Neutral Citation Number: [2022] EAT 149

Case No: EA-2020-000365-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 4 May 2022

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

CONCENTRIX CVG INTELLIGENT CONTACT LIMITED	**Appellant**
- and -	
MISS D OBI	**Respondent**

- -
- -

Anisa Niaz Dickinson (instructed by iGlobal Law) for the **Appellant**
Adam Ohringer for the **Respondent**

Hearing date: 4 May 2022

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JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE – Extension of Time

The employment tribunal found that the claimant had been sexually harassed by her line manager on three separate occasions. It went on to find that these three incidents amounted together to conduct extending over a period, and accordingly time for presenting a complaint to the tribunal in respect of all of them ran from the date of the last incident. Calculating limitation in that way, these complaints had been presented one day out of time. The tribunal decided it was just and equitable to extend time.

The respondent appealed in respect of the decision to extend time.

Ground 1 contended that, having found that there was no evidence at all as to why the claimant had not presented her claim form sooner than she did, the tribunal was bound to refuse to extend time. This ground failed. **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 considered.

Ground 2 contended that the tribunal had erred in its approach to the question of forensic prejudice to the respondent. This ground succeeded. The tribunal erred by confining its consideration of that question to whether any such prejudice had been occasioned by the complaints being one day out of time, and by failing to take into account its own earlier findings about forensic prejudice when determining a complaint of racial harassment relating to one of the three incidents found to amount to sexual harassment. **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 considered.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. I will refer to the parties as they were in the employment tribunal as claimant and respondent. This is the respondent's appeal in respect of one aspect of a decision arising from a full merits hearing in March 2020 at Manchester before Employment Judge Phil Allen, Mrs D Radcliffe and Mr A J Gill.

2. This appeal concerns three complaints, of conduct amounting to harassment relating to sex, that, subject to being out of time, the tribunal found to be well-founded. Having determined the merits, the tribunal then decided first that these incidents together amounted to conduct extending over a period within the meaning of section 123(3)(a) **Equality Act 2010**, so that time for presenting a complaint in respect of all of them was to be treated as running from the date of the most recent of them. Even on that basis, however, the complaints were one day out of time. But the tribunal then decided, secondly, that it was just and equitable to extend time in accordance with section 123(1)(b).

3. The live grounds of appeal before me solely concern the tribunal's decision on the just and equitable extension point.

4. At the outset I note that section 26 of the **2010 Act** proscribes, among other things, harassment by way of unwanted conduct related to sex or by way of unwanted conduct of a sexual nature, in either case, if it also has the proscribed purpose or effect. In this case the tribunal's formal judgment was that in respect of each of the three episodes, the conduct found amounted to harassment related to sex. There is no live challenge to the conclusion that, one way or another, this conduct on each occasion was contrary to section 26 by reference to being related to sex or of a sexual nature. I will simply use the term "sexual harassment" to refer compendiously to these complaints and to distinguish them from a separate complaint which the tribunal also had to consider, albeit arising from one of the same incidents, which was of unlawful harassment related to race.

5. There were originally three proposed grounds of appeal, two of which were permitted to

proceed at a preliminary hearing by Choudhury P. These were grounds 1 and 2. As expressed in the original Notice of Appeal, the headlines of grounds 1 and 2 were as follows: (1) the claimant provided no reason for lodging her claim late. How could it therefore have been just and equitable to extend time?; (2) further or alternatively, the prejudice to the respondent of that extension of time was not correctly considered. Those headlines grounds were developed in the original grounds of appeal. It is evident that this was further considered and discussed at the preliminary hearing before Choudhury P; and they were further refined in argument for the full hearing of this appeal today.

The Background and the Employment Tribunal's Decision

6. The material background, as found by the employment tribunal, is as follows.

7. The respondent is a provider of outsourced call centre services. The claimant's employment with it began on 2 October 2017, working at a call centre answering customer calls for a particular client. The claimant's line manager from the start of her employment was Jordan Barton. She began ACAS early conciliation on 6 April 2018 which ended with the issue of a certificate on 6 May 2018. She presented a claim form to the employment tribunal on 4 June 2018. She alleged that a number of incidents had occurred on various dates, the earliest of which was in early November 2017 and the most recent of which had been on 3 June 2018. Each incident was said to have involved treatment amounting to sexual harassment, harassment related to race and/or direct discrimination because of race or sex. A number, but not all, of these complaints concerned the alleged conduct of Mr Barton.

8. On 23 June 2018 the claimant was dismissed for the given reason of conduct. This post-dated the presentation of her claim form and in any event the tribunal noted that there was no complaint of harassment or discrimination in relation to the decision to dismiss.

9. In its decision the tribunal found that conduct amounting to sexual harassment had occurred on three occasions, subject to the time point. In summary these were (a) an occasion in early November 2017 when Mr Barton, who was also a personal trainer, made a reference to the claimant's

body, told her that she was his favourite and showed her a photograph of himself in gym shorts; (b) an incident during a briefing later in November 2017 when Mr Barton grabbed the claimant by the waist and, it appears the tribunal found, also said something to the effect that he preferred black girls; and (c) an incident at the post-Christmas party at a nightclub, when he pulled the claimant's waist and told her that she looked sexy. That event began on the evening of 5 January 2018 but the incident occurred in the early hours of 6 January.

10. The issues to be determined at the full merits hearing which had been identified at an earlier preliminary hearing, were set out in the tribunal's reasons. The time point was identified in this way:

> **"Insofar as any of the matters for which the claimant seeks a remedy occurred on or before 6 January 2018, can the claimant show that it formed part of conduct extending over a period which ended after that date? If not, can the claimant show that it will be just and equitable for the Tribunal to allow a longer period for bringing a claim."**

11. At the full merits hearing, the claimant, who today has been represented by Mr Ohringer, represented herself. The respondent has been represented, at that hearing and again today, by Ms Niaz-Dickinson. At that hearing the claimant gave evidence in her own behalf as well as calling other witnesses. The respondent called a number of witnesses, but Mr Barton was not among them. He had left its employment in December 2018.

12. In the course of its findings of fact, the tribunal said this:

> **"81. The claimant is an experienced litigator who has brought claims at the Employment Tribunal before against two previous employers. The claimant accepted in evidence that she knew about Employment Tribunal time limits. There was no evidence before the Tribunal as to why the claimant did not bring a claim earlier than she did, nor was there any evidence that she had sought or received advice about the claims she might have. In answers to questions about delay, the claimant referred to the Tribunal's discretion to extend time in certain circumstances, but provided no particular reason for an extension of time to be granted. The claimant did give evidence that she had suffered ill health since leaving the respondent's employ, but gave no specific evidence about why that ill health explained any delay in proceedings being entered at the Tribunal (particularly during the period when the claimant remained in the respondent's employment)."**

13. In its self-direction as to the law on time limits, the tribunal began with this:

> **"104. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (with the applicable extension arising from ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period."**

14. After directing itself regarding the concept of what the tribunal, as tribunals often do, called a continuing act, but which was plainly referring to what the statute calls "conduct extending over a period", the tribunal's self-direction as to the law continued as follows:

> **"106. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Factors relevant to a just and equitable extension include: the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings); the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed; the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application; the conduct of the claimant over the same period; the length of time by which the application is out of time; the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim; and the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given.**
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> **107. Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434 confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases."**

15. In a concluding section the tribunal considered whether, in light of its findings of fact, each of the complaints was meritorious, subject to time points. At the start of that section, it found that the incident at the briefing in November 2017 amounted to harassment related to race but was, in that respect, a one-off, and the complaint in relation to it was therefore some four months out of time. The tribunal went on to find that it was not just and equitable to extend time in relation to that complaint. The tribunal's decision on the time point in relation to the race discrimination complaint has not been the subject of any challenge before the EAT. I pause to observe that, while the tribunal found that for the purposes of the complaint of harassment relating to race in respect of this particular incident,

it did not form part of conduct extending over a period, even though, as we shall see, it also found that, for the purposes of the complaint of sexual harassment, it did. I have to say that, at any rate on the particular facts of this case, I am not sure that this was the right approach, but as I have said, there is no appeal or cross-appeal in respect of the decision on the time points in relation to the race harassment claim, nor have I heard this particular point argued, and I will say no more about it.

16. Having decided that the act of racial harassment in this incident was a one-off, the tribunal went on to consider whether it was just and equitable to extend time in respect of the complaint about it. Although that part of the decision is not, to repeat, the subject of any challenge before me as such, the reasoning is relevant to the matters that I have to consider to resolve the live grounds of appeal.

17. In that respect the tribunal said this at [118]:

> **"The claimant was an experienced litigator who had brought claims at the Employment Tribunal before, as confirmed in paragraph 81. The claimant accepted in evidence that she knew about Employment Tribunal time limits. There is no evidence before the Employment Tribunal as to why the claimant could not, or did not, present her claim earlier. The claimant did raise a grievance, but chose not to enter a Tribunal claim when she did so. Time limits are important and this claim was entered well outside the relevant period. There is some prejudice to the respondent, as a number of employees have left its employ who might have given evidence, including Mr Barton (in December 2018), albeit it is unclear to what extent the delay in claiming contributed to their not being able to give evidence. The memories of witnesses in any event fade over time. Whilst the impact of not extending time on the claimant is significant in that she is unable to succeed in this complaint that is out of time, on the basis that time limits are important and are there for a good reason the Tribunal concludes that it is not just and equitable to extend time for this claim to be heard. Accordingly, the Tribunal does not have jurisdiction to determine this claim."**

18. I interpose that the reference there to the claimant having raised a grievance was to the tribunal's earlier finding that she raised a formal internal grievance at some point in February 2018 which included reference to all three of the alleged incidents in relation to which her tribunal claims of sexual harassment ultimately succeeded.

19. The tribunal went on to find the complaints of sexual harassment in relation to the incidents

with which this appeal is concerned which, in terms of the factual allegations unpinning them, were referred to as "POC2, POC3 and POC7", were well-founded on their merits, subject to the time point. Other complaints of harassment or direct discrimination failed on their merits or fell to be dismissed as direct discrimination complaints, because they related to conduct amounting to harassment.

20. The tribunal then went on to find that the conduct to which the three meritorious complaints of sexual harassment related, together amounted to conduct extending over a period. Accordingly, for the purposes of limitation, time ran from the date of the most recent of them: 6 January 2018. As I have noted, it had been agreed and recorded in the list of issues that any complaint which related to a matter which occurred on or before 6 January 2018 was out of time. Accordingly, the complaints relating to these three incidents had been presented one day out of time. There was no challenge to that part of the decision on the limitation issues.

21. The tribunal then continued:

> **"152. The relevant findings of fact are at paragraph 81, and the relevant factors as they applied to POC3 (and harassment on the grounds of race) have already been outlined at paragraph 118. The claimant was an experienced litigator who had brought claims at the Employment Tribunal before and knew about Employment Tribunal time limits. There is no evidence before the Employment Tribunal as to why the claimant could not, or did not, present her claim in time. Time limits are important. However, in respect of the continuing acts of sexual harassment concluding with POC7, the claim was only entered one day outside of the time required. The claim being entered one day late did not cause any genuine prejudice to the respondent, whereas if the extension of time is not granted the claimant will not be able to receive an outcome or remedy at all for the harassment alleged. Accordingly, the Tribunal has determined that it is just and equitable to extend time by the one day required to enable the claims to be determined in accordance with section 123(1)(b) of the Equality Act 2010."**

22. It is, as I have noted, the reasoning and conclusion on the just and equitable extension issue that is the subject of the two grounds of appeal.

The Arguments

23. I had the benefit of written skeletons and extensive oral argument and discussion from both

counsel before me this morning, and I was referred to a sizeable bundle of authorities. As I have indicated, the arguments were developed, refined and focused, both in the skeletons and then during the course of the hearing this morning.

24. I will focus on what seem to me to have been the most significant arguments on each side.

25. Ms Niaz-Dickinson accepted that authorities such as **Robertson v Bexley Community Centre** [2003] EWCA Civ 576, [2003] IRLR 434, as well as other authorities, establish that the discretion to extend time on a just and equitable basis is a broad and flexible one and that the EAT can only interfere with the exercise of such a discretion where the tribunal has erred in law or principle. However, in relation to ground 1, she submitted that the length of, and reasons for, a claimant's delay in presenting her claim to the employment tribunal will, almost always, be relevant considerations. This has been said in a number of authorities, such as, recently, **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194.

26. She also submitted that it is established by the authorities including **Morgan** that a tribunal will therefore err if it fails to give any consideration to the question of what appears on the evidence before it to have been the reason for the delay in the given case. She went further and submitted that if, on a consideration of all of the evidence before it, whether from the claimant herself or otherwise, no reason for the delay can be found in the evidence, then in such a case it cannot be just and equitable to extend time, and the tribunal would err in law if it did so.

27. Whether that is a correct statement of the law has been considered over the years in a number of authorities of the EAT. I was referred to some of these which were in my bundle and which in turn refer to others. The ones in my bundle were **Szmidt v AC Produce Imports Limited**, UKEAT/0291/14, which also refers to **Pathan v South London Islamic Centre** UKEAT/0312/13, **Habinteg Housing Association Limited v Holleron**, UKEAT/0274/14, which refers to **Outokumpu Stainless Ltd v Law**, UKEAT/0199/07, **Rathakrishnan v Pizza Express (Restaurants) Limited**

[2016] ICR 283 and **Edomobi v La Retraite RC Girls School**, UKEAT/0180/16.

28. It suffices for the present to say that Ms Niaz-Dickinson accepted that some of these authorities were for her on this point and some were against her. She submitted that in these circumstances I had to decide which line of authority to follow. She submitted that, as a matter of principle, the right answer, and the authorities that I should follow, were those which indicated that if there is no explanation at all to be found from any source in the evidence before the employment tribunal, as to the reason for the delay in presenting the claim, then a just and equitable extension should be refused and it would be an error to extend time.

29. As we shall see, Mr Ohringer in his submissions also agreed that some of the EAT decisions went one way and some the other, although in relation to at least one of them, he and Ms Niaz-Dickinson disagreed as to which side of the argument it came down on. But his case was that none of that mattered any longer, because the question had now been authoritatively determined by the Court of Appeal in **Morgan**.

30. Ms Niaz-Dickinson, however, submitted that, on a careful reading, it could be seen that the issue that had to be decided in **Morgan** was a narrower one, namely whether, if the claimant did not herself specifically give any evidence as to the reason for delay, that by itself necessarily meant that the tribunal could not extend time. She submitted that the answer to that question given in **Morgan** was that this did not necessarily follow as a matter of law in such a case, because the tribunal might find that there was a reason emerging from all of the evidence before it, even if it had not been articulated in evidence by the claimant; and if it could identify such a reason from all of the evidence, it could then put that into the balance in favour of an extension of time. That, she said, was indeed what had happened in the **Morgan** case, when, following an initial appeal to the EAT, it had been remitted to the tribunal for a second time, before that second decision was itself the subject of a further appeal which found its way to the Court of Appeal.

31. Ms Niaz-Dickinson submitted that **Morgan** did not actually decide either way whether, if a tribunal could find *nothing* in the evidence to explain the delay, it would necessarily be bound to conclude that time should not be extended, although she submitted that a straw in her favour was the observation at [19] that factors which are almost always relevant to consider when exercising any discretion whether to extend time are (a) the length of and (b) the reasons for, the delay. That analysis of **Morgan**, she submitted, left me in the position of being able to decide which of the conflicting lines of authority in the EAT I should follow. As I have said, her submission was that in principle, if there is no explanation for the delay to be found in *any* of the evidence available to the tribunal, then it would be an error to extend time.

32. Turning to the present case, Ms Niaz-Dickinson said that she accepted, having regard to the various findings to which I have referred, that the present tribunal did consider whether there was any evidence at all to explain why the claimant had not presented these claims sooner than she did. It did not make the error of confining its consideration only to the evidence that she herself gave. However, it correctly concluded that there was no such evidence at all. Its error, she submitted, was in failing then to treat that as conclusively meaning that no extension of time could be granted.

33. In relation to ground 2, as this evolved and came into focus, Ms Niaz-Dickinson's principal submissions were, it seemed to me, in summary as follows.

34. First, it was significant that in a case such as the present, though time ran from the date of the last of the three incidents that together formed conduct extending over a period, nevertheless in fact the factual enquiry required of the tribunal would extend back in time as far as the actual real time date of the very earliest of those incidents.

35. In such a case it would be an error for the tribunal, when deciding whether it was just and equitable to extend time, and when considering the question of forensic prejudice to the respondent, to confine its consideration to the impact of the claim only being in this case late by one day, by

reference to when, as a matter of law, time began to run. Rather, she submitted, once the claim was late, so that the claimant was dependent on a just and equitable extension of time, forensic prejudice to the respondent, were time to be extended, had to be considered by reference to the actual prejudice that it was liable to suffer, in view of when the events in question had actually in real time occurred.

36. In the present case, she submitted, the tribunal had erred because it had confined its consideration at [152] to the question of whether there had been any forensic prejudice caused by the claim being formally presented just one day out of time, and concluded that there was none. Had it, as it should have done, considered whether there was forensic prejudice to the respondent in having to defend the sexual harassment complaints in relation to the three incidents, it would have been bound, in light of its earlier findings, in particular at [118], to conclude otherwise. Specifically, at [118] the tribunal had concluded that there was forensic prejudice to the respondent in being required to defend the race harassment claim in relation to incident POC3, because of the unavailability of witnesses, including Mr Barton, and the fading of memories over time. Since this was factually precisely the same incident that gave rise to the complaint of sex harassment by reference to POC3, had it approached the matter properly, the tribunal would have been bound to conclude that there was forensic prejudice to the respondent in being obliged to answer to that complaint in respect of that same incident as well, and should have weighed it in the balance.

37. Further, since the incident alleged at POC2 happened no later than POC3, albeit perhaps only a few days earlier, and since the tribunal at [118] had considered that fading memories and the absence of Mr Barton, and possibly others, were an issue in relation to POC3, it would have been bound, consistently, to conclude that this was a factor in relation to POC2 in the context of the sexual harassment complaints, which also fell to be weighed in the balance.

38. Ms Niaz-Dickinson also submitted that this line of argument held good in relation to POC7, notwithstanding that it happened more recently in point of time than POC3, given the tribunal's finding in [118] at least that the respondent was at a disadvantage because Mr Barton had left its

employment and, for whatever reason, it was not able to call him to give evidence.

39. Accordingly, she submitted, the tribunal erred by not taking these aspects of forensic prejudice into account and weighing them in the balance.

40. For the claimant, Mr Ohringer emphasised that the authorities establish that the discretion to extend time on a just and equitable basis is very broad. Further, as recent decisions have emphasised, most recently that of the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, which refers in turn to the discussion in a number of earlier authorities, there is no checklist of necessarily relevant or irrelevant factors and it is for the tribunal in every case to determine which are the particular relevant factors on either side of the scale in that case. It will not err unless it takes account of a patently irrelevant factor or fails to take account of a patently relevant factor in the given case, or otherwise makes some error of law or principle.

41. In relation to ground 1 Mr Ohringer, as I have indicated, submitted that the Court of Appeal's decision in **Morgan**, properly read, established that where a tribunal finds that there is no explanation forthcoming from the evidence at all for why the claim has been presented late, it does not necessarily follow that it will therefore be an error of law to extend time. It is simply a matter which may be taken into account, but is not by itself necessarily decisive, though he accepted that the tribunal would err if it failed to consider the question at all.

42. In the present case, he submitted, the present tribunal, as indeed Ms Niaz-Dickinson acknowledged, did, as such, consider and take into account its finding that there was no explanation apparent from the evidence, for the reason why the sexual harassment claims had not been presented sooner. Where he differed from Ms Niaz-Dickinson was on the question of whether, as a matter of law, that meant the tribunal was wrong nevertheless to grant a just and equitable extension.

43. In relation to ground 2 Mr Ohringer submitted that the tribunal properly considered the relative prejudice to the parties if it either did or did not extend time. As explained in **Miller v**

Ministry of Justice UKEAT/0003/15, referring to the earlier discussion in **DCA v Jones** [2007] EWCA Civ 894; [2007] IRLR 128, the fact that, if time is not extended, a claimant will be unable to pursue a complaint that might be meritorious, and, if it is, a respondent will be obliged to defend and be on risk of losing in respect of, a complaint that it would not otherwise have had to defend, are always customarily relevant; and this tribunal was plainly alive to that. But what was particularly relevant in this case, above and beyond that, was the issue of whether there was any forensic prejudice to the respondent if time were extended. In this case the tribunal had considered both aspects and what weight it placed on these features was a matter for it, with which the EAT could not interfere.

44. Mr Ohringer accepted that in a case where the tribunal will need, in order to resolve a complaint or complaints, to look at events historically going further back in time than the date on which the cause of action formally arises, then it would be an error for the tribunal not to consider at all the forensic prejudice that a respondent might suffer by having to deal with events in reality going back in point of time in that way.

45. In **Adedeji** it had been held that when considering a complaint of constructive discriminatory dismissal which was late, it was not an error for the tribunal to take into account that, although the complaint was formally late only by a few days from when the cause of action arose, adjudication of it would require the tribunal to consider events going back earlier in time, which were said to have contributed to the constructive discriminatory dismissal when the claimant in that case resigned.

46. Mr Ohringer accepted that, in a case such as the present, where the tribunal was considering acts of harassment which in factual reality had occurred earlier than the date of the last act which gave rise to the date on which limitation began to run, it would have been an error for the tribunal not to give some consideration to the forensic prejudice to the respondent, of having to deal with factual disputes about events which had occurred earlier in reality in point of time. But he submitted that in this case it could be inferred that the tribunal had *not* failed to give consideration to that aspect, and to weigh it in the balance. That was because at [152] it referred back to its findings of fact at [81] and

the relevant factors already outlined at [118], before developing its consideration of other factors relevant to the balancing exercise in relation to the sexual harassment claims.

47. The tribunal had therefore taken on board its earlier findings at [118], about the forensic difficulties that the respondent faced in relation to the factual dispute about POC3, and by inference POC2. But it went on, he submitted, to find that in relation to these complaints, those were outweighed by the fact that they were formally only one day late, a consideration that the tribunal was properly entitled also to weigh in the balance. Indeed, submitted Mr Ohringer, in referring to the continuing acts of sexual harassment, concluding with POC7, the tribunal could be read as considering that a further factor in favour of extending time was the continuing and more serious nature of these three acts of sex discrimination together constituting continuing treatment, when compared with the one-off act of race discrimination.

48. In all events, he concluded, the tribunal had taken all relevant factors into consideration and had properly weighed them up in a way that the EAT could not disturb.

Discussion and Conclusions

49. I do not need to analyse case by case the various authorities of the EAT on the question of whether, if the tribunal cannot discern any reason at all from any of the evidence as to why a claim has been presented late, it is or is not thereupon bound to conclude that time cannot be extended. Both counsel rightly accept that some EAT authorities clearly point one way and some the other, and in those circumstances the prior authorities of the EAT as a body do not tie my hands on this point. Although the EAT customarily follows its own previous decisions, that is simply not wholly possible when there are conflicting previous decisions as there are here, and a choice has to be made.

50. Without any assistance or guidance from the Court of Appeal, I would unhesitatingly hold that such a conclusion does not as a matter of law mean that a just and equitable extension must be refused in every case, and that it would necessarily always be an error to extend time. In fact, I

consider that that view is supported by the most recent decisions of the Court of Appeal.

51. **Morgan** concerned litigation which, from the brief references to it I have already made, it can be appreciated had a long-running and complex background. As the Court of Appeal describes, an initial decision of the employment tribunal, which included a decision that it was just and equitable to extend time in relation to certain complaints of failure to comply with the duty of reasonable adjustment, was the subject of an appeal to the EAT heard by Langstaff J. As described by the Court of Appeal, at [5], one error that he identified was that the first employment tribunal "**had failed to consider each claim separately, had not identified or taken account of the reasons why the claimant had failed to bring each claim in time or sooner than she did**". On remission, the tribunal again found that it was just and equitable to extend time and HHJ Shanks dismissed an appeal. That decision was in turn the subject of the further appeal to the Court of Appeal.

52. In its discussion of the general principles of law, Leggatt LJ (as he then was), with whom Bean LJ agreed, said at [18]:

> **"First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in 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 section 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] ICR 800, 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 section 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 AC 72, para 75."**

53. The court went on to say at [19]:

> **"That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh)."**

54. At [20], the court said in part that the EAT should only disturb the tribunal's decision if it has erred in principle:

> **"… for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant – or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable …"**

55. Pausing there, these broad statements as to the law do not, in my view, support the adoption of a different approach in a case where the tribunal has found that there is no evidence at all as to why a claim was not presented sooner, by way of singling out that as a factor which must necessarily in every case lead to an extension being refused. Nor does the description, at [5] of the Court of Appeal's decision, of the error that was identified by Langstaff J in the first appeal to the EAT, suggest at that point that the court thought that this was a distinction of significance.

56. Ms Niaz-Dickinson, however, relies on the discussion that follows in **Morgan**, of what happened in that particular case, and the grounds of challenge in that case. At [21] the Court noted that the first tribunal had not addressed the question of why the claimant had not begun proceedings sooner than she did. It noted there that there was no direct evidence from the claimant on that point, but when the issue was remitted, the tribunal in its second judgment attached weight to evidence of her ill-health and other matters that it found were preoccupying her during the relevant period.

57. Leggatt LJ then said the following:

> **"24. The Board's argument is that the employment tribunal misdirected itself by "failing to place a burden" upon the claimant to satisfy the tribunal that it was just and equitable to extend time in her favour. The Board's submissions in support of these grounds made it clear that the reference in this context to a "burden" upon the claimant was not**

> **to a burden of proof but to the need to satisfy the tribunal that it was just and equitable to extend time. This appeared to be conflated in the Board's skeleton argument with an alleged requirement to satisfy the tribunal that there was a good reason for the failure to bring the claim in time. The thrust of Mr Allsop's argument was that, in the absence of an explanation from the claimant as to why she did not bring her claim in time and an evidential basis for that explanation, the tribunal could not properly conclude that it was just and equitable to extend time.**
>
> **25. I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act to the employment tribunal to decide what it "thinks just and equitable" is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. The most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard. Nor do I consider that the original decision of the EAT went any further than that. The error identified by Langstaff J, as I read his judgment, was that the tribunal had failed to give any consideration at all to the reason for the delay in bringing the claim and had therefore failed to have regard to a relevant factor. I agree, however, with HHJ Shanks in his judgment given on the second EAT appeal that Langstaff J was not 'intending to suggest that if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is *obliged* to infer that there was no acceptable reason for the delay, or even that if there was no acceptable reason that would inevitably mean that time should not be extended.**
>
> **26. It is plain that in its second judgment the employment tribunal did give consideration to the reasons why the claimant had not commenced proceedings until March 2012. The identification of those reasons and the weight to be given to them were matters for the tribunal. There was no requirement that it 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."**

58. Ms Niaz-Dickinson submitted that the focus of challenge rejected by the Court of Appeal in **Morgan** was that the tribunal in that case had erred by not deciding not to extend time, once it had found that there was no reason or explanation forthcoming *from the claimant*. In rejecting that argument, Leggatt LJ was making the point that the tribunal had to consider *all* of the evidence; but he did not find that if, having considered all the evidence, it still found no reason at all for the delay, it would still be open to the tribunal to extend time. He did not need to go that far, because he found that, second time around, the tribunal did, on a wider consideration, find *some* evidence of the reason

why the claim had not been presented sooner, which it then properly relied upon.

59. As to that, although Ms Niaz-Dickinson is right that the focus of the challenge in **Morgan**, and therefore some of the language used at [24] to [26], was on whether the tribunal had erred in its approach to the fact that there was no evidence from the claimant herself on this point, nevertheless there are also observations in this passage about the position more generally, and what may be the implications of a case in which there is found to be no explanation in the evidence *at all* for the delay. Though they may be argued to be strictly *obiter*, they command attention.

60. In particular, although parts of this passage refer to the absence of any explanation of the delay from the claimant, Leggatt LJ also says at [25]: **"The most that can be said is that, whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard."** That is a more general proposition. Further, Leggatt LJ at [25] approves HHJ Shanks' analysis in the EAT of what Langstaff J had meant in *his* decision. That includes that Langstaff J was not merely **"not intending to suggest that if a claimant gives no direct evidence about why she did not bring her claims sooner a tribunal is obliged to infer that there was no acceptable reason for the delay"** but also that he was not intending to suggest "**that if there was no acceptable reason that would inevitably mean that time should not be extended**". Again, that is a broader statement of principle.

61. Even if these remarks were strictly *obiter*, I consider that what was said in **Morgan** at [5] about the Langstaff J decision, in the general discussion of the law at [18] and [19] and overall in the discussion at [24] to [26], supports the principle that appears to me to be the right one to apply. I also do not think that what is said at [19] indicates otherwise. The statement that it is almost always relevant to consider the length of, and reasons for, the delay, is unsurprising; and, indeed, I am not sure that anyone has yet been able to come up with an example of a case in which it would be immediately obvious that this was wholly irrelevant, and did not need to be considered as a potential issue at all. As I have noted, Ms Niaz-Dickinson and Mr Ohringer in fact both agreed that failure to

consider this question at all would be an error. But that is not the same as saying, and nor does this passage in **Morgan** say, that if, upon consideration, no reason is apparent at all from the evidence, then necessarily in every case the extension must, as a matter of law, be refused.

62. I draw further support from the discussion in **Adedeji** in which Underhill LJ deprecates the erroneous approach sometimes taken to the so-called **British Coal Corporation v Keeble** [1997] UKEAT 496/98; [1997] IRLR 336 checklist. At [37] he says:

> **"… rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion …"**

He continues a little further on in the same paragraph:

> **"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."**

63. He goes on to refer to discussion in earlier authorities to the same effect. He cites from the decision of Peter Gibson LJ in **London Borough of Southwark v Afolabi** [2003] EWCA Civ 15; [2003] ICR 800 stating:

> **"Whilst I do not doubt the utility of considering such a check-list … in many cases, I do not think that it can be elevated into a requirement on the ET to go through such a list in every case, provided of course that no significant factor has been left out of account by the ET in exercising its discretion."**

64. He refers to Pill LJ in **Department of Constitutional Affairs v Jones** [2007] EWCA Civ 894; [2008] IRLR 128 saying:

> **"Their relevance depends on the facts of the particular case. The factors which have to be taken into account depend on the facts and the self-directions which need to be given must be tailored to the facts of the case as found."**

65. He references also Elisabeth Laing J (as she then was) in **Miller v Ministry of Justice** [2016] UKEAT 0004/15. I note that in that decision, at [30], she said:

> **"It is not the function of the EAT, on an appeal on a point of law, to give detailed instructions to ETs about how they are to exercise a wide discretion which Parliament has given to them, and not to the EAT. It is clear from DCA v Jones that it is for the ET to decide (subject to Wednesbury) what factors are relevant to the exercise of its discretion. What weight it decides to give to those factors, having decided that they are relevant in any case, is, axiomatically, a question for the ET."**

66. Finally, Underhill LJ also cites [18] and [19] of **Morgan**. All of that fortifies me in my view that it cannot be said that a conclusion that no explanation appears at all from the evidence for why the claim was not presented any sooner, must necessarily as a matter of law always lead to the conclusion that time cannot be extended. As I have said, it would usually be an error not to consider the question at all, but that is a different point. If the tribunal, having considered the question, concludes that there is no such evidence, then it will need to put that into the scales. But provided that it does so, it will not err in law merely because it nevertheless decides to extend time, unless it does so in a manner that is amenable to challenge on what for shorthand Elisabeth Laing J referred to as the *Wednesbury* grounds.

67. In the present case, as Ms Niaz-Dickinson accepted, the tribunal found that there was no reason for the late presentation of the complaints forthcoming from any of the evidence, and it took that into account. It was not bound for that reason alone to treat this as a knock-out point for the respondent, leading to the conclusion that time could not be extended, and so it did not err by not so deciding. Ground 1 therefore fails.

68. I turn to ground 2. The starting point here is **Adedeji**. As I have described, in that case there was a complaint of constructive discriminatory dismissal. Time for presenting such a complaint runs from the effective date of termination, and it was formally only a few days out of time. However, the constructive dismissal was said to have arisen from the cumulative effect of a series of episodes of discriminatory treatment, which went much further back in time than when the cause of action arose. That being so, it was not an error for the tribunal to take into account the prejudice that the respondent would face, if time were extended so that it had to defend that complaint, of having then to answer to

factual allegations which went significantly back in time. That was so, even though it would have had to do so, had the complaint been in time.

69. It seems to me that, just as it is not an error to take such "real time" forensic prejudice into account, when considering whether it is just and equitable to extend time from the formal date on which the primary time limit expires, so, conversely, in a case where there may be an issue of such potential forensic prejudice, if time were to be extended, the tribunal would err in principle if it failed to consider that aspect, as it would fail to take into account a relevant consideration.

70. In **Adedeji**, the complaint in question was of constructive discriminatory dismissal. In the present case the tribunal was concerned with a number of real time discrete incidents, which it found together amounted to conduct extending over a period, in respect of which time therefore ran from the date of the most recent episode. It seems to me that in principle the reasoning in **Adedeji** must carry across from the constructive dismissal scenario, to the conduct extending over a period scenario, insofar as both give rise to issues about what did or did not factually happen going back potentially very much earlier than the date on which limitation begins to run. When such features are obviously present in a given case, it would be an error of principle for the tribunal not to consider them at all.

71. It occurs to me that, where the tribunal is considering a series of complaints about individual incidents occurring over a period of time, which, applying **Hendricks v Metropolitan Police Commissioner** [2003] ICR 530 principles, are found, for limitation purposes, to amount to conduct extending over a period, there is a further potential issue. Where the out of time complaint is of constructive discriminatory dismissal, then, having weighed all relevant considerations, including the prejudice to the respondent of having to defend historical factual allegations, the tribunal's options are either to extend time in relation to that complaint, or not to do so. Where, however, the tribunal is (or is also) considering a number complaints of what it finds to be discrete incidents of discriminatory treatment that have occurred over a period of time, and which amount to conduct extending over a period, but which are still out of time, the question arises as to whether the tribunal's

approach to just and equitable extension of time must then be all or nothing.

72. I am inclined to think that the answer is that the tribunal should consider first whether, taking all of the incidents as a course of conduct extending over time together, it is just and equitable to extend time, taking into account any issues of forensic prejudice by reference to the earlier incidents that are said to form part of the overall conduct. The tribunal may conclude, having done so, that it is just and equitable to extend time in relation to the whole compendious course of conduct. But if, because of issues of forensic prejudice in relation to earlier incidents, the tribunal concludes that it is not just and equitable to extend time in relation to the whole of the compendious conduct over time, it may then need to give further consideration to whether it is alternatively just and equitable to extend time in relation to the most recent incident in its own right, standing alone, on the basis that the same forensic difficulties might not arise, or arise so severely, in relation to it.

73. I turn then to the present tribunal's decision on this point. I do not agree with Mr Ohringer that the sense of [152] is that the tribunal has taken on board its findings at [118] about the forensic difficulties faced by the respondent because of the historical nature of claim POC3, and by logic and implication therefore, POC2, and has concluded that, whilst taking that on board, it is outweighed by the fact that in formal terms, the complaint relating to this continuing conduct was only one day out of time, which did not give rise to any additional forensic prejudice in and of itself.

74. Rather, it seems to me that the natural reading of [152] is that, whilst the tribunal has indeed started by referring to the factual findings at [81] and the conclusions at [118], on the question of forensic prejudice, it considers that there is a point of distinction between the sexual harassment complaints and the racial harassment complaint, because it has erroneously focused *solely* on the consideration of what, if any, forensic prejudice was caused by that compendious complaint being one day out of time. It has not weighed that in the balance against the forensic prejudice found earlier in [118]. It has *contrasted* it with that earlier finding, and focused solely on it, and decided that it is determinative in tipping the scales in favour of an extension.

75. For completeness, I would add that I do not read the reference at [152] to "the continuing acts of sexual harassment" as signifying that the tribunal also put into the balance that it considered the repetitive or ongoing nature of such harassment as making it more egregious than the racial harassment, for the purposes of deciding the just and equitable point. That, it seems to me, is simply no more than a reference by the tribunal to the fact that it has found that these three incidents together amounted to conduct extending over a period, which it referred to as continuing acts.

76. Accordingly, it seems to me that the tribunal did err by failing to address at [152] the forensic prejudice question in relation to POC3; and, had it done so, it would have been bound as a matter of consistency to take on board the findings of forensic prejudice it had made in that regard at [118]. It would also, in order to be consistent, at least have had to consider that there was some issue of fading memories in relation to POC2, since it considered that was such an issue in relation to POC3 and POC2 occurred no later in point of time, although possibly only a matter of days earlier. It would also, again as a matter of consistency, have had to take on board that it considered, entirely unsurprisingly, at [118] that the fact that the respondent was not in a position to call Mr Barton as a witness, would also be a source of some forensic prejudice to it, were time to be extended.

77. As I have said, had it not made the earlier findings, it might have been open to the tribunal, even if upon examination it decided not to extend time in relation to the compendious continuing act of discrimination consisting of POC2, POC3 and POC7 taken together, separately to consider POC7, and whether time ought to be extended in relation to it alone. But even there, because it had found in respect of POC7 that it also saw some disadvantage to the respondent, in that Mr Barton was no longer available as a witness, it would have needed to take that on board, even when considering whether to extend time in relation to POC7 as a freestanding complaint of sexual harassment alone.

78. In my view that is so notwithstanding that it appears that Mr Barton left the respondent's employment some time after the claim had been presented in December 2018. It might be suggested that, viewing POC7 as a freestanding claim, the delay of one day did not make any difference in terms

of the availability of Mr Barton, because he only perhaps became unavailable later. But, firstly, we do not know that for sure, and secondly, I do not think his unavailability can be said as a matter of law to have been off limits as a consideration, when deciding whether it was just and equitable to extend time in relation to that complaint. The reality is that any complaint takes some time to come to a hearing, and an employer may find that by the time of the hearing, it faces a difficulty that it did not face on the day when the claim was presented, because a witness has subsequently become unavailable, or died, for example. An employer faces no such risks or concerns in respect of a complaint which is out of time unless or until time is extended.

79. To be clear, I am not saying that in such a case, where formally the claim is out of time only by a day or a few days, that is itself a wholly irrelevant consideration. It, too, can be weighed in the balance. Nor am I saying that in a case where the difficulty facing the respondent has only come to pass since the claim was issued, that is necessarily an irrelevant consideration. It too can be weighed in the balance. The point is just that, where it appears that forensic difficulties face the respondent, which they would not have to face or deal with, if time were not to be extended, then that is a relevant consideration, and the tribunal will err if it fails to consider it and to place it in the balance.

80. For all the foregoing reasons I consider that the present tribunal did make a principled error of approach at [152] and I uphold ground 2. This appeal therefore succeeds.