



EMPLOYMENT TRIBUNAL

Claimant: Mr. Ahmed Rouaba

Respondents: (1) Mr. Safaa Jibara
(2) Ms. Hevar Hasan
(3) British Broadcasting Corporation

Heard at: London Central ET (via video/CVP) **On:** 9 May 2022

Hearing: Open Preliminary Hearing

Before: Employment Judge Tinnion

Appearances: For Claimant: In person
For Respondents: Mr. T. Gillie (Counsel)

RESERVED JUDGMENT

1. It is in the interests of justice for the matters addressed at paras. 2-6 immediately below to be determined at the Open Preliminary Hearing on 9 May 2022.
2. The Claimant has no reasonable prospect of showing that his first complaint - that certain comments the 1st Respondent made about him during an interview on 14 August 2020 were an act of direct race discrimination against him under ss.13(1) and 39(2) of the Equality Act 2010 or an act of harassment under ss.26(1) and 39(2) of the Equality Act 2010 - were either presented in time or formed part of a continuing act in respect of which a timely complaint has been presented.
3. The Claimant has no reasonable prospect of showing that his second complaint – that certain comments the 2nd Respondent made about him during an interview on 6 August 2020 were an act of direct race discrimination against him under ss.13(1) and 39(2) of the Equality Act 2010 or an act of harassment under ss.26(1) and 39(2) of the Equality Act 2010 - were either presented in time or formed part of a continuing act in respect of which a timely complaint has been presented.
4. It is just and equitable to extend time in respect of the Claimant's first complaint concerning the 1st Respondent's comments about him on 14 August 2020.
5. It is not just and equitable to extend time in respect of the Claimant's second complaint concerning the 2nd Respondent's comments about him on 6 August 2020.
6. The Claimant's complaint against the 2nd Respondent is struck out under Rule 37(1)(a) for lack of jurisdiction.

REASONS

Claims

1. The Case Summary at paras. 43-45 of the Case Management Order dated 2 February 2022 (**CMO**) [58-65] quoted below summarised and clarified the Claimant's claims against the Respondents in his two ET1s [4-15, 16-27] and Grounds of Claim [28-31]:

“43. *The claimant was employed by the third respondent, as a journalist with the Arabic Service of the BBC World Service, from 30 September 2012. His employment is ongoing. The first and second respondents are also employees of the third respondent. Early conciliation started in respect of the first respondent on 10 August 2021 and ended on 20 September 2021; in respect of the second respondent starting on 11 August 2021 and ending on 20 September 2021; and in respect of the third respondent, starting on 31 August 2021 and ending on 20 September 2021. The claimant presented two claim forms on 19 October 2021.*

44. *The claim is about allegations that racially discriminatory and racially harassing comments were made by the first respondent in a disciplinary investigation interview on 14 August 2020, and by the second respondent in a disciplinary investigation interview on 6 August 2020. The claimant further alleges that a manager employed by the third respondent, on 12 July 2021 failed to uphold his grievance against the first respondent about the comments allegedly made by him on 14 August 2020. He says this was an act of direct race discrimination and race related harassment.*

The Complaints

45. *The claimant is making the following complaints:*

45.1 Direct race discrimination about the following:

45.1.1 Comments of the first respondent in a disciplinary investigation meeting on 14 August 2020;

45.1.2 Comments of the second respondent in a disciplinary investigation meeting on 6 August 2020;

45.1.3 Failing to uphold his grievance against the first respondent on 12 July 2021.

45.2 The above acts of race discrimination are in the alternative put as acts of race related harassment.”

2. In response, the Respondents lodged joint ET3s [32-39, 40-47] and Grounds of Resistance [48-54] which denied the Claimant's three complaints of direct race discrimination/race-related harassment on their merits, and in respect of the first two

complaints (the 1st Respondent's conduct on 14 August 2020, the 2nd Respondent's conduct on 6 August 2020) contended that the Tribunal lacked jurisdiction to consider those complaints on the basis that (i) they did not form part of a continuing act which lasted until 12 July 2021 (ii) were presented out of time, and (iii) it is not just and equitable for the Tribunal to extend time to allow those two complaints to be presented out of time.

3. Although the Respondents denied the merits of the Claimant's third complaint against the BBC (based on the conduct of a Mr. Mitchell, who considered the Claimant's grievance complaint submitted on 21 December 2020 and dismissed it by an outcome letter dated 12 July 2021), the Respondents accept this complaint has been presented in time. The Respondents have not applied to have this claim struck out, accordingly there will be a final merits hearing in respect of the third complaint regardless of the outcome of the Open Preliminary Hearing.

Open Preliminary Hearing

4. By para. 11 of the CMO, the Tribunal listed an Open Preliminary Hearing (**OPH**) on 7 May 2022 to consider the Respondents' application to strike out under Rule 37(1)(a) (no reasonable prospects of success - jurisdiction/time) the claims set out at paras. 5 (1st Respondent's comments on 14 August 2020) and 7 (2nd Respondent's comments on 6 August 2020) of the Grounds of Claim [28-31].
5. The OPH was held on 9 May 2022. The Claimant acted in person. The Respondents were represented by counsel. The Respondent relied on a 202-page PDF bundle (references herein in square brackets are to the relevant page of that bundle). The Claimant said the Respondents' bundle did not include all the documents he wanted to refer to, but did not provide a bundle of his own. At the Tribunal's request, after the OPH was over the Respondents' solicitors forwarded two documents to the Tribunal which the Tribunal wanted to review before making certain factual findings. The Claimant confirmed in email correspondence that the two documents forwarded were genuine. The Claimant prepared written submissions for the OPH, the Respondents relied upon a skeleton argument. Both the Claimant and the Respondent's counsel also made oral submissions. The Tribunal reserved judgment because it required sight of the two documents before deciding the application.
6. At the OPH, the Claimant made repeated criticisms of the candour and honesty of the Respondents' legal representatives, including the conduct of the Respondents' counsel at the OPH. For the avoidance of doubt, the Tribunal is satisfied that these criticisms are wholly without merit.

Background findings of fact

7. The Tribunal makes the following findings of fact, including any contained in its Discussion/Conclusions section, on the balance of probabilities.
8. In September 2012, the Claimant joined the BBC as a journalist in the BBC World Service – Arabic Service. He is of Algerian national origin and/or ethnicity, and speaks fluent English and Arabic. It is possible – the Tribunal puts it no higher than

that at this stage – that the Claimant may speak Arabic with an Algerian dialect.

9. On 9 July 2019, a staff meeting in the BBC World Service division was held following a recent staff survey. The Claimant was in attendance, and spoke at that meeting.
10. By letter dated 12 July 2019, a Mr. S. Farah (Head of Journalism) wrote to the Claimant raising concerns about his conduct at the 9 July 2019 staff meeting.
11. On 13 July 2019, the Claimant sent a message to Mr. Farah which made complaints about Mr. M. Kadhum (the Claimant's line manager) and Mr. M. Yehia (Mr. Kadhum's line manager).
12. On about 19 July 2019, the Claimant submitted a formal grievance complaint about the conduct of Mr. Kadhum and Mr. Yehia.
13. On a date unknown in 2019, a Mr. M. Finn (Senior HR Adviser, Support at Work) was appointed to investigate the concerns Mr. Farah had raised about the Claimant's conduct at the 9 July 2019 staff meeting.
14. On a date unknown, an HR Business Partner was appointed to investigate the Claimant's grievance complaint about Mr. Kadhum and Mr. Yehia.
15. On 6 August 2020, Mr. Finn conducted an interview with the 2nd Respondent (Ms. Hasan) concerning the Claimant's conduct at the 9 July 2019 staff meeting. A note of the interview was prepared [90-94], which notes her saying (amongst other things) (i) the Claimant usually gets angry often and quickly in meetings (ii) the Claimant raised his voice towards Mr. Kadhum and Mr. Yehia (iii) the Claimant behaved improperly at the 9 July 2019 staff meeting (iv) the Claimant had complained about discrimination after a colleague had asked the Claimant to speak formal Arabic as not all Arab speakers can speak Algerian Arabic.
16. On 10 August 2020, Mr. Finn conducted an interview with the Claimant concerning his conduct at the 9 July 2019 staff meeting.
17. On 14 August 2020, Mr. Finn conducted an interview with the 1st Respondent (Mr. Jibara) concerning the Claimant's conduct at the 9 July 2019 staff meeting. A note of the interview was prepared [95-99], which (amongst other things) records the following exchange:

MF: *How would you describe AR's relationship with the management?*

SJ: *There's a lot of background between him and the management. He has an attitude towards them. Before that we have to mention AR's character and the fact he is from Algeria. There is a violence behind it [the way he speaks], a Bedouin character. He always shouts when he tries to give his opinion, he comes across as sharp. He can't explain himself in a mild way. He always shouts and is nervous. This belongs to his character and his cultural character.*

18. On 20 August 2020, Mr. Finn concluded his investigation. His Investigation Report recommended that the Claimant undergo a formal disciplinary review regarding (i) his conduct at the 9 July 2019 staff meeting (ii) his conduct/comments at his investigatory interview on 10 August 2020.
19. Under cover of an email sent on 11 November 2020 [100], the Claimant was sent a copy of Mr. Finn's 'Investigation Report'. The Tribunal accepts the Claimant's case that he was not given a copy of the notes of the August 2020 interviews of the 1st and 2nd Respondents at this point in time.
20. On 20 November 2020, the Claimant attended a disciplinary meeting chaired by a Mr. J. Dodds (Commissioning Executive).
21. By letter dated 18 December 2020, Mr. Dodds notified the Claimant of the outcome of the 20 November 2020 disciplinary hearing. The Claimant was given a Final Written Warnings for the comments he was found to have made at the 9 July 2019 staff meeting.
22. It was at this point in time – 18 December 2020 - that the Claimant first saw a copy of the August 2020 interview notes of the 1st and 2nd Respondents, and became aware of what they had said about him during their interviews.
23. On 21 December 2020, the Claimant appealed against the Final Written Warning Mr. Dodds had given him. In his appeal, the Claimant also complained about what the 1st and 2nd Respondents had said about him in their August 2020 interviews.
24. There then followed an unfortunate period in which the person assigned to hear the Claimant's appeal and new grievance complaint changed over time. The first person assigned to hear and decide those two matters was a Mr. A. Moser (Programme Manager, Programme and Portfolio Management). On 4 February 2021, the Claimant attended a meeting with Mr. Moser. Mr. Moser was ultimately replaced by a Mr. J. Mitchell (Principal R&D Engineer).
25. On 22 February and 19 April 2021, Mr. Mitchell attended a meeting with the Claimant.
26. By an outcome letter dated 12 July 2021 [103-120], forwarded under cover of an email on 12 July 2021 [102], Mr. Mitchell notified the Claimant that he did not uphold the Claimant's grievances against the 1st and 2nd Respondents based on their comments at their August 2020 interviews. Mr. Mitchell's letter informed the Claimant of his right to appeal against that decision [120].
27. Mr. Mitchell rejected the Claimant's grievance concerning the 1st Respondent's comments [116-118] on the grounds that although he found his comments unacceptable ("*I can see why this statement may have been upsetting for you to read and I absolutely agree that these comments are not acceptable.*"), Mr. Mitchell accepted the 1st Respondent's case that he had not meant those comments in a harmful or malicious way, and had used incorrect, unacceptable language in an attempt to explain cultural and background aspects.

28. Mr. Mitchell rejected the Claimant's grievance concerning the 2nd Respondent's comments [118] on the grounds that he was satisfied with her responses and her reflection on the language she had used in her 6 August 2020 fact-finding interview meeting.
29. By a separate letter dated 12 July 2021, Mr. Mitchell informed the Claimant that his appeal against the Final Written Warning had been unsuccessful (although one of the grounds for that sanction was no longer upheld after new evidence came to light).
30. By email on 12 July 2021, the Claimant submitted an appeal against Mr. Mitchell's rejection of his grievance complaints concerning the 1st and 2nd Respondents.
31. On 10 August 2021, the Claimant attended an appeal meeting, chaired by Ms. Steph Marshall (Head of Journalism). Ms. Marshall was accompanied by Ms. Kerstie Skeaping, from the BBC's panel of 'External Experts'. The Claimant was accompanied by a union representative.
32. On 10 August 2021, the Claimant contacted ACAS regarding a potential claim against the 1st Respondent [2]. On 11 August 2021, the Claimant contacted ACAS regarding a potential claim against the 2nd Respondent [3]. On 31 August 2021, the Claimant contacted ACAS regarding a claim against the 3rd Respondent [1].
33. On 19 October 2021, the Claimant presented his two ET1s [4-15, 16-27] and Grounds of Claim [28-31]. As part of his wider case, the Claimant alleged in one of his ET1s: "*I have been harassed and intimidated for years by two editors and their clique for years. They have made racist comments towards me and threatened me. They have also filed a series of false claims against in order to dismiss me. This all started after I filed a claim for favouritism in the employment tribunal 4 years ago. The BBC has done nothing to protect me from intimidation and racial abuse.*" [9]. For the avoidance of doubt, in the index proceedings the Claimant did not originally bring a 'victimisation' complaint under s.27 of the Equality Act 2010 (**EqA 2010**) or a 'whistleblowing' complaint under s.47B of the Employment Rights Act 1996.
34. By letter dated 8 December 2021, Ms. Marshall (on behalf of herself and Ms. Skeaping) upheld only one point of appeal (it would have been preferable for additional witnesses to have been spoken to at the first stage of his grievance). Mr. Mitchell's rejection of the Claimant's grievances concerning the 1st and 2nd Respondent's August 2020 interview comments was not disturbed on appeal.
35. It is relevant to note that by letter dated 25 February 2022 [132], the Claimant was required to attend a disciplinary meeting on 7 May 2022 to answer an allegation that on 7 May 2021 he had been absent without notification during his night shift. The Claimant was sent an email about this alleged non-notification on 14 May 2021 [123]. The Tribunal notes here that Mr. Mitchell appears to have had no involvement in the incident on 7 May 2021 nor any involvement in the process which led the 3rd Respondent to require the Claimant to attend this disciplinary hearing. The Claimant made no allegation to that effect at the OPH. The Claimant relies upon this as further evidence of a campaign of harassment and intimidation against him.

Medical evidence

36. As part of his case, the Claimant adduced the following medical evidence:

- a. Emergency Department discharge summary dated 13 December 2019 [134-135];
- b. Emergency Department discharge summary dated 31 March 2020 [136-137], which noted Claimant had 1 week history of dry cough, intermittent fever/dizziness;
- c. GP letter dated 9 February 2022 [incomplete] [138], which notes that Claimant had numerous GP encounters over past 5 years with issues related to work-related stress; noted stress causing him abdominal pain, gastroesophageal reflux symptoms; possible Covid symptoms/diagnosis in March 2020;
- d. various medical notes [139-146];
- e. medical assessment in March 2022 [147].

Relevant statute law / procedure

37. Rule 37(1)(a) of the Employment Tribunal Rules of Procedure provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim on the ground that it has no reasonable prospect of success. Rule 37(2) provides that a claim may not be struck out unless the party in question has been given a reasonable opportunity to make representations either in writing or, if requested by the party, at a hearing.

38. Section 123 of EqA 2010 provides:

123 Time limits

- (1) **[F1 Subject to [F2[F3 section] 140B]]** proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
 - (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Continuing act

39. The question of whether there is conduct extending over a period of time rather than a distinct succession of unconnected or isolated acts requires a focus on the substance of the Claimant's case. Commissioner of Police of the Metropolis v Hendricks [2003] ICR 530, CA.

40. The test to be applied is whether the claimant has a reasonably arguable basis for contending that the complaints are so linked as to be continuing acts or to constitute

an ongoing state of affairs. Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ. 1548, CA.

Discretion to extend time on just and equitable grounds

41. The burden rests on the claimant to persuade the Tribunal to exercise its discretion to extend time to present a complaint on just and equitable grounds. There is no presumption a Tribunal will do unless it can justify a failure to do so. The exercise of the discretion is the exception, not the rule, but that is not to say that exceptional circumstances are required. Robertson v Bexley Community Centre [2003] IRLR 434, CA at para. 25.
42. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640, [2018] IRLR 1050, Leggatt LJ said (at [18]–[19]):

"...it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike s 33 of the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in s 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220, para [33]. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under s 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2008] EWCA Civ 374, [2009] 1 WLR 728, paras [30]–[32], [43], [48]; and Rabone v Pennine Care NHS Trust [2012] UKSC 2, [2012] 2 All ER 381, para [75]. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."

43. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, Underhill LJ stated:

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

44. Where a claim to the Tribunal is delayed while an employee pursues an internal appeal, that may result in a claim being presented out of time. In Aniaqwu v London

Borough of Hackney and Owens [1999] IRLR 303, the EAT held that this justified an out-of-time claim. The EAT used language suggestive of a new principle limiting the generally wide discretion enjoyed by Tribunals to deal with late applications, so that delays for this reason should always be excused.

45. In Islington London Borough v Dean EAT/594/97 (1 Dec 1999), Charles J observed that key features of Aniagwu were that the claimant had taken a conscious decision to delay the initiation of legal proceedings to allow internal processes to run their course, and that the employer had been made aware of that decision. It does not follow that in every case a delay caused by internal procedures will provide an excuse for being out of time. In Robinson v Post Office [2000] IRLR 804, EAT, it was said that Aniagwu did not establish what was termed 'a proposition of broad applicability'. In Apelogun-Gabriels v London Borough of Lambeth [2001] EWCA Civ 1853, [2002] IRLR 116, the Court of Appeal confirmed this is the correct approach. Thus just because an internal process is unexhausted, delay to await its outcome will not always excuse an otherwise out of time claim - this is a factor, nothing more.

Issues

46. The issues the Respondent's strike out application gives rise to are three-fold:
47. First, does the Claimant have a reasonable prospect of showing that the conduct underlying his first two complaints – the 1st Respondent's comments during his interview on 14 August 2020, the 2nd Respondent's comments during her interview on 6 August 2020 - extended over a period of time ending on 12 July 2021 such that those two complaints were presented in time (it being common ground that a complaint in respect of conduct which occurred on 12 July 2021 was presented in time)?
48. Second, if not, does the Claimant have a reasonable prospect of showing that his complaints about the comments which were made on 6 and 14 August 2020 were presented in time?
49. Third, if not, were either of those complaints presented within such other period as the Tribunal thinks just and equitable?

Discussion / Conclusions

50. First, the Tribunal is satisfied that the Claimant has no reasonable prospect of showing that the conduct underlying his first two complaints – the 1st Respondent's comments during his interview on 14 August 2020, the 2nd Respondent's comments during her interview on 6 August 2020 - extended over a period of time ending on 12 July 2021 when Mr. Mitchell wrote to him notifying him that he was rejecting the Claimant's grievance about those comments.
51. The Tribunal accepts the Respondents' submission that the acts of the 1st Respondent on 14 August 2020 (comments about the Claimant during his interview meeting) and the 2nd Respondent on 6 August 2020 (comments about the Claimant during her interview meeting) on the one hand and the act of Mr. Mitchell on 12 July 2021 (a letter rejecting the Claimant's grievance in respect of those

comments) on the other hand formed separate acts for the reasons identified by the Respondents: the acts were done by different people, nearly a year apart in time, and were of a very different nature. Critically, there is no evidence – nor is there any suggestion – that the 1st Respondent or 2nd Respondent had any involvement in Mr. Mitchell's 12 July 2021 decision to reject the Claimant's grievance about their comments. Whether Mr. Mitchell's decision to do so was right or wrong, there is no evidence before the Tribunal, nor was it submitted by the Claimant, that Mr. Mitchell's decision was not made independently of those two individuals.

52. The Tribunal notes that in his submissions, the Claimant did not actually dispute this. The Claimant was at pains to state his case that he has been subject to a longstanding campaign of harassment and intimidation extending over a period of years (he says 6 years) which he says the comments on 6 and 14 August 2020 formed part of. Neither in his oral or written submissions, however, did the Claimant attempt to link Mr. Mitchell to that campaign of harassment and intimidation (*"I have been for 6 years the victim of intimidation, bullying, and harassment by MK and MY assisted by their acolytes including defendants SJ and HH who actively participated in the systematic victimisation campaign."*). On the contrary, when the Tribunal asked him specifically about Mr. Mitchell, the Claimant replied: *"We are not talking about Mr. Mitchell here. I don't know Mr. Mitchell. He doesn't know me. Mr. Mitchell is a different case."* The Tribunal invited the Claimant to focus his submissions on the link/nexus between the 1st and 2nd Respondent's comments in August 2020 and Mr. Mitchell's decision in July 2021 to reject the Claimant's grievance about their comments. In response, the Claimant gave an answer which made no mention at all of Mr. Mitchell or his decision to reject the Claimant's grievance. When asked, the Claimant accepted his ET1s made no allegations about the conduct of the 1st or 2nd Respondent after 18 December 2020. When asked, the Claimant accepted that the statement he had prepared for the OPH did not identify any acts by either the 1st or 2nd Respondent after 18 December 2020. When asked if there was anything relevant in the Respondent's Bundle, the Claimant referred to the 14 May 2021 email at [123], in respect of which he stated: *"This is from the guru – the abuser in chief."* However, this email was neither sent by, or to, Mr. Mitchell, and the email itself makes no reference whatsoever to Mr. Mitchell.
53. Second, the Tribunal is satisfied that the Claimant has no reasonable prospect of showing that his complaint about the comments the 1st Respondent made about him during his interview on 14 August 2020 were presented in time. Applying s.123(1)(a) of EqA 2010, any complaint about the 1st Respondent's comments on 14 August 2020 had to be presented by 13 November 2020 in order to be in time. They were not presented until 19 October 2021, and the Claimant did not contact ACAS in respect of a potential claim against the 1st Respondent until 10 August 2021 – approximately 9 months after the primary 3 month limitation period had expired.
54. Third, the Tribunal is satisfied that the Claimant has no reasonable prospect of showing that his complaint about the comments the 2nd Respondent made about him during her interview on 6 August 2020 were presented in time. Applying s.123(1)(a) of EqA 2010, any complaint about the 2nd Respondent's comments on 6 August 2020 had to be presented by 5 November 2020 to be in time. They were not presented until 19 October 2021, and the Claimant did not contact ACAS in respect of a potential claim against the 2nd Respondent until 11 August 2021 – again,

approximately 9 months after the primary 3 month limitation period had expired.

55. Fourth, even if the 2nd Respondent's comments on 6 August 2020 and the 1st Respondent's comments on 14 August 2020 themselves formed part of one continuing act, that continuing act ended on 14 August 2020, and the Claimant's complaint in respect of same was still presented substantially out of time.
56. Fifth, the Tribunal took into consideration the following in determining whether it was just and equitable to extend time in respect of the two complaints at issue:
- a. 6 August 2020 – 17 December 2020: no fair criticism can be made of the Claimant for not presenting his complaints during this period. He did not know what the 1st Respondent or 2nd Respondent had said about him during their August 2020 interviews any earlier than 18 December 2020. It would have been impossible for him to present an ET1 complaint about those comments in this period;
 - b. 18 – 19 December 2020: after discovering on 18 December 2020 what the 1st and 2nd Respondent had said about him during their interviews, this was a reasonable period of time for the Claimant to take to consider what he was going to do about their comments before taking action;
 - c. 20 December 2020 – 11 July 2021: it was reasonable for the Claimant to seek to resolve his complaints about the 1st and 2nd Respondent's August 2020 comments by trying to address and resolve those complaint through the BBC's internal process first, a process which he initiated on 20 December 2020. He was not required to take this step, but clearly it would have been in everyone's interests, including the Respondents, for that process to have resulted in an outcome sufficiently satisfactory to the Claimant that the need to present an ET1 claim to re-address those complaints was obviated;
 - d. 12 July 2021 – 9 August 2021: the Tribunal finds that the Claimant's delay in beginning the Tribunal process by contacting ACAS in this period is more problematic. By 12 July 2021, the Claimant knew his grievance concerning the 1st and 2nd Respondents' comments had been rejected by Mr. Mitchell. The Claimant would have acted reasonably had he waited until after his appeal against Mr. Mitchell's 12 July 2021 rejection of his grievances had been determined before presenting his ET1 claim. However, the Claimant chose not to do so, and began contacting ACAS on 10 August 2021. If the Claimant was going to start the Tribunal process before concluding his appeal – which is what he in fact did - there is no obvious reason why the Claimant should wait until 10 August 2021 to begin doing so. The Claimant's four week delay after 12 July 2021 is neither particularly long nor particularly short – it is a period of intermediate length;
 - e. Claimant's health/medical condition – the Tribunal was not satisfied, based on the medical evidence before it, that the Claimant's health and medical condition during the period 18 December 2020 – 9 August 2021 provides a satisfactory reason for the Claimant delay until 10 August 2021 in commencing the Tribunal process by contacting ACAS. The Claimant is a

highly intelligent individual, a union member, and was at work for nearly all of this period. The Tribunal concludes that if the Claimant was sufficiently mentally and physically fit and well enough to attend work and do his normal journalistic work during most of this period, he was likely sufficiently mentally and physically fit and well enough to commence the Tribunal process by contacting ACAS as well;

- f. ability to prove occurrence of discriminatory conduct at issue, have a fair trial – the Tribunal was satisfied that it would be possible to have a fair trial in respect of both complaints. There is no material dispute about what the 1st and 2nd Respondents said during their interviews on 6 and 14 August 2020, so the Claimant will have no difficulty establishing to a Tribunal's satisfaction the primary facts at issue here (unless many other discrimination complaints, where the occurrence of the discriminatory conduct at issue may be hotly disputed and very difficult for either side to prove or disprove);
 - g. merits – without conducting any sort of mini-trial, the Tribunal was satisfied that the Claimant's complaint concerning the 1st Respondent's comments is seriously arguable – Mr. Mitchell himself found the 2nd Respondent's comments about the Claimant during his 14 August 2020 interview unacceptable, and the 2nd Respondent in that interview made a clear, unambiguous reference to the Claimant's ethnicity ("*Bedouin*") when attempting to explain his behaviour;
 - h. merits – again, without conducting a mini-trial, the Tribunal was not satisfied that the Claimant's discrimination complaint concerning the 2nd Respondent's comments at her 6 August 2020 interview enjoys reasonable prospects of success. The 2nd Respondent's comments at that interview [90-94] focus overwhelmingly on how the 2nd Respondent observed the Claimant conducting himself at the 9 July 2019 staff meeting. The 2nd Respondent's comments concerning the Claimant's Algerian ethnic origins are ones she reports to have been said by a colleague of hers, and facially neutral ("*For example, once AR spoke and my colleague said 'can you speak formally' as not all Arabic speakers can speak Algerian Arabic.*").
57. Sixth, taking all of the above into account, the Tribunal concludes that it is just and equitable to extend time to allow the Claimant's complaint concerning the 1st Respondent to be presented out of time but not just and equitable to extend time to allow the Claimant's complaint concerning the 2nd Respondent to be presented out of time. The key factor in the difference in outcome is the Tribunal's judgment as to the likely prospects of success of those two complaints, plus the Claimant's 4 week delay in advancing his complaint against the 2nd Respondent after 12 July 2021.
58. Seventh, given the above, the Claimant's complaint against the 2nd Respondent is struck out under Rule 37(1)(a) (no reasonable prospect of success) because the Tribunal lacks jurisdiction over it.

Signed (electronically): Employment judge - Tinnion

Date of signature: 19 May 2022

Date sent to parties: 23/05/2022