EMPLOYMENT TRIBUNALS

Claimant: Miss D Obi

Respondent: Concentrix CVG Intelligent Contact Limited

Heard at: Manchester **On:** 31 January 2023

Before: Employment Judge Phil Allen
Ms D Radcliffe
Mr A J Gill

REPRESENTATION:

Claimant: Mr A Ohringer, counsel
Respondent: Ms A Niaz-Dickinson, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. It was not just and equitable to extend time for the claims of harassment related to sex in breach of section 26 of the Equality Act 2010, for the harassment found to have occurred in November 2017, and the Employment Tribunal does not have jurisdiction to consider those complaints as the claims were not entered within the time required by section 123 of the Equality Act 2010. Those claims are dismissed;

2. It was just and equitable to extend time for the claim of harassment related to sex in breach of section 26 of the Equality Act 2010, for the incident found to have occurred on 6 January 2018, and the Employment Tribunal does have jurisdiction to consider that complaint as a result of section 123(2)(b) of the Equality Act 2010. That complaint by the claimant of harassment related to sex by the respondent, is found.

REASONS

Introduction

1. The claimant was employed by the respondent as a Customer Care Adviser from 2 October 2017 until her dismissal on 23 June 2018. Her claims related to a series of events between early November 2017 and a meeting which she attended on 3 June 2018. She alleged that she was subjected to conduct which amounted to

harassment on the grounds of race and/or sex and/or direct discrimination on the grounds of race and/or sex. The respondent denied that she was subjected to any discrimination or harassment. All liability issues in the claim were heard by this Tribunal on 2-6 and 13 March 2020 and a written Judgment with reasons was prepared on 1 April 2020 and sent to the parties on 3 April 2020. That Judgment found for the claimant in three claims of harassment related to sex.

2. The respondent appealed against the Employment Tribunal's Judgment. The matters which were considered at the full hearing of the Employment Appeal Tribunal arose from the Employment Tribunal's finding that it had been just and equitable to extend time for the three matters found to be unlawful harassment related to sex. The appeal succeeded (in part). In the Judgment of Auerbach HHJ following the hearing on 4 May 2022, the Employment Tribunal was found to have made a principled error of approach in one paragraph of its decision and the case was remitted to the Employment Tribunal.

3. The issue remitted to the Tribunal to decide was whether or not it was just and equitable to extend time under section 123(1)(b) of the Equality Act 2010 for the three claims of harassment related to sex, which had been found as recorded in the previous Judgment.

Procedure

4. The claimant was represented at the hearing by Mr Ohringer, counsel. He had not represented the claimant at the original Employment Tribunal hearing, when the claimant had represented herself. He had represented her at the appeal hearing before the Employment Appeal Tribunal. Ms Niaz-Dickinson, counsel, represented the respondent, as she had at the original Employment Tribunal hearing and before the Employment Appeal Tribunal.

5. The hearing was conducted in-person in Manchester Employment Tribunal.

6. The Tribunal was provided with the bundle of documents and witness statements which had been before it at the original Employment Tribunal hearing. The Tribunal was also provided with an additional bundle containing the Employment Tribunal's previous Judgment, the appeal documents, and the decision of the Employment Appeal Tribunal.

7. Each of the counsel provided a written skeleton argument, which the Tribunal read before the hearing commenced. Each of the representatives then made oral submissions.

8. It was common ground between the representatives that the decision was to be made based upon the evidence previously heard and the facts found. There was some reference in submissions to Mr Barton, evidence given about him by Ms Dentith at the previous hearing, and why it was that he may not have attended to give evidence. In the light of those submissions and as the parties did not appear to be aware of it, the Tribunal read to the representatives some limited correspondence between the Tribunal and Mr Barton following the previous Judgment (in which he had sought anonymity). It was confirmed that the correspondence would not be considered as part of this Judgment (and it has not been), but the correspondence

was explained to the parties for reasons of transparency and as the Employment Judge was aware of it when the parties were not (and should have been).

9. At the end of the hearing, Judgment was reserved. Accordingly, the written Judgment and written reasons are set out in this document.

The relevant claims and Issues

10. The complaints under consideration were recorded in the Employment Tribunal's Judgment as PoC2, PoC3 and PoC7 (PoC identifying the Particulars of Claim and the number of the allegation within them).

11. What the Tribunal found occurred as PoC2, was that "*on one of the first occasions post-training when the claimant was undertaking work for the respondent, she was approached by her line manager who made reference to her body in the way alleged* [he believed he could enhance it and would give free sessions to do this (he had an interest in personal training)], *described her as his "favourite", and then showed her a half-naked photo of himself on his phone*". The line manager referred to was Mr Barton. The facts heard about that allegation (together with those recorded as they related to PoC3) were recorded at paragraphs 20-34 of the original Tribunal Judgment and the findings made when applying the law were recorded at paragraphs 140-144. It was found that the conduct: was of a sexual nature; did have the effect of undermining the claimant's dignity and creating a humiliating or offensive environment for her in the workplace; and that it was reasonable for it to have that effect in the circumstances in which it occurred. The event was found to have occurred in November 2017, once the claimant had started her normal work on the call floor (paragraph 20).

12. What the Tribunal found occurred as PoC3, was that Mr Barton held the claimant's waist and said that he preferred black girls. The facts heard about that allegation (together with those recorded for PoC2) were recorded at paragraphs 20-34 of the original Tribunal Judgment and the findings made when applying the law were recorded at paragraphs 145-147. It was found that the conduct: was unwanted; was of a sexual nature; did have the effect of violating the claimant's dignity and creating an offensive environment for her; and that it was reasonable for it to have that effect. That was found to have occurred on 4 or 5 November 2017 (based on Mr Singh's evidence as recorded at paragraph 26).

13. For PoC3 the Tribunal found that what had occurred constituted both harassment related to race and harassment related to sex. It was the only incident of harassment related to race found. For the finding of harassment related to race, the Tribunal did not find that it had jurisdiction to determine the complaint, as the claim had not been entered in the time required and it was not just and equitable to extend time for that complaint (as the sole finding of harassment related to race). The claim should have been entered at the Tribunal on 4 February 2018 and it was not presented until 4 June 2018. That was four months out of time (or three months if allowance was made for the period of ACAS Early Conciliation).

14. What the Tribunal found occurred as PoC7 was that "*at the Christmas party Mr Barton pulled the claimant's waist and started whispering inappropriate words to her such as "you look so sexy right now", forcing the claimant to use her hands as a*

defence mechanism and a barrier". The facts heard about this allegation were recorded at paragraphs 53-57 of the original Tribunal Judgment and the findings made when applying the law were recorded at paragraphs 148-149. It was found that the conduct: was unwanted; had the effect of violating the claimant's dignity and creating a degrading, humiliating and offensive environment for her; and that it was reasonable for it to have that effect.

15. In terms of time, it was common ground between the parties that the claims for harassment related to sex as found, were not entered within the primary time limit required. ACAS Early conciliation had commenced on 6 April 2018 and continued to 6 May 2018. The claim was entered at the Tribunal on 4 June 2018. For the last act found to have constituted harassment related to sex, the claim was entered (or at least early conciliation commenced) one day outside of the time required. The Tribunal in the previous Judgment had found that the three acts of harassment related to sex were conduct extending over a period (albeit that the Employment Tribunal used the phrase commonly used by Tribunals, that of it constituting a continuing act). The conduct extending over a period ended on 6 January 2018 (when PoC7 occurred).

16. In this hearing, the particular focus was on two paragraphs of the previous Tribunal Judgment, paragraphs 118 and 152. At paragraph 118, when determining the time issues for the claim of harassment related to race, the Tribunal recorded the following:

> "*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.*"

17. In the paragraph referred to in that part of the Judgment, paragraph 81, the Tribunal had found the following:

> "*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).*"

18. Paragraph 152 was the paragraph which had recorded the Tribunal's findings which the Employment Appeal Tribunal had found were in error. That had recorded:

> "*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.* "

19. The respondent's counsel quite correctly submitted that the decision of the Employment Appeal Tribunal meant that the Tribunal had erred when it had used the words shown in bold in the paragraph above (which were not recorded in bold in the original Judgment). The Tribunal's decision made and recorded at the end of the paragraph, had been overturned by the Employment Appeal Tribunal in its decision.

20. The Tribunal read and considered the Employment Appeal Tribunal Judgment in its entirety. It is not appropriate to reproduce that entire Judgment here. The main focus of the arguments heard focussed upon paragraph 76 of that Judgment. What the Employment Appeal Tribunal said from paragraph 76 onwards was the following:

> "*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.*
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> *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.*
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> *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.*
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> *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."*

21. Earlier in the Judgment, the Employment Appeal Tribunal had said that the issue of forensic prejudice must be considered. It went on to provide this guidance on the approach to be taken generally (at the end of paragraph 71 and onto 72):

> "*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.*

> *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."*

The Law

22. The Tribunal fully considered the submissions ably made by each of the representatives. It will not reproduce the entirety of the submissions made in this Judgment, but has considered them all.

23. Both representatives agreed that the Court of Appeal decision in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 was the starting point. The claimant's counsel referred to the Judgment as establishing that the discretion to extend time is a very general and broad discretion.

24. The respondent's representative quoted a lengthy passage from the Court of Appeal's Judgment in **Adedeji** in her skeleton argument:

> *"plainly the three days by which the Appellant missed the deadline could have made no difference to the cogency of the evidence about any material issues of fact …*
>
> *However, I do not believe that the substantive point that the Judge was making at para. 33 of her Reasons was about the impact of that very short delay, which she herself described as "not substantial". Rather, she was making the point that the substance of the claim concerned events which had occurred long before the formal act complained of, and that the evidence of those events was likely to be less good than if a claim about them had been brought nearer the time: see para. 22 above. I appreciate that, if that was her point, her reference to "impact on the cogency of evidence" is rather inapt because if taken by itself it would suggest that she had in mind "Keeble factor (b)", which is indeed focused specifically on the impact of the delay following the expiry of the relevant deadline; but we are concerned with the substance of her reasoning, which is in my view adequately clear, and we should not be distracted by any mere looseness of expression.*
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> *So understood, I see no error of law in this element in the Judge's reasoning. Of course employment tribunals very often have to consider disputed events which occurred a long time prior to the actual act complained of, even though the passage of time will inevitably have impacted on the cogency of the evidence. But that does not make the investigation of stale issues any the less*

> *undesirable in principle. As part of the exercise of its overall discretion, a tribunal can properly take into account the fact that, although the formal delay may have been short, the consequence of granting an extension may be to open up issues which arose much longer ago. On the facts of this case the Judge clearly had in mind both the respects in which the events of late 2016 were historic, as identified at para. 22 above; and she also had in mind the fact that the Appellant could have complained of them in their own right as soon as they occurred or in May, immediately following his resignation. She does not, rightly, treat this factor as decisive: in fact, as I read it, she placed more weight on the absence of any good reason for the delay. But what matters is that she was entitled to take it into account. As regards the Appellant's point that the relevant proposals were contained in emails, it is not clear that this specific point was made in either the ET or the EAT, but in any event it cannot be assumed that it follows that no oral evidence on the issue would be required: the assessment of whether there was a risk of evidence being less satisfactory because of the passage of time was for the Judge and cannot be challenged in this Court unless it was perverse. (I would add, while acknowledging that this does not appear to have been the Judge's approach in this case, that the fact that the grant of an extension will have the effect of requiring investigation of events which took place a long time previously may be relevant to the tribunal's assessment even if there is no reason to suppose that the evidence may be less cogent than if the claim had been brought in time.)"*

25. Neither representative relied upon the factors set out in **British Coal Corporation v Keeble** [1997] 336 and the claimant's representative emphasised that **Adedeji** held that there was no need to refer to the factors highlighted in that case. The claimant's representative relied upon the Court of Appeal Judgment in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 1194 (a Judgment cited in the Employment Appeal Tribunal's decision in this case) and, in particular, the following passage:

> "*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)*"

26. The claimant's representative also referred to what Laing HJ said in **Miller v The Ministry of Justice** (UKEAT/0003/15) in which she said:

> "*DCA v Jones also makes clear (at paragraph 44) that the prejudice to a Respondent of losing a limitation defence is "customarily relevant" to the exercise of this discretion. It is obvious that if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of the discretion, telling against an extension of time. It may well be decisive. But, as Mr Bourne put it in his oral submissions in the second appeal, the converse does not follow. In other words, if there is no forensic prejudice to the Respondent, that is (a) not decisive in favour of an extension, and (b), depending on the ET's assessment of the facts, may well not be relevant at all. It will very much*

> *depend on the way in which the ET sees the facts; and the facts are for the ET*. "

27. The respondent's representative highlighted what was said by HHJ Tayler in **Secretary of State for Justice v Mr Alan Johnson** [2022] EAT1:

> "*I also consider that at paragraph 4.12 in the last two sentences, the tribunal directed itself that it was only the period by which the complaint was originally submitted out of time that was legally relevant. It is clear from the decision in Adedeji that in considering whether to exercise the broad discretion to extend time it is relevant for the tribunal to consider the consequences for the respondent of granting an extension, even if it is of a relatively brief period, including whether it will require the tribunal to make determinations, for whatever reason, about matters which occurred long before the hearing. Accordingly, while it was correct that it was neither of the parties' fault that there had been considerable delay whilst the personal injury proceedings had been dealt with, allowing an extension of time, even of a relatively brief period, would result in the tribunal having to make determinations on matters that had happened many years ago. That was a factor that the tribunal was required to consider.*"

28. The claimant's representative referred to three authorities as supporting what he said in his skeleton argument, that: where a claimant succeeds at trial on the facts, they would suffer a very severe prejudice if their claim was ruled out of time and the Tribunal refused to extend time. Those authorities were: **Szmidt v AC Produce Imports Ltd** UKEAT/0291/14; **Rathakrishnan v Pizza Express (Restuarants) Ltd** [2016] ICR 283 and **Bahous v Pizza Express Restaurant Ltd** UKEAT/0029/11. He quoted the following passage from HHJ Peter Clark's Judgment in the latter:

> "*Our approach is this. The question of the balance of prejudice is plainly a material factor and one that is significant in this case. We prefer not to treat the merits as a separate consideration but as part of the prejudice balancing exercise. We agree with Mr Khan that there is no indication on the face of the Tribunal's Reasons that it took this matter into account*
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> *It is significant because on the one hand the Claimant has lost, not simply a speculative claim, but a good claim on its merits. Conversely the Respondent has suffered no prejudice in conducting its defence to the claim. In these circumstances the balance of prejudice is all one way. It impacts solely against the Claimant's interest*."

29. The Employment Tribunal accepted the respondent's counsel's verbal submission that this factor alone cannot be determinative (otherwise the time limits, which are there for a good reason, would have no relevance at the end of a substantive hearing). The Tribunal also accepted the claimant's counsel's submission that the cases he cited showed that a claimant who succeeded at the hearing on the facts would suffer a severe prejudice if their claim was ruled out of time and the Tribunal refused to extend time.

30. In her skeleton argument, the respondent's representative submitted that: the forensic prejudice that justified the Tribunal's refusal to extend the primary time limit in respect of PoC3 for racial harassment, must, in order to ensure internal consistency within the Tribunal's reasons, result in the same refusal in relation to PoC3 for sexual harassment; and as PoC2 occurred earlier in time than PoC3 it would (she said respectfully) be perverse to reach any other conclusion in relation to that allegation given that all of the factors set out for PoC3 must apply equally to PoC2. There was some considerable merit in those submissions. It was also noted, as the respondent's representative submitted, that if there had only been one possible outcome in the decision to be made for PoC2 and PoC3, the Employment Appeal Tribunal would not have referred the decision to be made for those allegations back to this Tribunal.

31. In her skeleton argument, the respondent's counsel also stated that the entire delay of over two years, between the date of the last sexual harassment allegation and the hearing of the claimant's claim, was a legally relevant and material matter in the context of the forensic prejudice suffered by the respondent, that the Tribunal was entitled to take into account bearing in mind what was said in **Secretary of State for Justice v Mr Alan Johnson** as quoted above. When asked about this, the claimant's counsel accepted that this was in part right. The Tribunal accepted the submission as being entirely right and therefore did take that into account as being a relevant matter.

32. The respondent's counsel submitted that all of the matters which the Tribunal had weighed in the balance when considering whether or not to extend the primary time limit in respect of PoC3 (for the harassment related to race found), should also now be weighed in the balance when considering whether it was just and equitable to extend time for PoC7. That submission was entirely correct and, as explained below, the Tribunal did so. She also submitted that the forensic prejudice suffered by the respondent should tip the balance in its favour in the context of all those matters. As explained below, the Tribunal did not agree, but fully accepted that the respondent's forensic prejudice was an important factor which need to be considered in the balance undertaken.

33. The Tribunal was grateful to the representatives for the detailed submissions made and the appropriate reference to a considerable number of cases. It noted the contrast with the submissions made in respect of time/jurisdiction at the previous hearing.

Conclusions – applying the Law to the Facts

34. The Employment Tribunal had erred when reaching its previous decision, in not considering all of the relevant factors when determining whether it was just and equitable to extend time for the claims of sexual harassment found to have occurred. As a result, the Tribunal was particularly mindful to ensure that it considered all of the factors raised which it should take into account. It reminded itself of exactly what it had found and recorded at paragraphs 81 and 118 of the previous Judgment and considered and weighed in the balance all of the factors recorded in those paragraphs.

35. The Tribunal also took into account the matters which had been raised by the representatives at the hearing, in addition to those matters recorded in paragraph 118. The fact that all of those factors are not listed or repeated in this paragraph should not be read as meaning that they were not all considered (or that they were not considered when considering the issue separately for the different allegations/findings); they were.

36. In its previous decision, the Tribunal had determined that it was not just and equitable to extend time for the finding of harassment on grounds of race. The reasons for that decision were set out at paragraph 118 of the previous Judgment. That decision had not been appealed. In considering whether it would be just and equitable to extend time for PoC2 and PoC3 individually (and for the compendious continuing act of all three of the matters found (PoC2, PoC3 and PoC7)), the Tribunal also considered very carefully what was set out by Auerbach HHJ in his decision, particularly at paragraph 76.

37. PoC3 occurred on 4 or 5 November 2017. PoC2 occurred at the start of November, on the same date or slightly before it. The Tribunal found in its previous Judgment that it was not just and equitable to extend time for an incident of harassment which occurred on 4 or 5 November 2017. The Tribunal has considered all of the factors set out when that decision was reached, alongside all of the matters raised at this hearing. The Tribunal has decided that it would not be just and equitable to extend time for the claims of sexual harassment for PoC3 and/or PoC2. It has also found that it would not be just and equitable to extend time for the compendious continuing act of all three of the matters found (PoC2, PoC3 and PoC7). That decision is consistent with the decision reached previously for PoC3 as an allegation/finding of harassment on grounds of race. The Tribunal has taken account of the forensic prejudice identified and recorded, as it was told it must do by the Employment Appeal Tribunal. Auerbach HHJ recorded that the Employment Tribunal "*was bound as a matter of consistency to take on board the findings of forensic prejudice*" the Tribunal had made in that regard at paragraph 118 of the previous decision. The Tribunal has done so. The Tribunal has found that it is not just and equitable to extend time.

38. For PoC7 alone, the position is slightly different, as the claim was formally out of time by only one day (or, at least, ACAS Early Conciliation was only commenced one day after the primary time limit expired). Auerbach HHJ stated that this was "*not itself a wholly irrelevant consideration*" something which the Tribunal has understood to mean that it can be a relevant consideration where it is considered alongside all the other factors. As with PoC2 and PoC3, the Tribunal has reminded itself of exactly what it had found and recorded at paragraphs 81 and 118 of the previous Judgment and has considered and weighed in the balance all of the factors recorded in those paragraphs. The Tribunal also took into account the matters which had been raised by the representatives at the hearing (including in submissions and in the parts of the submissions and case law cited above), in addition to those matters recorded in paragraph 118.

39. As a result, the particular factors taken into account and weighed in the balance were (for PoC7 alone):

a. The claimant was an experienced litigator who had brought claims at the Employment Tribunal before;

b. The claimant knew about Employment Tribunal time limits;

c. There was no evidence before the Employment Tribunal as to why the claimant could not, or did not, present her claim earlier;

d. The claimant did raise a grievance, but chose not to enter a Tribunal claim when she did so;

e. As the claimant had raised a grievance and as the respondent had undertaken internal procedures, including interviewing Mr Barton about the claimant's allegations at the time, the respondent had investigated the incidents when matters were still fresh and did have a record of what had been said about the matters raised from closer to the time. Witnesses were not being asked to recall matters later about which no record had been made at the time (or would not have been if they had given evidence);

f. Time limits are important;

g. The claim for PoC7 was entered (or at least early conciliation was commenced) one day outside the relevant time limit (and in that respect PoC7 differed from PoC2 and/or PoC3);

h. There was some prejudice to the respondent, as a number of employees had left its employ who might have given evidence, including Mr Barton (in December 2018). In paragraph 118 of the last Judgment the Tribunal had observed that it was unclear to what extent the delay in claiming contributed to their not being able to give evidence, however in the light of the respondent's counsel's submissions based on **Adedeji** and **Johnson** the Tribunal did not take what we had observed last time into account in the balance undertaken following this hearing;

i. The liability hearing took place in March 2020, when the Tribunal had been considering an event which occurred on 6 January 2018. The respondent was required to defend a claim at a hearing which took place two years and two months after the act complained of;

j. The respondent had not witness ordered Mr Barton to attend the hearing and give evidence, albeit they could have done so. We noted what the respondent's counsel said about employers and why they might not witness order a reticent witness or one who may not be happy with their former employer, but in any event had Mr Barton been witness ordered he would have been required to tell us the truth about what occurred;

k. The memories of witnesses fade over time (albeit in this case that factor was lessened by the records and accounts taken by the

respondent as part of the internal grievance process closer to the time, which would have assisted recollection);

l. Time limits are important and are there for a good reason; and

m. If the Employment Tribunal does not extend time, the claimant whom the Tribunal has found to have been subjected to sexual harassment, would not be able to succeed in her claim and/or to receive a remedy. The claimant would not have lost just a speculative claim, but a good claim on its merits.

40. Weighing in the balance all of the above factors, the Employment Tribunal found that it would exercise its discretion under section 123(2)(b) and found that the claim for harassment related to sex relying upon the conduct of Mr Barton on 6 January 2018 (PoC7) was brought within such other period as the Employment Tribunal found to be just and equitable. Accordingly, the Tribunal did have jurisdiction to consider and determine that claim. The claimant's claim for harassment related to sex for that allegation (only) was found and succeeded.

Remedy

41. The Tribunal will need to go on to determine remedy issues. The parties are encouraged to do all they reasonably can to endeavour to agree the steps which should be taken to address remedy, and to agree when a remedy hearing can be listed (and how long it should be allocated). In the event that the parties are unable to agree all such steps, a preliminary hearing (case management) has been listed for one hour at 10 am on 16 June 2023 to be conducted by Employment Judge Phil Allen, by CVP remote video technology. If the parties are able to agree matters, that preliminary hearing will not be required.

Employment Judge Phil Allen

20 February 2023

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

27 February 2023

FOR THE TRIBUNAL OFFICE