EMPLOYMENT TRIBUNALS

Claimant: Mrs Elizabeth Stephens

Respondent: The Secretary of State for the Home Department

RECORD OF A PRELIMINARY HEARING

Heard at: In person **On:** 26 January 2022

Before: Employment Judge Sekhon (sitting alone)

Appearances
For the claimant: In person
For the respondent: Mr A Bershadski, Counsel

RESERVED JUDGMENT

1. **The Claimant's complaints of harassment related to race are not dismissed and the Tribunal has jurisdiction to hear them at the final hearing on 10 August 2022.**

REASONS

Introduction

1. The claimant has worked for the respondent, Home Office as an Executive Immigration Officer since 13 September 1999. She remains employed. By a claim form presented on 2 December 2020, the claimant brought complaints of direct discrimination on the grounds of race (under section 13 Equality Act 2010) and harassment on the grounds of race (under section 26 Equality Act 2010). The claim of age discrimination is no longer being pursued.

2. Early conciliation commenced on 7 October 2020. ACAS issued the Claimant with an ACAS certificate on 4 November 2020.

3. An ET3 was filed on with the Tribunal by 29 January 2021 denying the allegations and seeking a request for further and better particulars of the alleged acts of discrimination to enable the respondent to provide a detailed response. The respondent sought an extension to serve a response upon receipt of further particulars.

4. A telephone case management hearing took place on 10 June 2021 before Employment Judge Fowell. The claimant attended without representation and Mr Bershadski, Counsel attended upon behalf of the respondent.

5. Employment Judge Fowell discussed the issues with the parties and recorded in the case summary of his Order, details of the complaints made and the matters which will fall to be determined by the Tribunal in the list of issues (set out in detail below). A 3-day final hearing was listed to take place on 10 August 2022. The respondent was provided leave to serve an amended response by 30 July 2021.

6. The respondent served an amended response on 30 July 2021 which denied the allegations and stated that the alleged acts of harassment and direct discrimination took place on or before 11 September 2019. The respondent submitted therefore that it is for the claimant to prove, that any of the alleged unlawful acts or failures to act complained of which occurred on or before 8 July 2020, should be entertained by the Tribunal. The respondent sought a preliminary hearing to determine whether the Tribunal had jurisdiction to consider the claims as they had been bought out of time.

Hearing

7. This hearing was listed to take place as a public preliminary hearing and arranged in person. This preliminary hearing was listed to consider whether the claims had been presented in time and if not whether the time limits should be extended.

8. The respondent provided a bundle totalling 46 pages in advance of the hearing which had not been agreed by the claimant. This contained no witness statements. The claimant did not serve a witness statement prior to the hearing. A skeleton argument was received from the respondent's counsel on the morning of the hearing.

9. The claimant attended the hearing and confirmed that she had received the respondent's bundle but that she had not seen the respondent's skeleton argument. The email to the tribunal enclosing the skeleton argument did not copy the claimant in.

10. The claimant attended without representation, and she explained that she had difficulty with her sight and needed to use a magnifying glass to read documentation. I discussed with the claimant whether any steps could be taken during the hearing to accommodate her and assist with her sight difficulties. I asked to tell me if it would assist to read any documents to her that are referred to in the hearing, if she needed time to review documents referred to during the hearing or a break during the hearing.

11. The claimant was provided with time to review the skeleton argument at the outset of the hearing; however, it was clear that she would not have enough time to review the cases referred to in the skeleton argument as these are detailed and lengthy. Counsel for the respondent was therefore asked to set out the respondent's case in detail in oral submissions and where appropriate to refer to the parts of the case referred to.

12. The respondent confirmed that they intended to rely on the documentation provided in the bundle together with the cases referred to in their skeleton argument and that they did not intend to call any witnesses. The respondent clarified (as set out in the skeleton argument) that they only intend to raise issue with the allegations on harassment and that these were out of time and not the allegations relating to discrimination. This was the first time that the tribunal was put on notice of this. I noted that the final hearing listed to take place on 10 August 2022 will therefore proceed on the allegations relating to discrimination irrespective of my decision today. I therefore provided further case management directions at the end of the hearing.

13. I heard evidence from Mrs Stephens on her own behalf whilst under oath. She had not prepared a statement but gave evidence in response to questions from me and under cross-examination from Mr Bershadski.

Issues to be determined today

14. The issues to be determined today in relation to the harassment allegations are:

    1. When did the acts complained of take place?
    2. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
    3. If not, was there conduct extending over a period?
    4. To the extent that the Claimant has shown a prima facie case of "conduct extending over a period", when did it end?
    5. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
    6. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    (a) Why were the complaints not made to the Tribunal in time?
    (b) In any event, is it just and equitable in all the circumstances to extend time?

The Law

15. Section 123 of the Equality Act 2010 provides, so far as relevant:

    (1) Subject to sections 140A and section 140B, proceedings on a complaint within section 120 may not be brought after the end of—
    (a) the period of 3 months starting with the date of the act to which the complaint relates, or
    (b) such other period as the employment tribunal thinks just and equitable.
    …

    (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.
    …

16. It is well established that there is a difference between a continuing act for the purposes of s.123(3) and an act that has continuing consequences. A decision, such as a decision not to promote someone, may have continuing consequences but it will not constitute a continuing act unless the Claimant can show the existence of a discriminatory policy, rule or practice.

17. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 the Court of Appeal made it clear that Tribunals should not take too literal an approach to this issue and where (as in that case) there are allegations of numerous discriminatory acts over a long period, the Claimant may be able to establish that there was an ongoing situation or continuing state of affairs which constituted a continuing act. Ultimately, the Tribunal should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer (Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548).

18. In Hale v Brighton and Sussex University Hospitals NHS Trust EAT 0342/16 an employment tribunal found that the decision to commence a disciplinary investigation against H was an act of discrimination, but it was a 'one-off' act and was therefore out of time. H appealed, arguing that the tribunal had been wrong to treat the decision to instigate the disciplinary procedure as a one-off act of discrimination rather than as part of an act extending over a period ultimately leading to his dismissal. Referring to Hendricks (above), the EAT observed that the tribunal had lost sight of the substance of H's complaint. This was that he had been subjected to disciplinary procedures and was ultimately dismissed – suggesting that the complaint was of a continuing act commencing with a decision to instigate the process and ending with a dismissal. In the EAT's view, by taking the decision to instigate disciplinary procedures, the Trust had created a state of affairs that would continue until the conclusion of the disciplinary process. This was not merely a one-off act with continuing consequences. Once the process was initiated, the Trust would subject H to further steps under it from time to time. The EAT said that if an employee is not permitted to rely on an ongoing state of affairs in situations such as this, then time would begin to run as soon as each step is taken under the procedure. In order to avoid losing the right to claim in respect of an act of discrimination at an earlier stage of a lengthy procedure, an employee would have to lodge a claim after each stage unless he or she could be confident that time would be extended on just and equitable grounds. However, this would impose an unnecessary burden on claimants when they could rely upon the provision covering an act extending over a period. The EAT therefore concluded that this part of H's claim was in time.

19. The Court of Appeal's decision in Aziz v FDA [2010] EWCA Civ 304 dealt with the procedural point of how the Employment Tribunal should approach the question of whether there is a continuing act at a preliminary hearing. The Court approved the approach laid down in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 that the test to be applied at the pre-hearing was whether the claimant had established a prima facie case, or, to put it another way, 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'. Further respondent's counsel referred me to the following passage, "In considering whether separate incidents form part of an act extending over a period … one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents":

20. In E v X, L and Z UKEAT/0079/20 and 0080/20 the EAT stated at paragraph 48 referring to the case of Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 that where at a preliminary hearing the issue is whether the acts complained of are capable of amounting to a continuing act, the facts are to be assumed to be as pleaded by the claimant. Caution is to be exercised in deciding time points at a preliminary hearing having regard to the difficulty of disentangling them because there may be no appreciable saving of preparation or hearing time by deciding them: because of the acute fact sensitivity of discrimination claims; the high threshold for strike out and the need for evidence to be prepared if facts are not agreed. In Sridhar it had been clear from the claimant's witness statement that the claimant was alleging a continuing act. It was held that the tribunal should only have struck out the complaints at the preliminary hearing stage if "on the material before it, the claimant had not established a prima facie case relating to the continuing discriminatory state of affairs, the claimant's claims were not capable of being part of such a continuing discriminatory state of affairs, and it was not reasonably arguable that there was such a continuing discriminatory state of affairs."

21. The court went on to set out the key principals distilled from the case law in the light of six leading cases, namely Sougrin v Haringey Health Authority [1992] IRLR 416, Robinson v Royal Surrey County Hospital NHS Foundation Trust UKEAT/0311/14 (30 July 2015, unreported), Sridhar v Kingston Hospital NHS Foundation Trust UKEAT/0066/20 (21 July

2020, unreported), Caterham School Ltd v Rose UKEAT/0149/19 (22 August 2019, unreported), Lyfar v Brighton & Sussex University Hospitals NHS Trust [2006] EWCA Civ 1548, and Aziz v FDA [2010] EWCA Civ 304 on the question of striking out a claim due to time limits and whether the claimant can rely on the concept of 'acts extending over a period'. The guidance is lengthy, but is important and is set out here in full:

a. In order to identify the substance of the acts of which complaint is made, it is necessary to look at the claim form: Sougrin.
b. It is appropriate to consider the way in which a claimant puts their case and, in particular, whether there is said to be a link between the acts of which complaint is made. The fact that the alleged acts in question may be framed as different species of discrimination (and harassment) is immaterial: Robinson.
c. Nonetheless, it is not essential that a positive assertion that the claimant is complaining of a continuing discriminatory state of affairs be explicitly stated, either in the claim form, or in the list of issues. Such a contention may become apparent from evidence or submissions made, once a time point is taken against the claimant: Sridhar.
d. It is important that the issues for determination by the tribunal at a preliminary hearing have been identified with clarity. That will include identification of whether the tribunal is being asked: (1) to consider whether a particular allegation or complaint should be struck out, because no prima facie case can be demonstrated; or (2) substantively to determine the limitation issue: Caterham.
e. When faced with a strike-out application arising from a time point, the test which a tribunal must apply is whether the claimant has established a prima facie case, in which connection it may be advisable for oral evidence to be called. It will be a finding of fact for the tribunal as to whether one act leads to another, in any particular case: Lyfar.
f. An alternative framing of the test to be applied on a strike-out application is whether the claimant has established a reasonably arguable basis for the contention that the various acts are so linked as to be continuing acts, or to constitute an on-going state of affairs: Aziz; Sridhar.
g. The fact that different individuals may have been involved in the various acts of which complaint is made is a relevant, but not conclusive, factor: Aziz.
h. In an appropriate case, a strike-out application in respect of some part of a claim can be approached assuming, for that purpose, the facts to be as pleaded by the claimant. In that event, no evidence will be required – the matter will be decided on the claimant's pleading: Caterham.
i. A tribunal hearing a strike-out application should view the claimant's case, at its highest, critically, including by considering whether any aspect of that case is innately implausible for any reason: Robinson.
j. If a strike-out application succeeds, on the basis that, even if all the facts were as pleaded, the complaint would have no reasonable prospect of success (whether because of a time point or on the merits), that will bring that complaint to an end. If it fails, the claimant lives to fight another day, at the full merits hearing: Caterham.
k. Thus, if a tribunal considers (properly) at a preliminary hearing that there is no reasonable prospect of establishing at trial that a particular incident, complaint about which would, by itself, be out of time, formed part of such conduct together with other incidents, such as to make it in time, that complaint may be struck out: Caterham.
l. Definitive determination of an issue which is factually disputed requires preparation and presentation of evidence to be considered at the preliminary hearing, findings of fact and, as necessary, the application of the law to those facts, so as to reach a definitive outcome on the point, which cannot then be revisited at the full merits hearing: Caterham.
m. If it can be done properly, it may be sensible, and, potentially, beneficial, for a tribunal to consider a time point at a preliminary hearing, either on the basis of a strike-out application, or, in an appropriate case, substantively, so that time and resource is not

taken up preparing, and considering at a full merits hearing, complaints which may properly be found to be truly stale such that they ought not to be so considered. However, caution should be exercised, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case; the fact that there may be no appreciable saving of preparation or hearing time, in any event, if episodes that could be potentially severed as out of time are, in any case, relied upon as background to more recent complaints; the acute fact-sensitivity of discrimination claims and the high strike-out threshold; and the need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue: Caterham.

22. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). It entitles the Tribunal to take into account anything which it judges to be relevant. The discretion given to the Tribunal is as wide as that under section 33 of Limitation Act 1980. The Tribunal is therefore required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances. In particular, although this list is not exhaustive, the Tribunal should take into account factors such as (British Coal Corporation v Keeble EAT/496/9):
    a. the length of and reasons for the delay.
    b. the extent to which the cogency of the evidence is likely to be affected by the delay.
    c. the extent to which the party sued had co-operated with any request for information.
    d. the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and
    e. the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

23. Although the discretion is wide there is no presumption that it should be exercised so as to extend time. Respondent's counsel referred me to Robertson v Bexley Community Centre [2003] EWCA Civ 576, in which Auld LJ said at: "It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

24. Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

25. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. A delay caused by a claimant awaiting completion of an internal procedure may justify extension of the time limit, but it is only one factor to be considered in any particular case. In Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853, [2002] IRLR 116 - the Court of Appeal rejected the suggestion that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice.

26. In the case of Abertawe Bro Morgannwg University v Morgan [2018] EWCA Civ 640 the Court of Appeal however stated that the "such other period as the employment tribunal thinks just and equitable" extension indicates that Parliament chose to give the tribunal the

widest possible discretion. Although there is no prescribed list of factors for the tribunal to consider, "factors which are almost always relevant to consider are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent". There is no requirement that the tribunal had to be satisfied that there was a good reason for the delay before it could conclude that it was just and equitable to extend time in the claimant's favour.

27. In Adedeji v University Hospital Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5 the Court of Appeal stated that "The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) [Equality Act] is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.

28. It is well established that ignorance or mistaken belief as to rights or time limit will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done (Wall's Meat Co Ltd v Khan 1979 ICR 52). Trade union officials are considered skilled advisers in this context, so an action of a union adviser would be treated as attributed to the employee (Times Newspapers Ltd v O'Regan 1977 IRLR 101).

1. When did the acts complained of take place?

29. Following a case Management hearing on 10 June 2021 the list of issues agreed by the parties were that: -

*"**Harassment on the grounds of race***

9. Did Ms Leverette:

(i) Laugh and look at other colleagues when the Claimant said something;

(ii) Pull faces;

(iii) Mock the Claimant in front of a contractor?

10. Was this related to the Claimant's race?

11. Did this have the purpose or effect of violating Mrs Stephens dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Direct race discrimination

12. Did the Home Office, in

(i) Ignoring her informal complaints to her managers or HR;

(ii) Mr House not asking for her version of events after Ms Leverette raised

a complaint; or

(iii) Failing to address her grievance; or

(iv) Subjecting her to any of the treatment not found to have been harassment?

treat her less favourably than it treated or would have treated someone else in the same circumstances, apart from her race?"

30. I clarified with the respondent that they allege that the allegations in 9 (i), (ii) and (iii) are out of time and subject to the hearing today. I did not hear evidence relating to the allegations set out in point 12 of the list of issues.

31. Employment Judge Fowell set out in the case summary that based on a discussion with the parties and the information in the ET1 and ET3 that

"The claimant raised a grievance in September 2019 about a colleague, a Ms Zairean Leverette, who joined in or about May 2019. Ms Leverette had to complete a probationary period and Mrs Stephens was assigned as her manager. Mrs Stephens felt that Ms Leverette mocked her for her accent, to the extent that she found it upsetting and complained to her managers and the HR department. Mrs Stephens is from Brazil, so her accent was connected with her nationality, and hence race, as defined in the Equality Act 2010.

The claimant says that the management took no action. She then spoke to Ms Leverette directly about this mockery, but Ms Leverette went to Mr Edward House, a senior manager, complaining that Mrs Stephens had shouted at her. Mr House did not, she says, ask Mrs Stephens for her version of events. In due course, Ms Leverette passed her probationary period, despite Mrs Stephens' complaints. These events gave rise to the grievance."

32. I note that the List of Issues does not set out dates when the alleged acts took place. The respondent submits that the alleged acts set out in the list of Issues at 9(i), (ii), and (iii) took place on or about 11 September 2019. It is submitted by the respondent that the claimant lodged an informal complaint about these alleged acts on 12 September 2019 and the claimant then lodged a grievance on 19 November 2019.

33. The claimant's evidence was that in relation to being mocked by Ms Leverette in front of a contractor (allegation 9 (iii)) of the List of Issues above) that this took place around 11 September 2019. This is agreed between the parties, and I therefore accept this date.

34. However, the claimant stated that the alleged acts 9 (i) and (ii) of the List of Issues relating to Ms Leverette laughing and looking at other colleagues when the claimant said something and pulling faces, happened before and after she made her complaint and grievance. The claimant stated that she managed Ms Leverette until December 2019, and this continued until at least then, but she felt this carried on even after then although she could not provide an exact date. Save for the claimant's evidence, there was no evidence before me to suggest that acts of pulling faces or laughing and looking at other people's faces when the claimant spoke happened after Ms Leverette was transferred into another team where she then passed her probationary period. As this is a preliminary hearing only, I assume the facts pleaded by the claimant but I note that this will determined at the full merits hearing. The claimant stated Ms Leverette has left the respondent's employment, but she could not provide a date for this. No documentary evidence was provided by the claimant to confirm this date, and none was provided by the respondent.

35. Based on this evidence before me, I find that the latest date that the acts 9 (i) and 9 (ii) could have taken place were when Ms Leverette left the respondent's employment, a date which is not before the Tribunal. I therefore find that the acts in 9 (i) and (ii) continued until at least December 2019 when it is the claimant's evidence that Ms Leverette was transferred to another team but that these continued after that. Taking the claimant's case as the highest it can be, the allegations at 9 (i) and (ii) could not have continued beyond the date Ms Leverette left the respondent's employment. I cannot be more precise on the date than this as neither party provided a specific date that Ms Leverette was transferred or left the respondent's employment.

36. The claimant also stated that in her view the harassment continued until at least 15 September 2020, and this is what prompted her to contact ACAS in early October 2020. She stated this was the case for the following reasons: -

    (a) She lodged a grievance procedure about the harassment she was experiencing from Ms Leverette as set out in 9 (i), (ii) and (iii). She chased this approximately two months after she had put her grievance in but was told that this had not been progressed as the case manager could not be from the same business area. She continued to chase for this. The respondent's investigation concluded on 30 June 2021, some 19 months later. The claimant stated that she felt the harassment was continuing whilst she was awaiting the outcome of the grievance procedure as she did not receive an apology or an explanation of what the investigation found.
    (b) She was contacted by HR in September 2020 to provide evidence for a claim being bought by Ms Leverette against the respondent and she had been named as an individual whom Ms Leverette had complained about.
    (c) She found out on 15 September 2020 that the investigating officer had discovered that Ms Leverette had been sending malicious emails about her on the intranet and to other members of staff.

37. I note that (a) above refers to the harassment being a continuing act and I discuss this below. Further (a), (b) and (c) above relate to alleged acts of harassment that currently do not form part of the agreed List of Issues and upon which the respondent has not served an Amended Response. They currently therefore do not form part of the claimant's case on the issues of harassment. The claimant prepared her ET1 and attended the telephone case management conference with Employment Judge Fowell without representation. If it is her case that (a), (b) and (c) form part of her case for bringing a harassment claim against the respondent then she will need to make an application to the Tribunal under rule 29, if she wishes to pursue these and she should make this application as soon as possible if it is her intention to do so.

2. **Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?**
3. **If not, was there conduct extending over a period?**
4. **To the extent that the Claimant has shown a prima facie case of "conduct extending over a period", when did it end?**
5. **If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?**

38. The respondent submits the following are the key dates

- 8 July 2020 – Earliest date that an allegation will be in time.
- 7 October 2020 – Claimant contacts ACAS.
- 4 November 2020 – ACAS issues certificate.

- 2 December 2020 – Claimant lodges ET1.

39. The respondent argues that the earliest date that an allegation will be in time will be 8 July 2020, being three months before the claim form was issued and extending time for the period spent in early conciliation through ACAS. The claimant did not raise any issues with the calculation or accuracy of the dates above. I find that this is the correct based on the dates above. I accept that any alleged acts that took place before 8 July 2020 will be out of time.

40. As set out in my findings above, the alleged act at 9 (iii) took place on or about 11 September 2019 and 9 (i) and (ii) occurred until December 2019 and assuming the claimant's evidence this could have continued until Ms Leverette left the respondent's employment which would appear to be the latest date that the claimant could allege, they did so. However, without further evidence setting out this date I am unable to state in my decision when the latest date for the continuing acts could have taken place.

41. The claimant states that the harassment complaints are in time because the matters complained of at 9 (i), (ii) and (ii) are part of a continuing act because she lodged internal grievances about them which the respondent failed to deal with in a timely manner until 30 July 2021, when the respondent delivered the outcome of the grievance she made in November 2019. I note that the failure to address her grievance in a timely manner forms part of her claim on race direct discrimination as set out in the List of Issues but not her current harassment claim.

42. The mere fact that a grievance has been raised does not automatically transform a one-off act into a continuing act even if it were established that the respondent wrongly delayed or failed to uphold it. The claimant has not provided any detail about the grievance process and the alleged failings that allegedly amounted to harassment save that there was a delay. The claimant has not explained in her claim form or subsequently, or in her evidence for this preliminary hearing, in what respect(s) or on what date(s) the respondent's approach to her grievances was unreasonable or amounted to harassment. She relies on the fact she raised a grievance about these issues of harassment but there was a delay in responding to these which made her feel that the harassment was continuing. I note however that the claimant has not provided a witness statement for this preliminary hearing and no witness evidence has been served to date in the main hearing. The claimant in unrepresented and did not understand that evidence that was required for today and was unprepared when giving evidence on dates that events occurred, and the bundle did not contain documents that assisted her on these issues.

43. The respondent refers in their skeleton argument to the case law which defines "conduct extending over a period" as an "act extending over a period" or an "ongoing situation or a continuing state of affairs…as distinct from a succession of unconnected or isolated specific acts". Further, "In considering whether separate incidents form part of an act extending over a period … one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents".

44. I have considered the authorities set out above in detail. Having considered the way the claimant has put her claim in the claim form, the previous list of issues and the evidence she has given to me under oath today, I find that the claimant has established a prima facie case that the acts listed in 9 (i), (ii) and (iii) are linked such that they form a continuing discriminatory state of affairs and that they are not isolated incidents in themselves. The acts all relate to the same individual, Ms Leverette, and the way she mocked the claimant in front of others. I am persuaded by the claimant that these issues were all raised in her grievance in November 2019 and for her they constituted an ongoing state of affairs with Ms Leverette. I note that further more detailed evidence will be heard at the final hearing but for

the purposes of today's hearing, assuming the claimant's oral evidence at the hearing is correct, I have set out that these acts are alleged to have continued (at the latest) until Ms Leverette left the respondent's employment which is a date that is not before the Tribunal. It is possible that this date was before 8 July 2020 and therefore that the harassment allegations are out of time based on the current List of Issues.

45. I note that the claimant has made numerous submissions which I have set out above at paragraph 36 and I have set out do not currently form part of the List of Issues and that she will need to make an application under Rule 29 if she wishes to rely on these. I am conscious that if her application is successful before the Tribunal then she would potentially have a case to say that the additional harassment allegations would constitute a continuing discriminatory state of affairs until 15 September 2021 and her claims under 9 (i), (ii) and (iii) would then all have been bought in time.

46. The case law is clear and helpful in identifying that caution should be exercised when considering time limits, having regard to the difficulty of disentangling time points relating to individual complaints from other complaints and issues in the case. I am conscious that in this case the claimant is bringing claims under direct race discrimination which will continue to a final hearing on 10 August 2022. Further I note that the events that form part of the discriminatory procedure complained of by the claimant are the events detailed in the harassment allegations and there is a clear link between the two heads of claim. Indeed, the claimant stated in oral evidence (set out in paragraph 36) that she considers the delay in handling her grievance was also an allegation of harassment.

47. This is a fact sensitive claim and for which there is a high strike out threshold. The case law states that there is need for evidence to be prepared, and facts found (unless agreed), in order to make a definitive determination of such an issue as to whether the claim has been bought in time. I am not persuaded that the evidence before me today is sufficient for me to make a determinative decision on whether the claims have been bought in time. The claimant was not represented and had not understood what evidence she needed to provide at the hearing. As such, she did not prepare a witness statement in advance of the hearing or provide collated documents in a bundle that would assist or advance her case on timings of events. As a result, she could not provide a date when Ms Leverette last mocked her in front of colleagues and the latest date this could have occurred (whilst Ms Leverette was employed) is not known to the Tribunal either. It was simply not possible to elucidate the key facts at this hearing. The claimant has raised issues that do not form part of the current List of Issues and she needs to decide whether these form part of her case and if so, make the appropriate application to the tribunal. As set out above, this may potentially change whether the current harassment allegations have been bought in time, particularly if the claimant raises that the additional discriminatory acts were continuing.

6. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

(a) Why were the complaints not made to the Tribunal in time?

(b) In any event, is it just and equitable in all the circumstances to extend time?

48. I am aware that Ms Leverette may have left her employment before 8 July 2020 and / or the latest date that the claimant alleges she was mocked by Ms Leverette was before 8 July 2020. If this is the case and if the claimant does not make an application or is unsuccessful in amending the List of Issues, then based on my reasons above, the claims for harassment under the Equality Act 2010 may be out of time. In those circumstances, the Tribunal only has jurisdiction to hear it if it is just and equitable to extend the time limit. To provide certainty to the parties, I have elected to consider whether if this is the case, I would consider it just and equitable to extend the time limit.

49. I have considered factors set out above in the relevant case law. I reminded myself that the exercise of the discretion is the exception rather than the rule, although I do have a wide discretion. I take particular note of the directions given by the Court of Appeal in the Abertawe Bro Morgannwg University v Morgan and the more recent Adedeji v University Hospital Birmingham NHS Foundation Trust case above. I am aware that the burden of persuading the Tribunal to exercise its discretion lies on the claimant, albeit this is not a burden of proof or of evidence.

50. The respondent argues that the length of delay in this case was considerable totalling 11 months on their calculations. Based on my findings above, I cannot say definitively the extent of the delay, but I note that is Ms Leverette moved teams in December 2020 and this is 7 months before 8 July 2020.

51. The reason for the delay is explained by the claimant as largely resulting from the failure of the respondent to provide a response firstly to her compliant on 12 September 2019 and then to her grievance raised on 19 November 2019. Although no evidence has been provided by the respondent, the Amended Response suggests the respondent was relatively prompt at the outset and a meeting was held with the claimant to discuss her complaint on 16 September 2019 and she was emailed the grievance resolution procedure. She then raised a grievance on 19 November 2019, and it is her evidence that she chased for a response two months later.

52. However, the respondent then failed to provide her with a response until 30 June 2021, some 19 months later. The Amended Response states that the respondent contacted the claimant on 3 April 2020 to explain that the grievance investigation had given rise to the need for a further investigation under the respondent's disciplinary policy. It does not set out what further information was given to the claimant as to the status of her grievance or the likely timescale that the grievance outcome would be given to the claimant. The claimant provided no evidence on this issue. Whilst not raised by either party, I am however conscious that initial Covid 19 lockdown commenced in March 2020 and was ongoing for this period.

53. The claimant contacted ACAS in October 2020, eleven months after making her grievance. She had still not received an outcome to the grievance procedure at this stage but explained that the reason she did so was because HR contacted her seeking information about a complaint Ms Leverette had made naming her and because she heard that Ms Leverette had sent malicious emails about her.

54. I am sympathetic to the claimant's arguments that she had raised a grievance and was awaiting an outcome before she escalated this further. She had acted entirely appropriately and in good faith in firstly raising a complaint and then a grievance in November 2019 and had a reasonable expectation that this would be addressed and heard by the respondent within a reasonable period.

55. An explanation for the delay (albeit short) was provided by the respondent in April 2020 and I consider it reasonable for the claimant to provide the respondent with further time to respond in light of this and the pandemic at the time. What the claimant has not however done is to adequately explain what she considered a reasonable further time to be or explain why she did not take any steps to further her complaint during the months of say, July, August and September 2020 when she had not heard anything from the respondent or to confirm what information the respondent did tell her during this period. The claimant has not been able to explain why she did not act sooner to progress matters other than to say she was waiting for a response to her grievance.

56. I have considered the authorities above on whether pursuing an internal process can justify granting an extension of time and take note that this is just one factor which must be weighed in the balance along with others that may be present (Apelogun-Gabriels case referred to above). Here the lack of a response to her grievance clearly did influence the claimant's thinking but I am still unsure why she waited so long having not received a response before taking action to pursue her claim through the Tribunal. The respondent is clearly at fault in not responding but the claimant has not been able to adequately explain why she waited so long before deciding to escalate matters further. There may be good reasons based on what information the respondent had told her or she may have well also impacted by the Covid 19 lockdown in March 2020 as many people were, but she did not provide evidence of this to the Tribunal. The claimant was not represented and did not understand that this evidence was required at the hearing. She received the respondent's skeleton argument and case authorities at the beginning of the hearing and did not understand in advance of the hearing what she needed to prove.

57. Turning to other factors relevant to my assessment of whether it would be just and equitable to extend time:

58. The claims would to a significant degree involve the Tribunal considering why individuals including Ms Leverette had acted as they had between May 2019 and December 2019. Given that the full hearing is not listed until 10 August 2022, that would mean the Tribunal considering that question in light of recollections which would be approximately three years old. Such a delay would be likely to affect the cogency of the evidence substantially. I also take into account that the claimant is bringing allegations for discrimination which it is not argued are bought out of time and a final hearing has been set for 10 August 2022. Both parties informed me exchange of witness evidence have not yet taken place despite the Case Management Order setting out both parties are to do so by 12 November 2021. Further I note that the claimant alleges that the issues raised in her harassment claim and that form the basis of the List of Issues are the same issues raised in her grievance procedure and the failure to address her grievance procedure is an issue raised in her race discrimination claim. There is an argument therefore that the evidence will need to be put before the Tribunal on these issues in any event. The respondent argues that the evidence required on the discrimination claim relates more to procedure for the grievance but that the evidence on the harassment claim will be materially different and involve emotive and controversial evidence detailing the events listed in the List of Issues at section 9. I am not wholly persuaded by this argument and suspect there may be an overlap in the evidence, but it is difficult to quantify this any further without seeing any documentation in the case or being provided with further details from the respondent.

59. If a party against whom a claim has brought a claim has failed to cooperate with requests for information, this is a factor which weighs in favour of the Tribunal finding it just and equitable to extend time. The claimant, in cross-examination stated that she has requested from the respondent details of their investigation relating to the malicious emails sent out about be her by Ms Leverette, but she was told the investigation was ongoing and these could not be sent to her. I note that disclosure of documentation has not yet taken place despite the Case Management Order stating that this should take place by 27 August 2021. Further I note that currently the List of Issues does not include the that the malicious emails were an alleged act of harassment and form part of her claim. As set out above the claimant will need to seek to amend her claim should she wish the Tribunal to consider this allegation. Consequently, any failure of the respondent to provide information did not materially affect the claimant's ability to begin her claim at an earlier date on the List of Issues set out above although I accept subject to the evidence which the respondent has it may be argued that this affected the claimant's ability to include the malicious emails allegation in her harassment claim should she wish to raise this and seek to amend her case. This is a factor pointing away from it being just and equitable to extend time.

60. It is relevant to consider the steps taken to obtain appropriate professional advice once a potential claimant knows of the possibility of taking legal action. The claimant provided no witness statement, and she was asked under cross examination to explain what her understanding of the legal process is, her knowledge of time limits or what legal advice, if any, was sought. The claimant's evidence is that she did not know there was a three-month limit in which to bring her claims although she accepted that lack of knowledge about the law was not an excuse. The claimant said that she had at no point sought professional advice. She stated that she returned from annual leave to an email from HR on 15 September 2020, and she found out that the claimant had sent malicious messages about her to other employees, she contacted her union and they told her to send information to them, which she did but she never heard back from them. She then spoke to ACAS in early October 2020. She did not obtain legal advice then either, but she believed that her claims were in time when she received an ACAS number. I am sympathetic to the claimant's explanation that she sought assistance from her union and then ACAS when she discovered that the issues with Ms Leverette had escalated internally and felt she was being targeted and understandably felt that she could wait no longer for the grievance outcome. I note that she acted quickly, within a few weeks, once she discovered this. It is unclear at what point the claimant was aware of the facts which in her view gave rise to the claim of the possibility of taking legal action, but I am satisfied that by 15 September 2020 she believed this to be the case as until then she was waiting to hear what her employer had to say about the issues she raised in her grievance. It is easy to understand why the claimant did not pay for legal advice. She took no advice whatsoever about how she could bring an Employment Tribunal claim until mid-September 2020. The claimant is self-evidently an intelligent woman and could have carried out basic research on the internet and I believe would have done so earlier than mid-September 2020 if she understood that she had the basis for a legal claim. This is a factor pointing towards it being just and equitable to extend time.

61. The respondent says that it is prejudiced by the delay on the basis of the cogency of evidence which is discussed above at paragraph 56. I note that a key witness would be Ms Leverette whom I understand has left the respondent's employment and raised a grievance with the respondent's before doing so. If the claims had been presented within the applicable time limits, it is unlikely that the respondent would have had the opportunity to prepare a witness statement from Ms Leverette in any event. The claimant states the key witness is Edward House. The respondent confirmed that Mr House will be giving evidence at the final hearing. Without further details put forward by the respondent, I conclude that consequently that the delay has not prejudiced the respondent from calling the key witnesses in the claim. I note that the internal evidence would have been compiled on the allegations on harassment currently made for the purposes of the internal grievance procedure. Further I note that the claimant contacted ACAS on 7 October 2020 whilst the respondent was still investigating the grievance and would therefore have been on notice that she was making a claim on these issues and would therefore have had an opportunity to preserve the evidence in knowledge that a claim was being bought against them. It took the respondent a further 8 and half months to provide a grievance outcome to the claimant. I am not persuaded by an argument from the respondent therefore that they are prejudiced by the claimant's delay. Further I note the quality of their investigation into the grievance (dealing with the same issues as the current harassment claim) would equally have been compromised due to their own delay. This is, overall, a factor pointing towards it being just and equitable to extend time.

62. It is clear that the respondent's handling of the claimant's grievance became unnecessarily protracted and that the respondent must take the lion's share of the blame for this. The claimant stated that she has been prejudiced from bringing her claim due to the delay in the grievance process and I accept the claimant's evidence that she genuinely awaited the outcome of the procedure before she wished to consider whether to make a claim but that

the email, she read on 15 September 2020 from HR pushed her over the edge and she felt she could not wait anymore. It seems likely that if the grievances had been handled more quickly then either the claimant would have accepted the outcome because the outcomes of promptly run grievance procedures are more likely to be accepted, or she would have begun her claim at an earlier date. This is a factor pointing towards it being just and equitable to extend time.

63. Ultimately, deciding whether it would be just and equitable to extend time requires me to weigh up the relative prejudice that extending time would cause to the respondent on the one hand and refusing to extend time would cause to the claimant on the other. The claimant will clearly be prejudiced by not being able to pursue her claims for harassment which she feels strongly about. However, the respondent argues they are prejudiced by having to deal with claims raised after the limitation period for such claims to be brought had expired.

64. It is clear from the case law that it is not a question of the Tribunal being able to exercise jurisdiction just because it is sympathetic to the claimant. There must be something raised by the claimant which persuades me that it is just and equitable to do so.

65. Taking all of the above factors into account, I find that in this case the relative prejudice to the respondent, in preparing the necessary evidence at this point in relation to events which took place between approximately three years ago, does not outweigh that to the claimant, who would otherwise be precluded from bring claims of harassment which she feels very strongly about, and I find the delay in pursuing her claim is directly as a result of awaiting the outcome of the grievance that she made. I note that she is also pursuing a claim for race discrimination and that she is without legal representation which has not put her on an equal footing with the respondent at this hearing, and I conclude this hampered the evidence she provided the Tribunal about the delay in bringing her claim discussed at paragraph 54. I have also taken into account the overriding objective set out in Rule 2 of the Employment Tribunals Rules of Procedure 2013 when reaching my decision.

66. This is a case in which the claimant has hoped and expected that she would obtain the necessary redress internally and I am satisfied that she acted swiftly in pursuing a Tribunal claim when issues escalated internally in mid-September 2020, and she felt she could wait no longer for the grievance outcome. In coming to this conclusion, I have taken into account that time limits are an important element of litigation and go to the Tribunal's jurisdiction and are not simply procedural matters that can be disregarded lightly. Having considered all the factors above in particular the length of the delay and reasons for it and looking at the balance of prejudice, I conclude that the harassment complaints presented in the List of Issues at 9 (i), 9 (ii) and (iii) have been presented within "such other period as the employment tribunal thinks just and equitable" in this particular case and so they are not dismissed. The Tribunal therefore has jurisdiction to hear the harassment complaints and they will be heard at the final hearing on 10 August 2022.

_____

Employment Judge Sekhon

Date: 2 February 2022