking action.

80. In **Abertawe v Morgan** 2018 IRLR 1050 the Court of Appeal clarified that there was no requirement to apply this or any other check list under the wide discretion afforded to Tribunals by section 123(1). The only requirement is not to leave a significant factor out of account. Further, there is no  
10 requirement that the Tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account. A key issue is whether a fair hearing can take place.

81. In the case of **Robertson v Bexley Community Services** 2003 IRLR 434  
15 the Court of Appeal stated that time limits are exercised strictly in employment law and there is no presumption, when exercising discretion on the just and equitable question, that time should be extended. Nevertheless, this is a matter which is in the Tribunal's discretion.

82. That has to be tempered with the comments of the Court of Appeal in **Chief Constable of Lincolnshire v Caston** 2010 IRLR 327 where it was observed  
20 that although time limits are to be enforced strictly, Tribunals have wide discretion.

83. The judgment of Underhill LJ in **Lowri Beck Services v Brophy** 2019  
25 EWCA Civ 2490 also considered the factors that should be examined in dealing with this issue – see paragraphs 13 to 19. At paragraph 19 the Court stated that there are almost always 2 factors that would be relevant, the length and reason for the delay and the comparative prejudice that arises. The factors within **Keeble** are not to be followed slavishly but instead the

relevant factors pertaining to the case in question should be carefully considered and weighed in the balance.

5 84. Finally in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 the Court of Appeal (with Underhill LJ giving the leading judgment) considered the position and at paragraphs 37 to 39 reiterated the position as set out above.

85. Ultimately the Tribunal requires to make a judicial assessment from all the facts to determine whether to allow the claims to proceed.

10 **Submissions**

15 86. The respondent had produced a detailed written submission which the claimant had considered and responded orally. The claimant provided oral submissions and commented upon some of the points relied upon by the respondent's agent. The claimant had also provided written submissions in relation to the issues arising, which have been fully considered. The respondent's agent also supplemented the written submission orally. The parties' submissions are taken into account in full in reaching the decision and are set out where relevant below.

20 **Discussion and decision**

25 87. In order to properly consider the jurisdictional issues in respect of R4, R5 and R6 it is necessary to consider the claims raised in each claim form individually, assessing firstly whether the claims made are in time and if not, whether or not it is just and equitable to extend the time and allow the claims to proceed. That is because section 123 makes it clear that each complaint should be considered.

**Claims against R4 – in time?**

88. Firstly I must decide whether or not the claims against R4 were raised in time. The claimant in her pleadings makes it clear that the latest act relied

upon by R4 on which her claims are based was that which occurred on 10 December 2020 when R4 completed her review and made her recommendations. The claimant was not aware at that time that a review was being conducted nor of its outcome until she was told the detail in her dismissal letter which she received on 14 December 2020. As indicated above the statute makes it clear that the time limit begins on the date the act took place – not when it was communicated (nor when the worker discovered the conduct in question).

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10 89. Although the claimant did not see the actual review itself until 2 March 2021 she had sufficient information on which to base any claims she wished to raise given what she knew from the dismissal letter. Her amended pleadings which she lodged on 12 January 2021 make this clear given she was able to raise claims for disability discrimination, sex discrimination and detriment. 15 The fact she had not seen the content of the review did not mean she was prevented from raising such claims given she knew what the recommendation was (which formed the basis for her claims). From the information before the Tribunal there is nothing to suggest that there were new claims about which the claimant was unaware from the documents she received. The documents confirmed what she had already been told, albeit with more detail. 20

25 90. I considered the claimant's assertion that she did not know of the claims until she had received the actual report but I do not accept that as an accurate assertion from the information before the Tribunal. The dismissal letter on which the claimant relies in her claim as against the employer makes detailed reference to the recommendation which was set out in the dismissal letter. The claimant knew what the recommendations were and she was able to frame her claims as against the employer on the basis of the information 30 already in her possession. In cross examination the claimant referred to not having the "best evidence". That was a more accurate representation as to what happened. The claimant knew the outcome of the review but not the



detail. She did not need the detail (or best evidence) in order to raise the claims she did.

5 91. While I accept that the claimant did not have the full details underpinning the recommendation, no detail has been provided to the Tribunal to show what specifically was missing that made it difficult for the claimant to frame her claims. From the information before the Tribunal she claimant had sufficient detail to set out the broad basis of her claim. She had in fact done so as against the employer (and did not to raise any claim against R4).

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92. The act relied upon by the claimant in her claim against R4 is the recommendation R4 made. While she suggests in her written submission that “it is likely there was a later act of discrimination”, which appears to relate to the fact the claimant “thinks” there may have been a discussion between R4 and the person who actually dismissed the claimant, the pleadings are clear in showing the act relied upon was the making of the recommendation itself. That occurred on 10 December 2020.

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93. As set out above, the time limit begins when the act complained of occurred. The time limit begins therefore on 10 December 2020. A claim (or early conciliation) should have been raised on or before 9 March 2021. The claim was not raised until 26 April 2021.

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94. The claims raised against R4 are therefore out of time.

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95. The claimant argued that the Tribunal should find that the time limit in respect of R4 (and the other respondents) ended when the course of conduct relied upon ended (14 December 2020). Her submission was that an agent is liable for conduct of the principal even if the agent herself had no hand in the conduct relied upon. That is not a sound proposition as set out above as the Tribunal can only look at acts within the particular complaint in assessing time bar issues.

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**Claims against R4 – just and equitable to allow claims to proceed?**

- 5 96. Given the claim was not lodged within the time fixed by the Equality Act 2010 I must now consider whether the claim was raised within such period that the Tribunal thinks just and equitable.
97. The unlawful conduct complained of occurred on 10 December 2020. The claimant raised her claim against R4 on 26 April 2021.
- 10 98. The claimant relied on a number of grounds in seeking to persuade the Tribunal that it was just and equitable to allow her claims to proceed if found to have been lodged late (her principal position being the claims were in time).
- 15 99. Firstly she asserted that she had a lack of knowledge of “key facts” due to the respondent’s concealment. In relation to R4 she submitted that she did not receive the review carried out by R4 until 2 March 2021. She said she could not know about the acts of discrimination. From the information before the Tribunal there is no information to support that assertion. The claimant’s  
20 amended pleadings against her then former employer which she lodged on 12 January 2021 to make extensive reference to the review (which was summarised in the dismissal letter the claimant received on 14 December 2020). There was no specific information before the Tribunal that would allow it to find that “key facts” were concealed. It appears that the claimant  
25 knew the recommendation made which was the basis for her claims.
- 30 100. The claimant argued that “it would be almost impossible for me to exercise my rights” given the concealment relied upon. I considered this carefully but from the information before the Tribunal there is no basis to accept that submission. The review itself was not known to the claimant until she received the dismissal letter but once she had that letter she knew the outcome. It is not correct, as the claimant asserts, to say there is therefore a “ridiculously impractical time limit for enforcement” since the claimant

learned of the claim on 14 December 2020 (in respect of an act that occurred a few days earlier). There was sufficient time for her to prepare her claim, which she in fact did in respect of her employer the following month.

5 101. From the information before the Tribunal. there was no substantive lack of information or knowledge that prevented the claimant from raising her claim against R4.

10 102. The second ground the claimant relied upon in respect of exercising the Tribunal's discretion was in respect of the claimant's alleged disability. She stated in her written submission that she suffered from depression and anxiety. She said she was particularly badly affected from December 2020 to March 2021 because she was upset at being dismissed which caused stress and exacerbated her condition.

15 103. The difficulty with that submission is the absence of evidence to support the submission. There was no evidence (medical or otherwise) on which the claimant's submission was based. The claimant had provided no specific evidence that supported the submission that she was unable to prepare her claim against R4. She was able to prepare her revised claim against her then former employer, which included detailed and complex legal claims. The impairments relied upon do not by themselves mean it is just and equitable to allow the claim to proceed. The Tribunal must make a decision based on the impact the impairment had upon the claimant and her ability to progress her claims she now wishes to advance. The claimant was able to fully engage with the Tribunal and the respondent's agent in progressing her claims. There was no evidence her impairment was in any way affected such that she could not progress the claims against R4.

25 30 104. The respondent's agent relied on the fact that notwithstanding the fact that the claimant's disability is still in dispute, the claimant's argument that her impairment prevented her from raising her claim against R4 was disingenuous. Between her dismissal and April 2021 the claimant had been

able to produce lengthy pleadings against her former employer (clearly showing detailed research she had carried out). The claimant had also participated in 2 preliminary hearings having made detailed applications, including a detailed application to add R4 as a party to the proceedings. She had also engaged extensively with the respondent's agent over documents and produced a detailed table. Finally she prepared a second claim against her former employer on 14 April 2021 which incorporated all the claims now pursued against R4. Those are powerful factors which the Tribunal considers when balancing the issues in this matter. While the claimant's health was clearly an issue for her, she was capable of engaging with the issues and providing detailed and well researched responses to complex issues at the relevant time.

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105. The respondent's agent also argued that the claimant's background should be considered in this matter. The claimant is a qualified solicitor with significant experience in law, evidenced by her research ability and written work. She also has previous experience of Tribunal litigation including appeal proceedings on individual liability under the Equality Act. The claimant was familiar with the Tribunal process and the issues around personal liability under the Equality Act 2010.

106. Finally the respondent's agent noted that the claimant should have known that the time limit had expired when she lodged her claims given the ongoing proceedings against the corporate bodies which were defended raised the same claims. The fact there was a further delay between the expiry of early conciliation and the raising of the claim is further evidence of unreasonable delay. I did not consider the specific delay to be "unreasonable" but it is a factor that is taken into account. The reason why the claimant delayed lodging her claim after commencing early conciliation was linked to her belief the claims were in time.

107. The third and final argument the claimant relied upon was that she was not an expert in employment law. Although she was able to research the law

5 she had understood the claims were in time. She did not have the resources that the respondent had to conduct her case. I considered that there was force in this submission. It was clear that the claimant had researched the legal position and that she understood that a claim could be in time if an agent can rely upon the acts for which the principal was liable. It is perhaps surprising that there is no case law on this point but it is not a point that is so obviously wrong in law when one considers the wording of the Equality Act and the common law position in Scotland. While I considered that the claimant was wrong in law, I did not consider the position she adopted, which was a position she reached following research into the law, to be unreasonable or fanciful. She raised a stateable argument. The absence of any case law that sets the position out clearly is a relevant factor.

108. Turning to the factors the Tribunal considers in light of the foregoing and the facts in this case, the key issue is the prejudice the parties would face if the claims are allowed to proceed. The respondent's agent submitted that the claimant suffers no prejudice whatsoever if the claim is not permitted to proceed since the substance of the claim is already encapsulated in the claim against her former employer. There is no question of her being deprived of a remedy. She also does not lose the ability to hold those who discriminated against her to account since the Tribunal would require to make findings in respect of the conduct relied upon. In contrast, the respondent's agent argues the prejudice to R4 was very significant given the impact of personal liability upon the individual when no claim was raised within the time set by statute.

109. The fact the claimant is not deprived of a remedy is a significant factor and weighs heavily in the balance and I take into account that the issues raised by the claimant in the claim form will be covered in terms of the evidence led and findings made.

110. I also take into account that the claimant believes those who discriminated against her ought to be personally held responsible. That is something that

the claimant believed when she sought to add those respondents as parties. That is also a very important consideration since the issues arising in this case are not simply about compensation but about ensuring discriminatory acts are considered and those responsible are individually held to account. That is an important factor which I take into account. The fact there is an anonymity order in place clearly limits the impact by way of publicity but it does underline the fact that individuals can be personally held responsible for acts of discrimination and there is an important public interest in that aspect, which weighed heavily in the claimant's favour.

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111. I considered what the prejudice to the respondent would be if the claims were allowed to proceed. The obvious prejudice is the potential for personal liability but liability would obviously only arise if the claim is successful. If the claims are allowed to proceed, the respondent would be able to defend the claims. Refusing to allow the claims to proceed would prevent the claimant proceeding personally against R4. There is no impact upon the evidence given the claims would be heard despite the passage of time given the same claims are being determined as against the former employer. Nonetheless I do take into account the significant prejudice of being a party to litigation which is itself a very significant matter. While there was no submission as to the potentially significant costs that could be incurred if the claims are allowed to proceed, I have factored the potential costs to the respondent (and the prejudice of being brought into this litigation) into my consideration.

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112. The prejudice to which the respondent's agent refers is "an inherent personal and legal prejudice in being named as parties to the litigation". It was submitted that it was not just to visit the prejudice on them in circumstances where Parliament has legislated that they should not ordinarily face such proceedings if they are brought more than 3 months after the conduct complained of".

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113. I accept that there is a prejudice in having to defend proceedings but that is countered by the ability to defend the case. Given the anonymity order in place there is less prejudice than would otherwise be the case. The issue is whether it is just and equitable to allow the claims to proceed.

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114. I also take into account the public interest in having discrimination claims determined. There is a societal aspect to discrimination claims (that is not present in other claims, such as unfair dismissal).

10 115. I also take into account the length and reason for any delay. The delay was short: the unlawful conduct complained of occurred on 10 December 2020. The claimant raised her claim on 26 April 2021. The reason why the claimant did not raise the claims sooner appears to be due to her belief the claims were in time, there being a continuing act for which R4 was liable. As set out above I do not consider that to be legally sound but I do take it into account as a reason why the claims were not raised sooner.

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116. I did not consider the fact that documents were not produced until March 2021 as relevant. The claimant could have (and did) set out the specific claims without the benefit of "best evidence".

20 117. The Tribunal requires to balance the factors and decide whether or not it is just and equitable for the claims to proceed in all the circumstances. Having balanced all the factors the Tribunal concludes that it is just and equitable to allow the claims to proceed.

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118. A fair hearing is still possible, the delays in this case not affecting the cogency of the evidence. While I accept it was self evidently reasonably practicable for the claims to have been lodged in time, the test in this case is whether it is just and equitable to allow the claims to proceed. The claimant did delay in raising the claims but she believed the claims were in time. It was not unreasonable for her to have held that belief. She considers it important to have those responsible for discrimination personally liable. In

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all the circumstances it is just and equitable for the claims against R4 to proceed.

5 119. In making my decision I have taken into account the overriding objective and having balanced all the factors in light of the information before the Tribunal, it is just and equitable to allow the claims against R4 to proceed.

### **Claims against R5: In time?**

10 120. The first issue to consider is whether the claims against R5 was lodged in time. While the respondent argues that the final act of alleged unlawful conduct referred to in the claim form is that which occurred on 13 February 2020, on a fair reading of the claimant's pleadings she appears to argue that there was an act of victimisation by R5 that led to her dismissal. The claimant's written submission states that the conduct relied upon started with  
15 the attempted dismissal and ended with the alleged refusal by R5 to allow her to return to work which led to her dismissal. Regrettably the date when the claimant believes this took place is not stated (which is not surprising as the claimant would not know when (nor indeed whether) such an act took place. The respondent argued that there was no such discussion since the  
20 decision was taken pursuant to the recommendation that had been made. Logically the claimant's case must be that the discussion took place around the time of her dismissal and the recommendation (since the recommendation was to dismiss her, which she says stems from the decision of R5). That would mean that the last act relied upon by the claimant  
25 in her claim against R5 would be no later than 10 December 2020 (the date the review was conducted). It could not be later than 10 December since the report recommended the claimant's dismissal (which she says was based on the unlawful actions of R5).

30 121. A claim should have been lodged (or early conciliation commenced) on or before 9 March 2021. Early conciliation did not take place until 12 March 2021 (until 13 April 2021) with the claim being lodged on 12 May 2021.



122. The claimant argues that there was a course of conduct of the employer which ended with her dismissal. She argues that R5 is also liable, as an agent of the employer, for the acts of the employer and so the final date for lodging a claim was 14 December 2021. That is not a sound proposition for the reasons set out above.

123. The claims advanced against R5 have not been raised in time.

**Claim against R5 – just and equitable to allow claims to proceed?**

124. As the claim has not been raised within the statutory time scale, the next issue is to consider whether the claims should be allowed to proceed.

125. The claimant's submissions are identical to those pertaining to R4 but I must consider the specific circumstances pertaining to R5. Her first argument was that documents were concealed and not provided until March 2021. She argued that she was not aware of the discrimination claims until she received "certain documents". The nature of content of the documents are not specified, nor is there is any evidence before the Tribunal showing why it was not possible for the claims to have been raised sooner.

126. I did not consider that to be accurate. The amendment lodged by the claimant in respect of her then former employer made reference to the matters upon which she relies as against R5. That was provided by the claimant in January 2021. While she did not have the specific information, or "best evidence", it is clear that the claimant believed she had suffered unlawful conduct by R5 at the times set out. The claimant was aware of the broad claims she believes she had that arose from R5's conduct and the information she received in March 2021 while providing more detail, did not provide new claims of which she was previously unaware.

- 5 127. The claimant in her written submission relies on an inference being made that R5 did not want the claimant to return to the team because she had raised discrimination claims. She alleges that she did not know of the discrimination claim but provided no basis for the Tribunal to uphold that assertion. The claimant knew of the involvement of R5 and included the specific claims involving R5 in her claim against her former employer.
- 10 128. The delay in providing the information to the claimant is placed in the balance together with the information the claimant had. The respondent's submissions as set out above have considerable weight in this regard given the claimant's knowledge and abilities. I considered that the claimant could have raised the claims in time.
- 15 129. The issue is not, however, one of reasonable practicability, but whether or not it is just and equitable to allow the claims against R5 to proceed.
- 20 130. As set out above, the claimant relied on a number of grounds in seeking to persuade the Tribunal that it was just and equitable to allow her claims to proceed if found to have been lodged late.
- 25 131. She asserted that she had a lack of knowledge of "key facts" due to the respondent's concealment. While she did not know precisely what R5 and R6 had done in relation to the issues relied upon, it is clear from the revised claim form submitted in January 2021 that she knew the broad claims that arose in the relation to the incidents in question. From the information before the Tribunal, there was no substantive lack of information or knowledge that prevented the claimant from raising her claim against R5. I did not consider this argument to have any weight.
- 30 132. The second ground the claimant relied upon in respect of exercising the Tribunal's discretion was in respect of the claimant's alleged disability. She stated in her written submission that she suffered from depression and anxiety. She said she was particularly badly affected from December 2020

to March 2021 because she was upset at being dismissed which caused stress and exacerbated her condition.

5 133. The difficulty with that submission was the absence of evidence to support the submission. The claimant had provided no specific evidence that supported the submission that she was unable to prepare her claim against R5 and the facts showed a contrary position. She was able to prepare her revised claim against her then former employer, which included detailed and complex legal claims. The impairments relied upon do not by themselves mean it is just and equitable to allow the claim to proceed. The Tribunal must make a decision based on the impact the impairment had upon the claimant and her ability to progress her claims she now wishes to advance. The claimant was able to fully engage with the Tribunal and the respondent's agent in progressing her claims. There was no evidence her impairment was in any way affected such that she could not progress the claims against R5. This was not an argument that carried much weight.

20 134. The respondent's agent argued that the claimant's background should be considered in this matter. The claimant is a qualified solicitor with significant experience in law, evidenced by her research ability and written work. She also has previous experience of Tribunal litigation including appeal proceedings on individual liability under the Equality Act. I take that into account.

25 135. Finally the respondent's agent noted that the claimant should have known that the time limit had expired when she lodged her claims given the ongoing proceedings against the corporate bodies which were defended raised the same claims. The fact there was a further delay between the expiry of early conciliation and the raising of the claim is further evidence of unreasonable delay. While I have taken this into account, I did not consider the delay to be unreasonable as such. The time in question was relatively short. The reason why the claimant delayed lodging her claim after commencing early conciliation was linked to her belief the claims were in time.

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136. The third and final argument the claimant relied upon was that she was not an expert in employment law. Although she was able to research the law she had understood the claims were in time. She did not have the resources that the respondent had to conduct her case. I considered that there was force in this submission. It was clear that the claimant had researched the legal position and that she understood that a claim could be in time if an agent can rely upon the acts for which the principal was liable. It is perhaps surprising that there is no case law on this point but it is not a point that is so obviously wrong in law when one considers the wording of the Equality Act and the common law position in Scotland.

137. Turning to the factors the Tribunal considers in light of the foregoing and the facts in this case, the key issue is the prejudice the parties would face if the claims are allowed to proceed. The respondent's agent submitted that the claimant suffers no prejudice whatsoever if the claim is not permitted to proceed since the substance of the claim is already encapsulated in the claim against her former employer. There is no question of her being deprived of a remedy in the sense of compensation if successful, but she would be deprived of a finding against the individual, which is an important consideration.

138. The respondent's agent argues the prejudice to R5 was very significant given the impact of personal liability upon the individual when no claim was raised within the time set by statute. This was particularly so given the claimant had limited contact with R5 in the last months of her employment.

139. The fact the claimant is not deprived of a remedy is a significant factor and weighs heavily in the balance and I take into account that the issues raised by the claimant in the claim form will be covered in terms of the evidence led and findings made. I also take into account that the claimant believes those who discriminated against her ought to be personally held responsible. That

is something that the claimant believed when she sought to add those respondents as parties.

5 140. I considered what the prejudice to the respondent would be if the claims were allowed to proceed. The obvious prejudice is the potential for personal liability but liability would obviously only arise if the claim is successful. If the claims are allowed to proceed, the respondent would be able to defend the claims. Refusing to allow the claims to proceed would prevent the claimant proceeding personally against R5. Nonetheless I do take into account the significant prejudice of being a party to litigation which is itself a very significant matter. While there was no submission as to the potentially significant costs that could be incurred if the claims are allowed to proceed, I have factored the potential costs to the respondent (and the prejudice of being brought into this litigation) into my consideration.

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141. There is no impact upon the evidence given the claims would be heard in any event given the same claims are being determined as against the former employer.

20 142. The prejudice to which the respondent's agent refers is "an inherent personal and legal prejudice in being named as parties to the litigation". It was submitted that it was not just to visit the prejudice on them in circumstances where Parliament has legislated that they should not ordinarily face such proceedings if they are brought more than 3 months after the conduct complained of". I accept that there is a prejudice in having to defend proceedings but that is countered by the ability to defend the case. Given the anonymity order in place there is less prejudice than would otherwise be the case. That prejudice is balanced against the desire to hold those responsible for unlawful acts.

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143. I also take into account the public interest in having discrimination claims determined. There is a societal aspect to discrimination claims (that is not present in other claims, such as unfair dismissal). There is no prejudice to

the respondent if the claims are allowed to proceed in terms of cogency of evidence or time that has passed.

5 144. I also take into account the length and reason for any delay. The delay was short: A claim should have been lodged (or early conciliation commenced) on or before 9 March 2021. Early conciliation did not take place until 12 March 2021 (until 13 April 2021) with the claim being lodged on 12 May 2021.

10 145. I did not consider the fact that documents were not produced until March 2021 as relevant. The claimant could have (and did) set out the specific claims without the benefit of “best evidence”.

15 146. The Tribunal requires to balance the factors and decide whether or not it is just and equitable for the claims to proceed in all the circumstances. Having balanced all the factors the Tribunal concludes that it is just and equitable to allow the claims to proceed.

20 147. A fair hearing is still possible. While I accept it was self evidently reasonably practicable for the claims to have been lodged in time, the test in this case is whether it is just and equitable to allow the claims to proceed. The claimant did delay in raising the claims but she believed the claims were in time. It was not unreasonable for her to have held that belief. The legal position in that regard is not so obvious and the claimant’s belief that the claims were in time was not fanciful. It was based upon a stateable argument. The absence of authority on this point setting out the position clearly is relevant.

25 148. In making my decision I have taken into account the overriding objective and having balanced all the factors in light of the information before the Tribunal, it is just and equitable to allow the claims against R5 to proceed.

**Claim against R6 – In time?**

149. The first issue is whether the claims against R6 were raised within the statutory time scale. The final act of alleged unlawful conduct referred to in the claim form is that which occurred on 13 February 2020. There is nothing in the pleadings that suggests the claimant is relying on any act of R6 that occurred after February 2020. The claim was not lodged until 12 May 2021. Thus the claim was over 11 months late.

150. While the claimant argues there was an act extending over a period, the last act for which the claimant was responsible was in February 2020. Subsequent acts over which the claimant had no control cannot extend the limitation period. Given the last act relied upon for which R6 was himself responsible was around a year before the claim form was lodged, I consider the claim form to have been lodged out of time. I did not consider it possible for the claimant to rely on acts for which others had been responsible as relevant acts for the purposes of assessing the time limit in respect of the respondent in this case. The claims as against R6 are out of time.

**Claim against R6 – Just and equitable to allow claims to proceed?**

151. Having found the claim to have been lodged late I now turn to consider whether it is just and equitable to allow the claims to proceed.

152. The claimant's submissions are identical to those pertaining to R4 and R5 but I consider them specifically as against R6. The claimant argues that it was only when she received documents on 2 March 2021 that she became aware of her claim. I did not consider that to be entirely accurate. The claimant knew enough to be able to frame her claims about the issues arising at this time when she submitted her revised claim against her then former employer in January 2021. While she did not have "best evidence" (including the statement provided as part of the internal investigation) she had enough information on which her claims against R6 stood and she could have raised those claims in January 2021 when she raised the claims against her former employer. The claimant was aware of the broad claims she believes she had

that arose from R6's conduct and the information she received in March 2021 while providing more detail, did not provide new claims of which she was previously unaware. The claimant knew of the involvement of R6 and included the specific claims involving R6 in her claim against her former employer.

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153. The delay in providing the information to the claimant is placed in the balance together with the information the claimant had. The respondent's submissions as set out above have considerable weight in this regard given the claimant's knowledge and abilities. I considered that the claimant could have raised the claims in time.

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154. The issue is not, however, one of reasonable practicability, but whether or not it is just and equitable to allow the claims against R6 to proceed.

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155. As set out above, the claimant relied on a number of grounds in seeking to persuade the Tribunal that it was just and equitable to allow her claims to proceed if found to have been lodged late.

156. The claimant argued that she had a lack of knowledge of "key facts" due to the respondent's concealment. While she did not know precisely what R5 and R6 had done in relation to the issues relied upon, it is clear from the revised claim form submitted in January 2021 that she knew the broad claims that arose in the relation to the incidents in question. From the information before the Tribunal, there was no substantive lack of information or knowledge that prevented the claimant from raising her claim against R6.

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157. The second ground the claimant relied upon in respect of exercising the Tribunal's discretion was in respect of the claimant's alleged disability. She stated in her written submission that she suffered from depression and anxiety. She said she was particularly badly affected from December 2020 to March 2021 because she was upset at being dismissed which caused stress and exacerbated her condition.

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158. The difficulty with that submission is the absence of evidence to support the submission. There was no evidence (medical or otherwise) on which the claimant's submission was based. The claimant had provided no specific evidence that supported the submission that she was unable to prepare her claim against R6 particularly where she had been able to fully engage in the Tribunal process. The facts showed the claimant was able to fully engage with and in the Tribunal process.

159. The respondent's agent noted that the claimant should have known that the time limit had expired when she lodged her claims given the ongoing proceedings against the corporate bodies which were defended raised the same claims. The fact there was a further delay between the expiry of early conciliation and the raising of the claim was argued to be evidence of unreasonable delay. This is a relevant factor. The reason for the claimant's delay in lodging her claims after early conciliation was because she believed the claims were in time. The time that took to raise the specific claims weighs against the claimant but the claimant's knowledge as to the law relating to an act extending over a period and personal liability for acts of a principal (which was not so obviously wrong or unreasonable) requires to be balanced against this.

160. The third and final argument the claimant relied upon was that she was not an expert in employment law. Although she was able to research the law she had understood the claims were in time. She did not have the resources that the respondent had to conduct her case. I considered that there was force in this submission. It was clear that the claimant had researched the legal position and that she understood that a claim could be in time if an agent can rely upon the acts for which the principal was liable. It is surprising that there is no case law on this point but it is not a point that is so obviously wrong in law when one considers the wording of the Equality Act and the common law position in Scotland.

161. Turning to the factors the Tribunal considers in light of the foregoing and the facts in this case, the key issue is the prejudice the parties would face if the claims are allowed to proceed. The respondent's agent submitted that the claimant suffers no prejudice whatsoever if the claim is not permitted to proceed since the substance of the claim is already encapsulated in the claim against her former employer. There is no question of her being deprived of a remedy. She also does not lose the ability to hold those who discriminated against her to account since the Tribunal would require to make findings in respect of the conduct relied upon. In contrast, the respondent's agent argues the prejudice to R6 was very significant given the impact of personal liability upon the individual when no claim was raised within the time set by statute. This was particularly so given the claimant had limited contact with R6 in the last months of her employment. Nonetheless, if the claims are not allowed to proceed, the claimant would lose the ability to secure a finding against R6 personally. Holding individuals responsible for unlawful discrimination is an important factor that I balance.

162. The fact the claimant is not deprived of a remedy is a significant factor also weighs heavily in the balance and I take into account that the issues raised by the claimant in the claim form will be covered in terms of the evidence led and findings made. I also take into account that the claimant believes those who discriminated against her ought to be personally held responsible. That is something that the claimant believed when she sought to add those respondents as parties.

163. I considered what the prejudice to the respondent would be if the claims were allowed to proceed. The obvious prejudice is the potential for personal liability but liability would obviously only arise if the claim is successful. If the claims are allowed to proceed, the respondent would be able to defend the claims. Refusing to allow the claims to proceed would prevent the claimant proceeding personally against R6. I do take into account the significant prejudice of being a party to litigation which is itself a very significant matter. While there was no submission as to the potentially significant costs that

could be incurred if the claims are allowed to proceed, I have factored the potential costs to the respondent (and the prejudice of being brought into this litigation) into my consideration.

5 164. There is no impact upon the evidence given the claims would be heard in any event given the same claims are being determined as against the former employer.

10 165. I accept that there is a prejudice in having to defend proceedings but that is countered by the ability to defend the case. Given the anonymity order in place there is less prejudice than would otherwise be the case and the respondent is able to defend any personal liability by leading of evidence.

15 166. The public interest in discrimination claims being determined is also relevant. There is a societal aspect to discrimination claims (that is not present in other claims, such as unfair dismissal). There is no prejudice to the respondent if the claims are allowed to proceed in terms of cogency of evidence or time that has passed.

20 167. I also take into account the length and reason for any delay. The final act of alleged unlawful conduct referred to in the claim form is that which occurred on 13 February 2020. There is nothing in the pleadings that suggests the claimant is relying on any act of R6 that occurred after February 2020. The claim was not lodged until 12 May 2021. Thus the claim was over 11 months late. That is a significant delay. Nevertheless there is no evidence or submission that the delay itself gives rise to prejudice. The claims as against R6 will still be heard and evidence led. A fair hearing is still possible. Delay in this case is a relevant factor given the length of time it took to raise the claims and the general context.

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168. I did not consider the fact that documents were not produced until March 2021 as relevant. The claimant could have (and did) set out the specific claims without the benefit of “best evidence”.

5 169. I require to balance the factors and decide whether or not it is just and equitable for the claims to proceed in all the circumstances. Having balanced all the factors I conclude that it is just and equitable to allow the claims to proceed.

10 170. A fair hearing is still possible, the delays in this case not affecting the cogency of the evidence even although the delay in this case is longer than in respect of R4 and R5. While I accept it was self evidently reasonably practicable for the claims to have been lodged, the test in this case is whether it is just and equitable to allow the claims to proceed. The claimant did delay in raising the claims but she believed the claims were in time. It was not unreasonable for her to have held that belief. She wanted to hold those responsible for discrimination liable. Those individuals will be able to defend their position. In all the circumstances it is just and equitable for the claims against R6 to proceed.

15 171. In making my decision I have taken into account the overriding objective and having balanced all the factors in light of the information before the Tribunal, it is just and equitable to allow the claims against R6 to proceed.

### **Summary**

25 172. In reaching my decision in respect of each of the respondents I balanced the factors involved and decided whether or not it was just and equitable to allow the claims to proceed. This was not an easy decision to make but I carefully balanced each of the factors in light of the legal principles. The context of each individual claim was fully considered as were each of the submissions of the parties. I took into account the claimant’s knowledge and position and her expertise recognising that the onus is on the claimant, in respect of each 30 of the respondents, to persuade the Tribunal that it is just and equitable to

extend time, bearing in mind time limits are ordinarily strictly enforced (and there for a reason). I also took into account the fact the claims against her former employer included the individual respondents and those claims and that she could have included the current respondents in those claims (at least from January 2021 onwards) but did not.

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173. As set out the following paragraphs I identified a potential issue, namely res judicata, which had not been raised by the parties. The claimant had already asked to include the respondents as a party and been refused such request. I did consider this issue, which supported the respondents' position, when carrying out the balance required by the authorities. The claimant had already identified the issue and sought to include the respondents as parties which was refused. The claimant could have appealed against that decision but did not and instead raised fresh claims. That was clearly a factor supporting the respondents' position which I considered in respect of each respondent. The claimant believed she was within time in raising fresh claims. I considered this issue was a relevant factor to include in my consideration, which is whether or not it is just and equitable to allow the claims to proceed, but I was not satisfied it tilted the balance in favour of the respondents given the context and facts in this case.

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174. There were essentially 2 key factors that in my judgment shifted the balance in the claimant's favour in the balancing exercise the authorities make clear needs to be done – the claimant's knowledge of time limits (the fact she believed the claims were in time) and the wish to hold those whom the claimant considers to have unlawfully discriminated against her to be a personal party to these proceedings and thereby held to account. Although the anonymisation order prohibits revealing their identity, the judgment, which will be a public judgment, will make it clear (as this judgment does) that individual liability for unlawful discrimination does exist and individuals can be personally accountable for their actions. There is a public interest in that matter. That was weighed against the prejudice to each of the

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respondents in being a party to litigation and the fact the claimant would have a remedy (even if the respondents were not party to the litigation).

5 175. From the information before the Tribunal and having carefully balanced all the factors within their context and applying the legal principles as set out above, I was satisfied that the claimant had established that it was just and equitable for the 3 claims to proceed, despite the lateness in their lodging and the claimant's knowledge, conduct and context, taking account of the prejudice to the respondents.

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176. A fair hearing is clearly still possible in respect of each of the claims raised against R4, R5 and R6 and those claims will be heard. The claimant's desire to have those responsible for discrimination claims held personally liable, irrespective of the financial position, is an important factor given the societal nature of discrimination law. The respondents will be able to set out their defence with a Tribunal determining the matter.

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### **One final issue**

177. One issue which I considered as potentially relevant was the impact of the judgment that had been issued in respect of adding R4, R5 and R6 upon the claimant's attempt to raise fresh claims against those individuals. I was concerned that the fresh claims may be res judicata given the claimant had made it clear that she wished to add R4, R5 and R6 as parties to the action against the then former employer as she believed there were issues between the parties to be determined. That was a matter that had been judicially considered (and a judgment issued).

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178. This was not a matter raised by the respondent and I considered whether it was something that went to the jurisdiction of the Tribunal and a matter I should consider. A recent Employment Appeal Tribunal considered the legal principles in this area – see **Imrie v Right Track** UKEATS/16/20 which sets

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out the 5 conditions necessary for the res judicata plea (which is a plea to the merits of the action) to be sustained.

5 179. I was not satisfied that it was so obvious that the principles applied particularly given the reasoning in **Nayif v High Commission of Brunei Darussalam** [2015] IRLR 134 and in the absence of submissions from the parties I did not consider it appropriate to decide this issue. It is open to the parties to seek a reconsideration of my judgment if it is in the interests of justice to do so.

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### **Next steps**

15 180. Given I have allowed the claims as against R4, R5 and R6 to proceed (which are already claims contained in the claim as against the former employer), case management will be considered at the case management preliminary hearing that had already been fixed.

20 **Employment Judge: D Hoey**  
**Date of Judgment: 26 November 2021**  
**Entered in register: 29 November 2021**  
**and copied to parties**