EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms D Harding	**v**	China Construction Bank Corporation London Branch

Heard at: London Central **On**: 26 July 2022

Before: Employment Judge B Beyzade

Representation

For the Claimant: In person
For the Respondent: Mr J Morgan, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the tribunal is that:

1.1. The claimant did not have a disability for the purposes of section 6 of the Equality Act 2010. The claimant's disability discrimination claims are therefore dismissed;

1.2. the claimant's claims for race discrimination, are struck out under Rule 37(1)(a) of the Rules contained in Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure)*

Regulations 2013 on the ground that there is no reasonable prospect of success;

1.3. the claimant's application for permission to amend the claim to include a claim for unfair dismissal pursuant to section 94 of the Employment Rights Act 1996 and a claim under section 13 of the Equality Act 2010 that her dismissal took place because of her disability is refused;

1.4. The Preliminary Hearing (case management) provisionally listed to take place on 28 October 2022 is vacated. Parties are therefore not required to attend the hearing.

REASONS

Introduction

1. In her claim form presented on 15 June 2022, the claimant ticked the box at 8.1 for race and disability discrimination, pay arrears and other payments. She also ticked the box for another type of claim, which she described as 'bullying, victimisation, harassment and demotion of my role and position.' The respondent denied those claims. In summary, these are claims for:

   1.1Race discrimination based on not being Chinese. These claims related only to treatment by the employer up to the point the claimant went off sick in January 2019 for one year. I will talk more about these claims below.

   1.2 Disability discrimination in relation to treatment since the claimant went off sick. The alleged disability is depression and anxiety with stress. The claimant says she was discriminated against because she was disabled at the time of the discriminatory actions and/or because she had been disabled in the past (i.e. while she was off sick) and/or because she had been

off for one year as a result of her disability. She also claims failure to make reasonable adjustments.

1.3 Victimisation under s27 of the Equality Act 2010 as a result of complaining of race and disability discrimination in her grievance. (Confusingly, but understandably, the claimant sometimes uses the word 'victimisation' in a non-legal sense, i.e. meaning 'picked on' because of her race (pre-January 2019) or disability (post January 2019. At the Preliminary Hearing on 19 April 2022 those matters were recorded as direct discrimination).

1.4 The claimant confirmed at the Preliminary Hearing on 19 April 2022 that the ticked boxes for pay arrears, other payments, and another type of claim in box 8.1 solely refer to the above claims and compensation.

2. An Open Preliminary Hearing was held on 26 July 2022. This was a hearing held by CVP video hearing pursuant to Rule 46. I was satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

3. The parties prepared and filed a Joint Bundle in advance of the hearing consisting of 122 pages, to which reference was made.

4. At an earlier Preliminary Hearing on 19 April 2022 before Employment Judge Lewis an Open Preliminary hearing was listed for 26 April 2022. The issues relating to the claimant's claims were set out at paragraphs 3, 4, 5, 6, 7, 8, 9 and 10 of the Case Management Summary. The issues to be considered at the Open Preliminary Hearing were recorded at paragraph 11.2 of the Case Management Summary. Paragraphs 1 and 2 of the Case Management Orders made by Employment Judge Lewis required the claimant to provide a witness statement and medical records

relating to her disability by 14 June 2022 and the wording for her proposed amendment by 10 May 2022.

5. At the outset of this hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:
   a. Whether the claimant was disabled as defined by the Equality Act 2010 at the time of the alleged disability discrimination and/or in the period while she was off sick.
   b. Whether the claims prior to January 2020 should be struck out on the grounds that there is no reasonable prospect of them being considered in time. This includes whether the Tribunal should exercise its just and equitable discretion to allow them in as late claims.
   c. Whether to allow the claimant's amendment request.

6. The claimant gave evidence at the hearing on her own behalf. She prepared a disability impact statement dated 16 June 2022 with a number of Exhibits attached (see pages 41-79 of the Hearing Bundle), to which reference was made.

7. A further document was provided by the claimant titled '*Impact statement by the claimant*' dated 25 July 2022. Following representations from both parties, the claimant's application to adduce that additional Impact Statement was granted to the extent that it could be used and referred to in relation to the claimant's amendment application. It did not appear to be relevant or contain any new material in respect of the other matters before the Tribunal. I was satisfied that any prejudice to the respondent was not significant, and the respondent could properly address any matters arising from this document in cross examination and submissions (as appropriate).

8. Both parties made oral closing submissions in relation to each issue. In addition, the respondent provided a Skeleton Argument which included a number of authorities, to which reference was made.

Findings in fact

9. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

Claimant's employment details and duties

10. The claimant was employed by the respondent from 24 November 2014 as Property Services Manager.

11. Her role as Property Services Manager included managing the respondent's building (and everything with respect to the respondent who was the owner occupier) and heading up the services department. The building consisted of six floors and the claimant was responsible for several matters including security, safety issues, running the logistics correctly, utilities coming in and out of the building, among other matters. This was a job with a degree of responsibility, and it was a busy role.

12. The claimant worked 37.5 hours per week on average.

13. The claimant was paid £6163.00 per month before tax and national insurance and her monthly pay after deduction of tax and national insurance was £4350.00.

Claimant's sickness absence

14. The claimant was on long term sickness absence from January 2019. She returned to work in January 2020. Throughout this

period the claimant maintained her trade union membership with Unite the Union.

15. In January 2019, the claimant suffered from a kidney infection, and she sought medical advice. This was a short illness (it lasted about 5 days), and it cleared up after she took antibiotics.

16. During the following two months the claimant consulted her GP and reported that she was feeling anxious, overwhelmed, and had low mood. She declined medication at that time.

17. In April 2019, the claimant was prescribed with medication (Sertraline 50mg daily and the dosage was subsequently increased in a 100 mg in May 2019). On 21 May 2019, the claimant's GP's records indicated that she reported she was suffering from stress at work.

18. Around this time the claimant was unable to focus, and socialise, and found it difficult to sleep and to manage some activities including exercise, eating, shopping, cooking, and reading. Some days were worse than others. She describes that she was able to focus on finding joy in her life again with her family and friends and undertaking simple tasks she enjoyed previously such as reading, walking watching TV, films, and cooking.

19. The claimant continued to experience her symptoms until around August 2019, and she started to develop coping strategies. The claimant had the support of her family and friends. From about August 2019 the claimant was able to focus on her wellbeing by way of meditation, therapy, good diet, regular sleep patterns and she felt her mental wellbeing slowly starting to be managed.

20. After six months of being off sick the claimant was no longer paid sick pay. Enquiries were made as to whether the claimant would

be accepted onto the respondent's Group Income Protection scheme. The claimant made an application pursuant to that scheme, and she completed the relevant documents and provided evidence.

21. The claimant was assessed by the respondent's insurer for the scheme. The claimant also sent letters dated 17 April 2019 and 08 May 2019 to Mr Z Yang. Head of HR, in relation to various matters including the report from the insurance company, her pay, her payslips, bonus and her current situation.

22. The insurance company advised the claimant on 01 July 2019 that she did not qualify for the scheme and concluded that her absence was not as a result of a medical condition as it was apparent that if the perceived workplace issue had not happened, her absence from work would not have been necessitated or for the duration it has to date. The letter states:

"Ms Harding has been absent from work since 9 January 2019. On the claim form you advised this was initially due to a kidney infection, and subsequently due to stress at work.

The medical evidence indicates Ms Harding attended her GP on 16 January 2019 reporting some symptoms of an infection, but she was not signed off work in relation to this. She then went back to her GP on 5 February 2019 reporting that she was finding it difficult to attend work due to ongoing stress, and that she needed some time off to find a solution. She declined any treatment at this point, but her GP did sign her off work.

Ms Harding then continued to attend her GP reporting ongoing issues at work, stating that she was not sleeping well and was feeling run down. She agreed to self-refer to a counselling service. On examination her GP noted that she was sometimes tearful when talking, but that she was well presented, made good eye contact, had normal speech, and that she reported that she was trying to eat well and walk regularly.

…

Overall, the evidence indicates that Ms Harding attended her GP reporting some psychological symptoms in relation to a perceived workplace issue. Her GP has prescribed some 'therapeutic' medication and suggested she attend counselling, but it is also noted that Ms Harding continues to function normally away from

the workplace, including hobbies, exercise, and childcare. Usually, for an individual to be affected by a condition or associated symptoms, it is apparent that they become unable to function normally on a day to day basis, which is not the case in Ms Harding's situation."

23. The claimant appealed against this decision. The claimant sent a detailed letter to the respondent's insurance company on 23 September 2019 providing information about her health since January 2019. She said she was unable to undertake her usual day to day activities, particularly attending work, and that the situation at the respondent and the lead up to January 2019 was the catalyst for her current condition. The appeal was refused.

Claimant's return to work

24. In January 2020, the claimant had returned to work, and she felt ready to do so. The claimant's GP provided a fit note dated 22 January 2020 advising that the claimant was fit for work, recommended a phased return, and altered hours.

25. The respondent's HR team then arranged in January 2020 for an Occupational Health report to assess the claimant and requested her to attend a meeting to discuss a return to work. On 21 January 2020, the Occupational Health Advisor stated that the claimant could return to work from 27 January 2020 and that no alterations to the claimant's work or working environment were necessary other than a gradual increase in her workload over the phased return period (and a stress risk assessment was recommended).

26. The claimant ensured she focussed on a structured living pattern, that she slept, and she focussed on undertaking her daily tasks and made time for her family.

Claimant's grievance

27. On 25 February 2020, the claimant sent a formal grievance to the respondent complaining in relation to persistent bullying, victimisation, discrimination, and harassment. She stated that this

"…*has now culminated in me being discriminated against because of my disability as a result of my recent prolonged illness*." Furthermore the claimant stated that the respondent "…*has an institutional racial bias towards its local employees*…" She said that the last incidents in December 2018 and January 2019 led to her being extremely stressed and to her medical condition (and being signed off sick between January 2019 and January 2020). She complained that on her return to work she was told that her role and duties had changed, and that she was being discriminated against because of her prolonged illness. The claimant attached an Appendix to her letter setting out a number of incidents between March 2015 and January 2020.

28. The respondent's CEO responded on 13 March 2020 to advise that he was appointing the Head of HR to investigate the claimant's grievance. The claimant replied on 18 March 2020 expressing that she felt that the hostility, abrasive tone of emails and interactions with HR, and HR generally not being supportive of her, made her uncomfortable in terms of HR investigating her grievance. Nevertheless the respondent's CEO replied on 11 April 2020 to confirm that the Head of HR would be in touch and would investigate her grievance as there were no senior managers available due to the current situation with COVID-19.

29. On 27 April 2020, the claimant submitted a formal grievance to the respondent in which she claimed she was bullied, victimised, harassed and discriminated against. She complained that her previous grievance submitted in February 2020 had not been progressed reasonably or in a timely manner, and that the respondent should not be making deductions from her salary unlawfully without consultation. In around April 2020 the claimant was required to work from home, and she was after some time, provided with the relevant access she required to the respondent's IT systems to enable her to do so.

30. The respondent engaged an independent HR consultant to carry out an investigation into the allegations. There was a delay in resolving the grievance.

31. The claimant appealed the outcome, and her appeal was heard by a non-executive director. An outcome letter was sent to the claimant dated 16 October 2020.

32. The appeal was not upheld. As a result of the grievance and the subsequent appeal the respondent states that it clarified its phone use policies, and a payment of an extra 2 weeks' wages was made to the claimant to compensate her for a period when there was a delay in the provision of IT equipment to enable the claimant to conduct work from home.

Claimant's dismissal

33. Since her return to work in January 2020, the claimant continued to carry out her work. However, the claimant was dismissed from her employment on 12 November 2020. The respondent advised the claimant that she was dismissed by reason of redundancy. The claimant was paid in lieu of her notice and she received statutory redundancy pay.

Other employees

34. Mr W Wu, Head of IT who is referred to in the claimant's claim left his employment with the respondent at its London branch on 30 November 2019. He now works at Cape Town or in China.

35. Mr Fung, who was previously the CEO, left his employment at the respondent's London offices and he thereafter lived in China (and subsequently worked in a heading up role in Risk and Compliance).

36. The claimant's previous line manager, Mr M Wright was dismissed from his employment with the respondent on 31 May

2020 and Mr Lee left in around August 2017. The claimant's line manager at the time of her dismissal was Ms Zhang who is no longer employed by the respondent, and she has since relocated to China. Mr Yang, Senior HR Business Manager left in 2019 and Ms Sun left in 2021, and both have left the respondent's London offices having subsequently moved to China.

Events following the claimant's dismissal

37. Following her dismissal the claimant consulted a solicitor. Her solicitor prepared correspondence on her behalf relating to her dismissal.

38. The ACAS Early Conciliation certificate records that the claimant started ACAS Early Conciliation on 04 May 2022 and ACAS issued the certificate by e-mail on 02 June 2022.

Claimant's claim and respondent's response

39. On 15 June 2020, the claimant presented a claim claiming discrimination on the grounds of race, disability, arrears of pay, other payments, and other claims (described as bullying, victimisation, harassment, and demotion). The claimant confirmed at the Preliminary Hearing before Employment Judge Lewis on 19 April 2022 that the ticked boxes for pay arrears, other payments, and another type of claim in box 8.1 solely refer to the claims for race discrimination, disability discrimination and victimisation (and compensation).

40. The respondent entered a response denying the claimant's claims. The respondent did not admit that the claimant was disabled and stated that it was unaware of the symptoms the claimant asserts she was suffering from, and that the claimant was certified as fit to work.

41. The claimant's GP provided letters dated 21 May 2019 (which confirmed the claimant reported stress at work, low mood and

anxiety resulting therefrom), 04 July 2019, 20 September 2019, 06 March 2020, 03 July 2020 (the 03 July 2020 correspondence confirmed that the claimant had received consultations with her GP and reported anxiety and depression), and a further GP letter was provided dated 04 May 2022.

42. At the Preliminary Hearing on 19 April 2022 the claimant indicated that she wished to pursue a claim for unfair dismissal. At the direction of the Tribunal, she provided the proposed amendments to her claim which accompanied her email dated 10 May 2022.

Observations on the evidence

43. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

44. On the whole the claimant gave her evidence in a clear way, and her account in terms of her symptoms and what she reported to her GP was consistent with the medical records in relation to the period between January 2019 and January 2020.

45. However, the claimant's GP letters referred to above lack specificity in terms of what daily activities the claimant was not able to carry out, the nature and extent of any difficulties, and the relevant dates during which these were impacted.

46. The claimant informed the Tribunal that that she was unable to read anything in 2019, but she confirmed that she did not ask someone else to read documents and other materials for her. She said she did not want to listen to anything. This detail was not provided in her disability impact statement. Additionally I noted that the claimant was able to read and respond to a number of communications with the respondent and their insurance

company while she was off sick between January 2019 and January 2020.

47. The claimant stated that she was unable to carry out some tasks while she was off sick from work from January 2019. The claimant did not state the dates that she was unable to carry out the tasks in question or the nature and extent of her difficulties. From the disability impact statement it was clear that from around August 2019 the claimant's mental wellbeing started to be managed and the claimant was focussing on her objective to get well enough to return to work (which she was able to do from January 2020).

48. The claimant did not dispute that she was able to carry out her job from January 2020 and so there was no real point of differences between the parties on that. There were no details provided in the claimant's disability impact statement or in her oral answers in cross examination in terms of any ongoing impact of the claimant's purported disability on her ability to carry out her normal day to day activities. The claimant's impact statement does not provide any or any sufficient detail in relation to the claimant being unable to carry out any day-to-day activities after her return to work (from January 2020 onwards).

Relevant law

49. To those facts, the Tribunal applied the law –

Disability discrimination

50. Section 6 of the Equality Act ("EqA") provides a definition of "disability" as follows:

(1) A person (P) has a disability if:

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

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

51. s212(1) of the EqA provides that "*substantial*" means more than minor or trivial.

52. Schedule 1 of the EqA gives further details on the determination of a disability. For example, Schedule 1 paragraph 2(1) provides that the effect of an impairment is long term is it has lasted for at least 12 months, is likely to last for at least 12 months or is likely to last for the rest of the life of the person affected.

53. Paragraph 2(2) of Schedule 1 of the EqA provides that if an impairment ceases to have a substantial adverse effect, it is to be treated as continuing to have that effect if that effect is likely to recur. In *SCA Packaging Ltd v Boyle 2009 UKHL 37*, the House of Lords ruled that "likely to" in this context means "could well happen" rather than "more likely than not".

54. Paragraph (5) provides that an impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if measures are being taken to correct it and but for that, it would be likely to have that effect.

55. I am required to take into account the *Statutory Guidance on the definition of Disability (2011)* which stresses that it is important to consider the things that a person cannot do or can only do with difficulty (B9). This is not offset by things that the person can do. This is also confirmed in *Aderemi v London and South Eastern Railway Ltd 2013 ICR 391*. Day to day activities are things people do on a regular or daily basis such as shopping, reading, watching TV, getting washed and dressed, preparing food, walking, travelling and social activities. This includes work related activities such as interacting with colleagues, using a computer, driving, keeping to a timetable, and other activities (Guidance D2– D7).

Race discrimination

Time limits

56. s123(1) of the EqA, provides:

'[Subject to section 140A and 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.'

57. What is just and equitable depends on all the circumstances. The burden of proof is on the claimant as explained in *Robertson v Bexley Community Centre [2003] IRLR 434*, in which the Court of Appeal also said, at paragraph 25:

"It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule."

58. In *British Coal Corporation v Keeble [1997] IRLR 336* the EAT held that the Tribunal's discretion is as wide as that in the civil courts under s.33 of the Limitation Act 1980. That section requires the courts to consider factors relevant to the prejudice which each party would suffer as the result of the decision to be made, including:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and

(e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

59. In *Southwark London Borough Council v Afolabi [2003] ICR 800* the Court of Appeal confirmed that, whilst that checklist provides a useful guide for Tribunals, it does not require to be followed slavishly. It added however that there are normally two factors which are almost always relevant –
    (i) the length of and reasons for the delay; and
    (ii) whether the delay has prejudiced the respondents, such as by preventing or inhibiting it from fully investigating a claim while matters are fresh.

60. In *Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278*, the EAT confirmed that the exercise of the Tribunal's wide discretion involves a multi-factorial approach, with no single factor being determinative.

Strike out

61. Rule 37 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 No. 1237* ("the ET Rules") state as follows:

"Striking out
37.—(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—
(a) that it is scandalous or vexatious or has no reasonable prospect of success."

Amending a claim

62. Rule 29 of the ET Rules sets out the Tribunal's power to make case management orders at any stage of the proceedings and such powers are to be exercised in accordance with Rule 2 (overriding objective) of the ET Rules.

63. The question whether or not to grant an application to amend is a matter of judicial discretion. When determining that question, account requires to be taken of the guidance set out by the EAT in *Selkent Bus Co Ltd v Moore 1996 IRLR 661*. In that case, the EAT stated that "*whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it*" (the so-called "balance of hardship" approach).

64. In making that assessment, the EAT stated that the relevant circumstances include (although are not limited to):

    a. the nature of the amendment. It is necessary to draw a distinction between (1) amendments which are simply intended to alter the basis of an existing claim, (2) those which add a new type of claim arising out of the facts already plead (re-labelling) and (3) amendments which add a wholly new type of claim which does not relate to the facts set out in the original claim at all.

    b. The applicability of time limits. If the amendments add a wholly new type of claim, it is necessary to determine whether or not any new claim is out of time, and if so whether the time limit should be extended under the relevant statutory provisions. This however is only a factor to consider and is not determinative.

    c. The timing and manner of the application. Otherwise, there are no time limits laid down in the rules for the making of amendments. The mere fact that there has been a delay in making any amendments does not mean that an application should be refused. Rather it is a factor to be taken into account, considering why the application was not made earlier and why it is now being made. Questions of delay, as a result of adjournments, and additional costs are relevant in reaching a decision.

65. Guidance Note 1 of the *Presidential Guidance – General Case Management* (amended and reissued on 22 January 2018) sets out at paragraph 3 that regard must be had to all the circumstances, in particular any injustice or hardship that would result from the amendment or a refusal to make it and contains a list of the relevant factors to be considered at paragraph 5. Further informative guidance is provided at paragraphs 6-14.

Time limits for unfair dismissal claims

66. Section 111 of the *Employment Rights Act 1996* ("ERA 1996") makes the following provisions in respect of time limits for unfair dismissal claims:

111 Complaints to employment tribunal
(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(2) Subject to the following provisions of this section,
an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—
(a)before the end of the period of three months beginning with the effective date of termination, or
(b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Respondent's submissions

67. The respondent refers to paragraph A4 of the EqA Guidance ('the Guidance'), pursuant to which impairment is to be determined by the effect that an impairment has on a person's ability to carry out day to day activities. A substantial effect is more than minor or trivial, as per s.212(1) EqA 2010.

68. The respondent maintains that the claimant is not disabled and was certainly not disabled as at her return to work, and that there is no expert report before the Tribunal (the respondent's representative accepts that as a matter of law such a report is not essential). The respondent notes that the claimant's GP does not explain how or why he is qualified to identify any mental

impairment and that the GP letters are not focussed on the test to be considered by the Tribunal. By way of example the letter dated 03 July 2020 refers to trouble focussing without stating the extent of any lack of focus or its duration.

69. The respondent cites the case of *J v DLA Piper UK Ltd [2010] ICR 1052* as authority for the proposition that a distinction can be drawn by the Tribunal between a mental illness and a reaction to adverse circumstances, such as a problem a work, and relies on paragraph 42 of that decision. It is also submitted that paragraph fifty-six of *Herry v Dudley Metropolitan Council [2017] ICR 610* provides the EAT's views on medical notes and that a lengthy absence is not necessarily evidence of a mental impairment. The respondent's position is that the claimant's reaction at its highest appears to be a reaction to a perceived adverse situation at work. A certificate (fit note) provided for the period 21 May 2019 to 14 June 2019 recorded the reason for absence as "stress at work" and similar statements are made in relation to the periods 23 April 2019 to 21 May 2019, 05 February 2019, and April 2019 (albeit there is a lack of detail provided on these).

70. The respondent says that in relation to the claimant's disability impact statement there is no evidence of any causal link between the claimant's medical conditions in 2018 and her kidney infection and there is no suggestion that this caused an interference with her day-to-day activities. The respondent refers to the sixth paragraph detailing events after May 2019 which the claimant says affected her ability to function normally but that at paragraph 7 the claimant then says her mental wellbeing started to be "managed". The respondent refers to a reference to an anxiety around her pay and insurance claim and it would appear that the claimant would not meet the definition in the EqA from this point as she had substantially recovered. Furthermore after her return

to work in January 2020 there is no evidence of the relevant disability test being met.

71. Reference is also made to the MetLife report which concluded that there was no medical condition substantially interfering with her day-to-day activities and her symptoms arose due to the situation at work. Reliance is also placed on the contents of the Occupational Health report of 21 January 2020.

72. In terms of time limits under the EqA 2010 the respondent relies on *Miller and Others v MOJ and Others UKEAT/0003/15/LA* which summarises the relevant legal principals at paragraph 10 for extending time and also *British Coal Corporation v Keeble [1997] IRLR 336 and DPP v Marshall [1998] IRLR 494*. In the case of *Leeds and Yorkshire Housing Association Limited v Fothergill UKEAT/0211/20* the EAT allowed an appeal where the Tribunal had extended time for race discrimination complaints brought 18 months out of time. The Tribunal having failed to consider whether the claimant's ignorance of his legal rights was reasonable and having failed to identify those facts that led to that conclusion.

73. The respondent says the claims prior to January 2019 are largely race discrimination claims (paragraph 10 of Preliminary Hearing Orders made on 19 April 2020) and are clearly out of time.

74. In relation to the failure to support the claimant's application for insurance cover for pay whilst she was off sick, the respondent submits that this is a discrete event in June 2019 (please see page 21 of the Hearing Bundle). This was a separate and discrete alleged failure: it could only have occurred when the claimant was absent from work. The respondent's HR department is referenced in general terms only rather than a particular individual.

75. The respondent says that the Tribunal should not grant a just and equitable extension of time and refers to the prejudice to the respondent. The allegations date back to March 2015 and those individuals who are alleged to be responsible for the acts in question including the Head of IT, the claimant's line manager, CFO, CEO have left the respondent's employment and there has been a significant reduction in the respondent's HR department. The respondent's representative points out that this significantly prejudices the respondent's ability to respond to the claimant's claims and impacts on their right to a fair hearing. It is mentioned that there is no sufficient explanation provided for the delay and that the claimant was able to communicate with the respondent's insurance company during the year she was off sick from work, and she maintained her union membership.

76. The respondent's representative highlights that the claimant's application to amend is significantly out of time and that the primary limitation period expired on 11 February 2021. It is submitted that the respondent will suffer significant prejudice in responding to this claim and in terms of its right to a fair hearing. The respondent submits that the claimant had access to trade union resources and had instructed solicitors during 2020, and accordingly, she had access to legal advice.

77. The respondent avers that the events surrounding her dismissal were of a different character, and that a lay person would easily understand that those events were not included in their claim form (it had not happened at the point of its presentation), and that the claimant is seeking a major amendment. It is submitted that it would involve significant new factual enquiry, there is a significant gap between January 2020 and the date of dismissal on 12 November 2020, and the amendment should not be allowed.

Claimant's submissions

78. The claimant submitted that the respondent did not comply with the recommendations made by the respondent's Occupational Health therapist, and that the respondent had not engaged with her.

79. The claimant confirmed that it was not the case that she was not able to read anything. However she did not want to engage with her normal activities that she enjoyed before her period of long-term sickness absence. She said before this she would read books and newspapers and kept herself fit.

80. She said that going through the NHS, it was difficult for her to access psychiatric help. She said the medication she took had helped. She maintained that falling out with her colleagues did not cause the issues that occurred in January 2019. She said she suffered burnout.

81. She returned to her employment with the respondent in January 2020 as she did not want to deal with a change of employment, and she wanted to support her family. She did not seek to bring a claim sooner as she wanted to keep her job.

82. She referred to reaching out to ACAS, contacting a solicitor, and she maintained that Unite the Union were overworked.

83. In relation to her race discrimination claim being out of time, she said she stood by what she had said earlier which were the genuine reasons why she had not met any relevant timelines.

84. She did not agree with the respondent's stance and although she recognised that she had not met the relevant timelines, she thought that the claim she presented in 2020 would cover her

unfair dismissal. She did not seek legal advice about this claim specifically but rather she sought advice about a financial settlement. She did not hear from the Tribunal until late in 2021 and she did not realise until after this that she needed to make an amendment application or present a further claim.

85. She also said the respondent was not engaging with her and that because of the pandemic it was difficult to reach out to the Tribunal to follow up in relation to her claim. The pandemic had delayed everything, and she was also continuing to work on her recovery. The grievance was hard work for her to deal with, and it has been difficult for her to relive all the events.

86. The claimant mentioned she had sent a Data Subject Access Request to the respondent, and she wanted to ask about how to see clarification relating to this. The respondent had earlier mentioned that they wanted to request a Scott Schedule. I suggested that parties write to the Tribunal to apply for any directions relating to any disclosure or further and better particulars (and they should copy in the other party).

87. The claimant says she was informed at the Preliminary Hearing on 19 April 2022 that she needed to have submitted a separate claim and ET1 form for her claim of unfair and constructive dismissal or submitted a request for an amendment. She states that she was not aware of this and had wrongly assumed that her subsequent unfair and constructive dismissal claim were included in the claims being considered by the Tribunal. She therefore requested that her additional claim for unfair and constructive dismissal be added to her claim.

88. Although she said she was not aware of the deadline for presenting an unfair dismissal claim, she confirmed that she did

not contact a Citizens' Advice Bureau or a Law Centre as she assumed this would not be available to her.

89. The claimant submitted that she did not know how the respondent was prejudiced and that they knew that this claim was on the cards for some time. They only gave her the legal minimum in terms of her redundancy entitlement, and they did not engage with her to avoid the need for her to present a claim for unfair dismissal.

Discussion and decision

90. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

Issue 1.1.1 - Disability – s 6 EqA
Did the claimant have a mental impairment?

91. Dealing first with the issue of mental impairment, I accept that the claimant experienced symptoms that related to low mood, anxiety, and depression and that these were reported to her GP at the material time. However, this was in circumstances where the claimant experienced difficulty and sought medical help in February 2019, and where she was on medication from around April 2019 for the next few months (and where there were a significant period of sickness absence). I considered that in *Herry v Dudley Metropolitan Council* the EAT noted that a lengthy absence is not necessarily evidence of a mental impairment. There is no medical evidence to suggest that the claimant's situation falls within the first state of affairs described in *J v DLA Piper* as a mental illness or a mental condition which is "clinical depression" and the evidence before me did not indicate that it is unquestionably an impairment within the meaning of the EqA.

92. Moreover, this seems to me, without expert medical evidence, to demonstrate a reaction to adverse circumstances (such as problems at work) or adverse life events as described in *J v DLA Piper* rather than an underlying mental impairment. Considering the circumstances I am therefore not satisfied that the claimant had a mental impairment at the relevant time, specifically depression and anxiety with stress (see paragraph 1.1.2 see Case Management Summary dated 20 April 2022.

93. I note that the claimant's GP correspondences confirmed that the claimant's had reported symptoms of stress at work, among other matters. On 21 May 2019, the claimant's GP's records indicated that she reported she was suffering from stress at work.

94. As I have found that the claimant did not have a mental impairment at the material time, the claimant's disability discrimination claims are dismissed on that basis. However, in the event that I am wrong, and the claimant did have a mental impairment, I have proceeded to consider below the other elements of the definition of disability in s 6 of the EqA.

Did that impairment have an adverse effect on her ability to carry out normal day-to-day activities?

95. Turning to the effect of that impairment on her day-to-day activities, I note the terms of the Statutory Guidance that I should focus not on what the claimant could do but what she could not do or only do with difficulty. I accept that there were things the claimant was able to do, such as reading letters received from the respondent and the respondent's insurance company and writing to the respondent and the respondent's insurance company (including making an application and lodging an appeal during her sickness absence in 2019). Around April and May 2019 the claimant describes that she had difficulty exercising, eating, shopping, cooking, reading, and looking after herself.

96. I did not accept that as a matter of fact the claimant had difficulty reading such that this could be regarded a substantial adverse effect on her normal day-to-day activities as she was able to read and respond to relatively detailed correspondences with the respondent and their insurance company on a number of occasions during her sickness absence. I also did not accept that the claimant had difficulties looking after herself generally and there were no specific details provided in relation to any additional day-to-day activities that she had contended were impacted.

97. There was no detail provided in respect of the other activities listed by the claimant and the nature of her difficulties. The claimant acknowledges that some days were worse than others and that she focussed on finding joy in her life again by interacting with family and friends and undertaking reading, walking, watching tv, films and cooking. She also suggested that by August 2019 her mental wellbeing started to be managed. Thereafter no or no sufficient further detail is provided by the claimant in relation to any continuing adverse effect on her day-to-day activities.

98. I do not consider that these findings contradict the claimant's evidence, which I have accepted, that for a short period of time (see below) she had difficulty in exercising, eating, shopping, and cooking. She was able to do these things but only with difficulty and with assistance from others.

Was that effect substantial?

99. The seriousness of the effects varied over the relevant period. It was clearly a substantial effect when she was absent particularly up to August 2019. It is less clear that the effect was substantial at other times. However, on the basis of the evidence given to me by the claimant I consider that throughout the period from February to August 2019, her purported mental impairment was

having an effect on her day-to-day activities as described above, that was more than minor or trivial.

100. I also have to consider the effect without medication or other treatment. It is difficult for me to assess this in the absence of medical evidence. There was no indication in the GP letters or in the Occupational Health report that it is the medication that was expected to enable the claimant to return to work. I consider that without the medication, any purported mental impairment would have had a more serious effect on her ability to carry out normal day to day activities (and that would have been substantial) between the period from February to August 2019.

Was the substantial adverse effect long term?

101. I then have to consider whether the substantial adverse effect was "long term." The claimant herself did not suggest that there was a substantial adverse effect before December 2018 (although this is when the claimant's complaints about race discrimination relate to there is no suggestion that she consulted her GP in relation to her purported mental impairment prior to February 2019). There is no suggestion that the claimant was receiving medication or any other treatment in relation to any mental impairment at that time. She continued to work until January 2019.

102. As noted above, I consider that the substantial adverse effect started in February 2019 and continued until August 2019. In cross examination the claimant stated that her symptoms lasted from January until about August 2019 after which there had been improvement. Although the claimant was absent from work from January 2019, she did not consult her GP in relation to what was described by her GP as stress at work until February 2019. There was no evidence (or there was insufficient evidence) before me that there was any substantial adverse effect on the claimant's ability to carry out day-day activities after August 2019.

103. This is not a period of 12 months and so I have to consider whether it was likely to last for 12 months (until February 2020). The fact that it has, in fact, lasted for that period is not relevant. The question is whether it was likely to last for that period as at the time when the alleged discrimination occurred.

104. I consider that on the evidence before me it was not likely to last for a period of 12 months as at the time the alleged discrimination occurred. The respondent correctly points out that the claimant's health was improving and by August 2019 the claimant developed coping strategies. There is no reference to any adverse impact of her purported mental impairment on her day-to-day activities after August 2019, the claimant decided to return to work in January 2020, and the Occupational Health report did not note any ongoing concerns about any mental impairment that were likely to have a long-term effect on the claimant's day-to-day activities. Having considered the position carefully, I have no hesitation in concluding that the substantial effect on her day-to day activities would not be likely to have lasted for at least 12 months from the onset in February 2019.

105. I have considered the issue of a recurring condition albeit this was not a matter that the claimant sought to raise before me. Again I have no medical evidence. However, if I had to decide this point I would say that when she has had her purported mental impairment from February 2019 until August 2019 and where there was no evidence of any further significant episodes thereafter (that evidenced any substantial adverse effect on the claimant's ability to carry out day-to-day activities), it is not likely on the evidence that there would be a recurrence of the effect.

106. In conclusion, I consider that the claimant did not have a disability and the disability discrimination claims cannot proceed. Therefore I dismiss the claimant's disability discrimination claims.

Issue 1.1.2 – strike out application relating to race discrimination claim

107. The Tribunal firstly considered s123(1) of the EqA and concluded that the claims relating to discrimination on the ground of race were not brought within the period of three months from the acts complained of.

108. In relation to the race discrimination claims, the claimant accepted at the Preliminary Hearing on 19 April 2022 that her claims related to treatment by the employer up to the point the claimant went off sick in January 2019. The claimant was off sick between January 2019 and January 2020 and there are no race discrimination claims on the ET1 Form that relate to that period (or any period thereafter up to the presentation of her claim).

109. In the amended ET1 (see page 107 of the Hearing Bundle) it is averred that the last two acts of discrimination because of the claimant's race took place in December 2019: "*For clarity two events of race discrimination and bullying, which took place in December 2019 with the CEO and a senior member of the Executive Committee culminated in me falling ill and going on long term sick in January 2019*." The reference to December 2019 appears to be a typographical error and I have assumed this was intended to refer to December 2018. In any event the claimant's original Claim Form did not contain any reference to anything that occurred in December 2019 in relation to the claimant's race discrimination claim and even if it did, those complaints would still have been presented outside the 3-month statutory time limit.

110. I am required to consider as part of the respondent's strike out application whether the claimant's race discrimination claim has no reasonable prospect of success in terms of whether an extension of time would be available to the claimant on a just and equitable basis.

111. Therefore, I then considered whether the claims were brought within such other period as was just and equitable, noting that the onus was on the claimant to demonstrate this. I considered the factors set out in *British Coal Corporation v Keeble* and reached the following conclusions in relation to each:

112. i) The length of and reasons for the delay. The acts complained of occurred in the period from March 2015 to January 2019. The claimant's claim was not presented until 15 June 2020, approximately 16 months after the last act complained of and well over 5 years after the first act complained of. The claimant's position was that she was prompted into action by the respondent's actions during and following her return from sickness absence (and the events pleaded that related to her disability discrimination claim). The claimant mentioned her lengthy period of ill health, the impact of the COVID-19 pandemic and the fact that the respondent did not engage with her and there were delays on the Tribunal's part. In considering the reasons for the delay, the Tribunal considered the questions posed in the *Barnes* case about the claimant's prior knowledge. It is clear that the claimant suspected that she had a claim for race discrimination before she went on her period of absence (from January 2019). The claimant's letter dated 25 February 2020 asserts that there was racial bias towards the respondent's local employees and that she reported this on several occasions to her line manager "…*over the years as and when they occurred*."

113. The letter dated 25 February 2020 may have expressly intimated a compliant of racial bias but, given the information provided in the accompanying schedule, it was reasonable for the claimant to know, or at the very least suspect, that she may have had a race discrimination claim at a much earlier stage. The events that took place thereafter provided the claimant with no further information in relation to any claim for race discrimination.

It is clear from the terms of her grievance that she knew or suspected that she had a claim of race discrimination at that stage. Moreover, in the period up to January 2019, the claimant was aware of the facts giving rise to her race discrimination claims and she also ought to have been aware of any potential legal basis for her claims.

114. It is difficult to see that there was any obvious impediment to her raising her claims with the Tribunal prior to 15 June 2020. None of the medical letters or other evidence that was before the Tribunal suggested that the claimant was unable to present her claim to the Tribunal during the period that she was off sick between January 2019 and January 2020. During her sickness absence, the claimant was able to correspond in detail with the respondent and the respondent's insurance company on a number of occasions (and to complete her claim form and an appeal in relation to her application under the respondent's Group Income Protection scheme policy of insurance). The claimant returned to work in January 2020 and continued to carry out work until her dismissal on 12 November 2020.

115. The claimant did not seek legal advice in relation to the Tribunal's jurisdiction to consider such a claim, or the applicable timescales. She accepted that she could have researched the position earlier or sought advice, including the ability to contact a Citizens' Advice Bureau or a Law Centre, but did not do so. The claimant was able to instruct a solicitor in 2020 to conduct correspondence on her behalf so it was not clear why she could not have instructed a solicitor prior to this to advise her in relation to her race discrimination claim and any limitation periods. She was also able to contact ACAS and she was a member of Unite the Union. Although she said Unite were overworked, there were no emails, records of telephone correspondences or any other correspondences before the Tribunal between Unite and the

claimant, and no evidence that the claimant contacted Unite to seek advice or access any of their resources (or that she accessed any ACAS resources and information on their website). She clearly contacted Unite at some stage (according to her amended ET1) but the claimant has not provided details of her correspondences in relation to this claim. No adequate or reasonable explanation was provided as to why it took the claimant a further three months after she presented her grievance to the respondent on 25 February 2020 to make a Tribunal claim.

116. ii) The extent to which the cogency of the evidence is likely to be affected by the delay. The events complained of relate to the period from March 2015 to January 2019. There is no doubt that there is a real prospect that the cogency of evidence will be significantly and adversely affected by the delay. The Tribunal accepted, as submitted by the respondent, that witness evidence is critical in discrimination cases.

117. A number of the respondent's witnesses have since left the respondent (or at least left its London Branch) and relocated abroad.

118. iii) The extent to which the party sued had cooperated with any requests for information. There was no specific assertion that the respondent had failed to do so in relation to a matter that relates to the claimant's race discrimination complaints. The claimant stated that there were issues in terms of clarification in terms of the respondent's compliance with a DSAR request, but it was not clear how and why (if at all) this was related to the claimant's race discrimination claim or why the DSAR request was not pursued (and/or followed up) sooner. The information relied on by the claimant in relation to her race discrimination claim was appended to her grievance dated 25 February 2020 (which was in turn included within the claimant's ET1 Form).

119. iv) The promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action. The claimant knew of facts giving rise to the cause of action as early as January 2019, when she alleged that her last complaint in relation to race discrimination took place. She alleged racial bias in her grievance dated 25 February 2020 thereafter. It was not clear why any grievance relating to her race discrimination claim was not sent to the respondent in close proximity to the dates that the relevant acts are said to have occurred. She was accordingly aware in January 2019, and at the stage she raised her grievance, of the facts giving rise to the causes of action she now seeks to assert. She confirmed that, whilst she could have sought advice or undertaken research earlier, she did not do so until later in 2020 (albeit this only related to her dismissal which the respondent says was on the grounds of redundancy). The Tribunal found, as a result, that the claimant did not act promptly once she knew of the facts giving rise to the cause of action.

120. v) The steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action. Whilst the claimant was, represented by a solicitor in relation to some correspondence sent in 2020 on her behalf in relation to her dismissal, there was no evidence of her requesting appropriate advice from them about the possibility of further action. Similarly, there was no evidence or no sufficient evidence that the claimant had sought to obtain appropriate professional advice from any other source at any stage.

121. The Tribunal took these factors into account in considering the balance of prejudice between the parties. The Tribunal concluded that no satisfactory explanation was advanced for why the race discrimination claims were not brought sooner, particularly where it was clear that the claimant suspected she had claims for discrimination at a relatively early stage. There was no obvious

impediment to the claimant raising her claims sooner. Had she undertaken research at an earlier stage (or contacted her Union, ACAS, her Solicitor, or another source of legal advice including free resources that may be available at an earlier point) she would have readily identified that she could potentially raise her claim with the Tribunal and the time limits for doing so, as she did, following the later events in 2020. The respondent would be prejudiced if the claims were allowed to proceed at this stage, as there is a real risk that the cogency of evidence in relation to the race discrimination claims would be significantly and adversely affected by the delay and key witnesses have left the respondent.

122. For these reasons, the claimant's race discrimination claims have no reasonable prospect of success, and they are accordingly struck out under Rule 37(1)(a) of the ET Rules. The race discrimination claims were presented outside the 3-month statutory time limit and there is no reasonable prospect of success of the Tribunal determining that the claim was brought within such other period as was just and equitable. Accordingly there is no reasonable prospect of the Tribunal determining that it does have jurisdiction to hear the claimant's race discrimination claims.

Issue 1.1.3 claimant's proposed amendment

123. Turning to deal with the claimant's proposed amendment in respect of an unfair dismissal claim, which is that the claimant has been unfairly dismissed "…*under the guise of redundancy on 12 November 2020*…".

124. In her application sent by way of an email dated 10 May 2022 the claimant summarised the content of her previous ET1, clarified two events relating to race discrimination and bullying in December 2019, and that she was *"…summarily dismissed under the guise of redundancy on 12 November 2020 following a review*

of the department and I was unsurprisingly, out of the team of three, the one chosen to be dismissed and I believe I was discriminated against because of my disability."

125. The claimant also refers to a constructive dismissal claim but this is obscure as the claimant did not resign from her employment and she was in fact dismissed. It is difficult to decipher why the claimant is seeking to bring a constructive dismissal claim in the circumstances.

126. Other than her proposed claim for unfair dismissal (which she stated she believes took place because of her disability), the claimant's email dated 10 May 2022 did not seek permission to amend her claim to add any other head of claim. During the hearing, the claimant pursued her amendment application on the same basis as she had set out in her email dated 10 May 2022.

127. In the first instance I considered the type of amendment being sought, that it is whether it fell within categories 1, 2 or 3 set out above.

128. The claimant believes that she was dismissed because of her disability. Her claims for unfair dismissal or dismissal because of her disability were clearly not pleaded in her ET1 Form as she presented her claim to the Tribunal prior to her dismissal.

129. She stated she was not aware that she had to bring a separate claim or to amend her claim in relation these claims, and she was not informed about this until the Preliminary Hearing took place before Employment Judge Lewis on 19 April 2022.

130. Further and in any event, she stated that she has outlined this claim in her amendment application.

131. The respondent submits that this is an entirely new cause of action, and that the claimant's dismissal did not take place at the time she submitted her ET1. This requires a whole new factual enquiry concerning examination of the claimant's dismissal and issues around it. It is submitted that the proposed claim concerned different individuals, and this would not be a simple exercise in terms of relabelling existing facts.

132. In response, the claimant said that she believed by presenting her ET1 Form she did all that was required, and that the "semantics" would be dealt with once the claim was reviewed by the Tribunal. As the Tribunal did not contact her until late in 2021, she did not realise that she needed to amend her claim. She submitted that she thought her claims relating to her dismissal were all under the same umbrella.

133. Considering what was stated in the ET1 overall, I conclude that the claimant is seeking to introduce entirely new claims through amendment. I did not expect the claimant, who has not had the benefit of legal representation in relation to the proposed claims, to have used the correct labels or "semantics" as she put it, or indeed necessarily to label the facts as using legal terminology, or to have specified on which legal provisions she was relying. However, I would have expected the claimant to have set out in the narrative the relevant facts upon which she could rely to establish her claim that she had been unfairly dismissed or dismissed because of her disability by way of a further claim or amendment application. However, nothing in the narrative set out at 8.2 indicated that the claimant intended at that point to pursue such a claim (and as the respondent indicated the dismissal had not taken place at the stage that the claim had been presented).

134. I have found that the claimant did not have a disability by reason of a mental impairment within the meaning of section 6 of

the EqA at the relevant times relating to the claimant's existing claim. In terms of considering the issue of whether the claimant was disabled as at the date of her dismissal, considering the evidence that was before me at the hearing, I am not satisfied that the claimant had a disability by reason of her mental impairment (or alternatively that there is any reasonable prospect of the claimant showing that she had a disability) pursuant to section 6 of the EqA at the date of her dismissal. I would therefore refuse permission for the claimant to amend her claim to include a claim for direct disability discrimination pursuant to section 13 of the EqA on the basis that such a claim would clearly have no reasonable prospect of success.

135. In any event (even if I am wrong and the claimant had a disability at the time of her dismissal), any claim for direct disability discrimination relating to the claimant's dismissal would have been presented outside the 3-month statutory time limit that is provided in section 123(1) of the EqA 2010. I do not consider that there was any reasonable prospect of the claimant showing that she brought such a claim within such other period as the Tribunal considers to be just and equitable. The proposed claim is significantly out of time (primary limitation being 11 February 2021) and the claimant has had ample opportunity to seek advice from Unite, the solicitor she consulted in 2020, ACAS and other sources. It is not clear why she failed to do so and there is no other justification for the claimant not presenting her claim within the primary time limit. There is likely to be significant prejudice to the respondent as the claim relates to different witnesses, witnesses have left the respondent's London branch and moved abroad, and the passage of time is likely to affect the cogency of the evidence substantially. Therefore, I would have in any event refused permission for the claimant to amend her claim to add a complaint pursuant to section 13 of the EqA on that basis also.

136. I next turned to the issue of time limits in respect of the claimant's unfair dismissal claim. The respondent's representative argued that this claim was significantly out of time. With regard to the date from which time was to run in respect of the amendment, the date of dismissal (effective date of termination, ["EDT"]) was 12 November 2020. The EDT was not in dispute. The claimant notified ACAS of her claim on 04 May 2022, and therefore the three-month time limit was not suspended. That meant that there were no days that had to be added to the original time limit. The primary time limit expired on 11 February 2021.

137. The claimant lodged her ET1 on 15 June 2020 (i.e. prior to the EDT by several months). However, in respect of the amendment application, this was presented to the Tribunal by an email dated 10 May 2022, which was after the Preliminary Hearing that took place before Employment Judge Lewis on 19 April 2022 (during which the claimant indicated her intention to amend her claim).

138. Using the EDT, it is clear in any event that the claim has been brought outside the applicable statutory time limits (the claimant is entitled to no ACAS Early Conciliation extension).

139. In respect of the question whether this claim was time barred, this falls to be determined by reference to the date when the application to amend is made, not by reference to the date at which the original claim form was presented. Accordingly, in respect of any new claims which she was seeking to add, the amendment application had been lodged almost 18 months after the date of dismissal, and it is therefore out of time.

140. The next question to ask is whether or not the time limit should be extended, the test being whether or not it was reasonably practicable to have presented the claim in time.

141. The respondent's representative argued that it was feasible and practicable for the claimant to submit the ET1 in time and so that undermines any argument the claimant may have that it was not reasonably practicable to include her unfair dismissal claim. There is no reference to new facts which have emerged, or she has become aware of since her dismissal. Although the claimant is arguing ignorance of the correct process to follow, her rights, and of the limitation period for bringing an unfair dismissal claim, it was reasonable for the claimant to have taken steps to inform herself as to these matters. It remains unclear why the claimant did not conduct research via Unite or ACAS or seek advice in relation to limitation and Tribunal procedure for presenting a new claim or amending an existing claim. As she instructed a solicitor in 2020 to prepare correspondence relating to her dismissal, it is not clear why the claimant did not ask her solicitor for advice in terms of the limitation period and what steps she needed to take to present a new claim or amend her existing claim.

142. There was no medical evidence before the Tribunal showing that the claimant could not present a new claim or an amendment application relating to her unfair dismissal claim at an earlier point as a result of any matter in connection with her health.

143. There was nothing in the amendment application which would serve as an explanation for the delay, and no physical impediment to lodging the claim, and therefore it has to be concluded that it was reasonably practicable to have lodged the claim in time.

144. The claimant said that as far as she was concerned there was no delay in her submitting her claim. She assumed that the Tribunal would deal with any "semantics."

145. I accepted the respondent's argument that it could not be said that it had not been reasonably practicable for the claimant to

have lodged the unfair dismissal claim in time. She had been able to lodge an ET1 in 2020, she had set out the facts there relating to her original claim, and subsequently set out new facts in her amendment application. The facts upon which she seeks to rely are the same facts which were known to her at the time of her dismissal. No new information or facts have emerged since which may explain why she now sought to categorise her complaint as one of having been unfairly dismissed or that she was dismissed because of her disability, if she believes that is the reason.

146. I conclude that this is a new cause of action, that the claim is time barred, that it could not be said that it was not reasonably practicable to have lodged the claim on time. I was aware, however, that this was only one factor to be taken into account in relation to whether the amendment should be allowed, albeit an important factor, given the particular circumstances of this case (that is that the claimant lodged her original claim in time, but she did not make a further claim relating to the proposed amendments or present an amendment application until 10 May 2022).

147. With regard to the timing and manner of the application, the respondent's representative highlighted the delay and significant prejudice that would result if the amendment were permitted. Stepping back to consider the extent to which the parameters of this claim would extend, he submitted that to permit the amendments which the claimant seeks would be to extend the factual and legal scope of the claim significantly. The facts, witnesses and legal issues are relevant to that question. From a relatively contained ET1, this would extend to a scenario involving a number of additional individuals. The cogency of the relevant witness evidence is likely to be impacted by the passage of time. A number of relevant witnesses have left the respondent who have offices in London and relocated themselves abroad.

148. With regard to other circumstances, I agreed that the legal and factual claim which the claimant now seeks to make varies significantly from the original claim. In particular, I take account of the fact that the claimant's original claim is a claim which relates to race discrimination and disability discrimination, and the claimant will not be entitled to pursue her claims in respect of those matters (as discussed above).

149. Taking all of the circumstances into account and balancing the injustice and hardship of allowing the amendment against refusing it, I concluded that the proposed amendments should not be allowed.

Conclusion

150. The claimant's claims for disability discrimination is dismissed. The claimant did not have a disability pursuant to s 6 of the EqA.

151. The claimant's claims for race discrimination is dismissed pursuant to Rule 37(1)(a) of the ET Rules on the basis that they have no reasonable prospect of success.

152. The claimant's application for permission to amend her claim to include claims for unfair dismissal and dismissal because of her disability is dismissed.

153. The Preliminary Hearing (case management) provisionally listed to take place on 28 October 2022 at 10.00am is vacated on the basis that this is not required in light of the Tribunal's Judgment and that all of the claimant's claims stand dismissed.

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Employment Judge B Beyzade

Dated: 22 October 2022

Sent to the parties on:

.25/10/2022

For the Tribunal Office