EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105842/2022

Held in Glasgow via Cloud Video Platform (CVP) on 6 February 2023

Employment Judge Russell Bradley

Ms Laura Mackenzie	**Claimant** **Represented by:** **Mr J Lawson - Solicitor**
The Chief Constable of the Police Service of Scotland	**Respondent** **Represented by:** **Ms N Moscardini - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claims were presented within such time as was just and equitable; and the tribunal has jurisdiction to hear the claims.

REASONS

Introduction

1. On 31 October 2022 the claimant presented an ET1 with a paper apart. In it she makes claims of disability discrimination under sections 13,15,19 and 20/21 of the Equality Act 2010. By an ET3 and Grounds of Resistance lodged on 30 November 2022 the claims are resisted. Other than bare denials and what is noted at paragraph 61 below, the respondent says nothing in response to the claims set out under each section of the Act.

2. The claims arise out of a decision of the respondent on 10 December 2019 to withdraw a provisional offer to appoint the claimant as a Probationary Police Constable. In the paper apart to her ET1 (paragraph 15) the claimant acknowledged that her claims were presented out of time. But she argues that it is just and equitable to extend time so as to allow them to proceed.

3. In its Grounds of Resistance, the respondent argues that it would not be just and equitable to do so. The respondent also denies that the Claimant was disabled in terms of section 6 of the 2010 Act at the time of the alleged discriminatory treatment, or at all. The impairment said by the claimant to be a disability is depression and anxiety.

4. The respondent conceded before me that the date from which time began to "*run*" was 8 April 2020 the date of a letter to the claimant from the respondent's health adviser.

5. By notice of hearing emailed to parties' agents on 8 December 2022 this hearing was fixed to consider the single issue of time bar.

Issue

6. After discussion it was agreed that the issue for determination is whether the claims have been brought within a period which the tribunal thinks is just and equitable, having been brought outwith the period of 3 months from the date of the act to which they relate.

Evidence

7. I heard evidence from the claimant. She spoke to a number of documents within a joint bundle which contained 20 entries and 74 pages. They included an undated impact statement (**pages 19 and 20**).

Findings in Fact

8. Relevant to the issue and from the ET paperwork and the evidence (oral and documentary) I found the following facts admitted or proved.

9. The claimant is Laura Mackenzie. She is a student nurse. She is also employed by NHS Highland as a nursing assistant.

10. The respondent is The Chief Constable of the Police Service of Scotland.

11. On 15 June 2019 the claimant completed and signed a pro forma application form (**pages 32 to 47**). It was an application to become a police officer within Highland and Islands area. In the form the claimant: set out why she wanted

to become a police officer; explained the preparation she had undertaken before applying; noted the experience she had which she considered would be relevant to the role; and set out background additional supporting information.

12. The claimant has a daughter. At the time of her application, she was about 4 years of age.

13. In the form she asserted that the role of police officer was her "*dream career*". In it she said, "*I spent a lot of time researching into what the police officer role involves and what personal qualities and skills are required to have the potential. By doing this, I have spent some time reading the information on the police Scotland website and the social media sites. To gain an understanding of the role and to know what to expect, I have read in depth the police officer job description, the personal competency descriptors, code of ethics for policing in Scotland and the frequently asked questions. I have also spent time reading the 'eligibility' and 'what it takes' sections*." She carried out research every night after the end of her working day to find out about the role and the core values of Police Scotland.

14. Her form recounted an incident from her early secondary school years from which she had noted patience and empathy evinced by some police officers. She said that she had since regarded them as role models whom she wished to emulate.

15. Following her application, the claimant was invited to attend an "*IQ*" test in Aberdeen. In advance of it she obtained practice books to improve her numeracy skills.

16. By letter dated 7 November 2019 (**page 48**) Gavin Davidson (Recruitment Inspector) made a provisional offer of appointment as a probationary police constable subject to 6 conditions. One of them was that the claimant was "*certified by a registered medical practitioner approved by the police authority to be fit both physically and mentally to perform the duties of a police officer in terms of Regulation 6(c) of the Police Service of Scotland Regulations 2013*." The letter noted that a failure to meet all or any of the conditions may

result in her start date being deferred or the provisional offer being withdrawn. Prior to writing the letter Inspector Davidson had telephoned the claimant. He did so to congratulate her on her provisional offer. In the call he told her that her application by that time had "*stood out*" and that he was very impressed.

17. On or about 6 December 2019 the claimant attended for a "*medical*." It was intended that on the same day she would then be fitted for a uniform.

18. The medical was carried out by an occupational health nurse. One of the first questions asked of the claimant related to anti-depressants. The claimant had understood that by that time the respondent (or its occupational health advisers) would have had access to her own medical records. She said that she was at that time taking an anti-depressant drug. The nurse telephoned a colleague. The nurse then advised the claimant of what became known as "*the two year rule*". This rule was such that applicants to the respondent for positions as probationary police officer had to be "*free*" of anti-depressant drugs for a period of two years before they could be considered for appointment. The nurse advised the claimant that as a result she could not be passed as "*fit*". She further advised that she would require to be "*free*" of such medication for two years before her application could be reconsidered.

19. The claimant did not attend the fitting for her uniform. She returned home by train. The claimant was taken aback by the nurse's decision. She was shocked about what she had been told. She believed she had been transparent with the respondent about her health. She was very upset as a result. She was very tearful. She understood the respondent to be suggesting that because of her medication she was not capable or fit to do the job for which she had applied. She described herself as being heartbroken. She was shocked that the respondent had "*such a stigmatising attitude towards mental health*."

20. On or about 8 December Inspector Davidson telephoned the claimant. She understood from him that he was also shocked by and apologetic for the decision. He said that he hoped she would return in 2 years and reapply then.

21. On 10 December 2019 Inspector Davidson wrote again to the claimant. In it he said "*I can now advise you that having received the required information relevant to your case the Force Medical Advisor (FMA) is unable to pass you fit in relation to our medical standards*." He withdrew his previous offer. He advised that he was unable to progress her application any further. The claimant felt upset and angry as a result.

22. At about that time the claimant was in the process of moving house. In December 2019 and into January 2020 she remained upset about her treatment. She remained determined to be a police officer. She considered stopping her medication, doing so for the 2 years, and re-applying. She also set out to attempt to have the respondent reconsider and change its position.

23. In early February 2020 the claimant saw an advertisement which suggested the involvement of Police Scotland with the "*See Me*" programme. Its stated intention is to end mental health stigma and discrimination. She contacted the programme. She "*signed up*" to be part of its movement. She explained to representatives from the programme what had happened to her application. They were sympathetic.

24. On 7 February 2020 the claimant sent an email to "*Police Officer Recruitment*." (**page 51**) On 11 February (**page 51**) it was forwarded on to "*Police Recruitment Aberdeen.*" In her email the claimant said, amongst other things; she had not passed her medical "*due to mental health and medication*"; she had been told by the nurse on 6 December that the guidelines (referring to the 2 year rule) which had operated unfavourably for her were "*old and may be due to be revised*"; she had been unaware of the rule before her medical; she hoped that it would change soon "*as I feel discriminated by this*"; and she referred to the launch of a partnership between Police Scotland and "*See Me Scotland*", expressing her hope that it would make "*much needed*" changes to policies, procedures and processes mainly those related to recruitment.

25. On 19 February (**page 54**) the claimant registered a complaint with the respondent about the medical recruitment process.

26. Later that day, 19 February (3.20pm) (**page 53**) Inspector Megan Heathershaw of Police Scotland replied to the claimant's email of 7 February. In it she; very much sympathised with the claimant's position; noted that Police Scotland do not see candidates' medical assessments; advised that instead they receive notification from Optima Heath as to the fitness of candidates to hold office as police constable or if they are to be deferred; advised that if she wished to appeal it should be to Optima Health; set out her understanding that the method of appeal was included in correspondence from Optima Health which advised of the outcome of her assessment; and advised that Police Scotland was to carry out a review of the policy of medical deferral in circumstances such as hers. Optima Health is a trading name of Working on Wellbeing Ltd. It provides occupational health services to Police Scotland.

27. By 19 February, the claimant had not received a letter from Optima Health.

28. Very shortly after receipt of the email, the claimant telephoned to enquire for her medical assessment.

29. Also, on 19 February (3.29pm) (**page 57**) the claimant emailed to policescotland@optimahealth.co.uk. She referred to her telephone call. She sought a copy of her "*medical assessment failure*".

30. On 3 March 2020 the claimant forwarded to that same email address her email of 19 February (**page 60**). That day an Optima customer service adviser replied to the claimant (**page 60**). It indicated that documentation would be sent to her "*in due course*" after it had been approved and checked by a clinician.

31. On 8 April 2020 Dr Sohall Ahmed, Force Medical Adviser (FMA) with Optima Health wrote to the claimant (**pages 58 to 59**). In the letter he referred to a letter from the claimant dated 20 February; said that the opinion formed about the claimant was a consensus based on a discussion of several FMAs; that opinion was that it is "*prudent that a two-year period of good mental health with no treatment, while living a normally stressful lifestyle is required before an individual would be considered suitable for the post of Police Constable.*

This is to demonstrate a period of ongoing stability prior to starting what is recognised to be a psychologically and emotionally challenging job;" and noted that in her circumstances Optima would be happy to review her case in February 2022. The claimant's letter of 20 February was not produced.

32. The letter of 8 April resulted in the claimant feeling that she was "*back at square one*". Her reaction at the time was to give up on her "*dream*" of becoming a police officer. She was not aware of a possibly remedy before the employment tribunal. She was again in touch with "*See Me*". She felt that the decision was "*not right*".

33. By April 2020, the population of the UK was subject to the restrictions put in place by its Government as a result of the COVID-19 virus. The claimant then worked from home. She was responsible for her 5 year old daughter who was living with her. This involved educating and entertaining her.

34. In about August 2020 the claimant began working as a nursing assistant with NHS Highland. In that role, she worked in a local psychiatric hospital. At about that time, she began to think again about the respondent's withdrawal of the offer. She again felt that she had been "*wrongly done by*."

35. Sometime shortly before 21 November 2020 the claimant contacted "*Employment Law Inverness*". It appears that she provided her name, mobile telephone number and her email address. It appears that she also indicated that she said she needed help with discrimination. On Saturday 21 November she received an email from noreply@employmentlawinverness.co.uk. (**page 63**) It noted that she had provided this information. It said that they would get back to her as soon as possible. The claimant believes that she did not hear further from them.

36. By 23 November 2020 the claimant had not by then received a copy of the report from her assessment in December 2019. On 26 November, a customer service manager employed by Optima emailed to the claimant a document, "*MacKenzie,Laura OH cert 051219.pdf*." (**page 62**)

37. On Saturday 13 March 2021 the claimant emailed Innes & Mackay, solicitors, Inverness. In it she said, "*I appear to qualify for legal aid and would like advice about a civil case against Police Scotland. It Is about mental health damages and their recruitment policy*."

38. The claimant believed that between November 2020 and March 2021 there had been a local lockdown. In that time, she was undertaking a course and trying to teach her daughter at home. She found the combination of various issues very stressful. Her recollection is that she did not receive a reply from Innes & Mackay.

39. She remained of the view that the respondent's decision to withdraw her offer was "*really, really unfair, wrong and unbelievable*." She believed that she was capable of becoming a police officer. She believed that she had put into her application a considerable amount of work. She believed that the respondent's policy was "*outdated*", and its application resulted in a "*massive stigma*" for her.

40. In the latter half of 2021 the claimant's studies included lectures on mental health issues. Her work required her to complete an assignment related to that subject. At that time, she had a lecturer on the subject. She discussed the circumstances of the withdrawal of the respondent's offer with the lecturer. Their suggestion was to obtain legal advice. At or about that time the claimant contacted the Citizens' Advice Bureau. Their advice was to lodge a claim herself. At that time she had "*neither the time nor the space*" to do so.

41. The claimant required the confidence to know that she had a claim. She attempted to get that confidence from a variety of sources. They included various local solicitors' firms in Inverness, her lecturer, and the Citizens' Advice Bureau.

42. On 24 February 2022 (8.58am) Munro & Noble, solicitors, in Inverness replied to an email from the claimant (**page 68**). It asked if she would require legal aid. It advised that they did not have capacity to take on cases with legal aid at that time. Within 10 minutes the claimant replied **(page 68)** to say she did not require legal aid. She heard nothing further from them.

43. Also, on 24 February 2022 the claimant emailed Harper Macleod, solicitors. In the exchange that followed that day (**pages 70 and 69** in that order) it became apparent that Harper Macleod were not able to assist due to a conflict of interest. In answer to a question, the claimant confirmed that she was happy for her details to be passed on to another firm local to Inverness. It appears that if those details were passed on, no other local firm contacted her as a result.

44. On Friday 14 October 2022 (17.40) Employment Law Inverness replied again to a further enquiry from the claimant (**page 71**). It replayed to her the same information as on 21 November 2020.

45. On or about 15 November 2021 the Sun newspaper published an article headed "*DISCRIMINATION' Scot ready to start work as cop 'rejected last-minute because she has depression*" (**pages 72 to 74**). It related to an applicant to the respondent who had had an offer from the respondent withdrawn. The article contained text saying, "*It is claimed that they* [Optima Health] *advised her that she would need "a minimum of two years of wellness" without taking anti-depressants before she could start the job*." It referred to employment tribunal proceedings which she had begun, having instructed the firm of solicitors who employ Mr Lawson.

46. On or about 31 October 2022 the claimant first read the newspaper article. She contacted Mr Lawson's firm that day. She did so because she believed that reading the article was like reading her own story. She thus had obtained advice from which she gained confidence that she may have a claim.

47. Early conciliation began on 31 October 2022 (**page 18**). A certificate was issued that day. Also, on 31 October 2022, the claimants' ET1 was presented.

48. The claimant was ashamed about the reason for the withdrawal of the respondent's offer. She has been ashamed since its withdrawal to date.

49. In the period since December 2019 there have been times when the claimant has been able to "*put it out of her head*". On other occasions her feelings of anger and frustration returned. Some of those occasions were prompted by

related activity. Examples include (i) learning about the respondent's engagement with "*See Me*" and (ii) her studies about mental health.

50. In the period between December 2019 and 31 October 2022 the claimant was not aware that there was a time limit for the bringing of employment tribunal claims.

Comment on the evidence

51. The claimant was keen to impress that she took her application very seriously. Her evidence was measured and to the point.

Submissions

52. Both parties made oral submissions. I do not repeat them. To the extent necessary, I mention what is said by them below.

The Law

53. Section 123(1) of the Equality Act 2010 provides, "*Subject to sections 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*." Section 123(3) of the Act provides, *"(3) For the purposes of this section—(a) conduct extending over a period is to be treated as done at the end of the period;(b) failure to do something is to be treated as occurring when the person in question decided on it*."

54. Sections 140A and 140B are not relevant here.

55. From the case of ***Robertson v Bexley Community Centre (t/a Leisure Link)*** [2003] IRLR 434 I take the following basic principles:

    a. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine.

b. When considering the exercise of its discretion, the tribunal has a wide ambit within which to reach a decision.

c. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time.

d. The exercise of discretion is the exception rather than the rule.

56. From the case of ***Miller and Others v The Ministry of Justice and Others*** [2016] 3 WLUK 394 I take the five points noted below. I note that in ***Wells Cathedral School Ltd v Souter*** EA-2020-000801-JOJ heard on 20 July 2021 at paragraph 29 the EAT said that the statutory provisions "*require the employment tribunal to decide what other limitation period, if any, it thinks is just and equitable in the particular case. That decision must of course be taken judicially, but the statute itself gives no further guidance as to how to apply that test. However, the authorities have, of course, laid out a number of useful principles and points of guidance over the years that should be followed by employment tribunals."* It continued that "*A number of them are usefully distilled*" and then referred to ***Miller and Others***.

a. The discretion to extend time is a wide one.

b. Limits are to be observed strictly in ETs. There is no presumption that time will be extended unless it cannot be justified: quite the reverse. The exercise of that discretion is the exception rather than the rule

c. If an ET directs itself correctly in law, the EAT can only interfere if the decision is, in the technical sense, "*perverse*", that is, if no reasonable ET properly directing itself in law could have reached it, or the ET failed to take into account relevant factors, or took into account irrelevant factors, or made a decision which was not based on the evidence.

d. What factors are relevant to the exercise of the discretion, and how they should be balanced, are for the ET. The prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "*customarily*" relevant in such cases.

e. The ET may find the checklist of factors in section 33 of the Limitation Act 1980 helpful.

57. Some of the frequently relevant factors are set out in the well-known case of ***British Coal Corporation v Keeble*** [1997] IRLR 336, EAT, though they are neither a checklist nor a substitute for the statutory wording. They are nevertheless helpful in many cases. The Tribunal must have regard to all the circumstances of the case including the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any request for information, the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action. A tribunal does not need to consider all of those factors in each and every case and in some cases certain factors may have no relevance at all.

58. Two factors which are almost always relevant the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (***Southwark London Borough Council v Afolabi 2003*** ICR 800).

59. When exercising its discretion, a tribunal is entitled to take into account the merits of the case. But it is against the rules of natural justice to do so if it has not been raised or argued (***Lupetti v Wrens Old House Ltd*** [1984] I.C.R. 348).

Discussion and decision

60. In her paper apart (**page 16** at paragraph 15) the claimant "*asserts that the delay in lodging the case were* [sic] *caused by the fact that she was not aware of the time limits, the impact of the decision on her health, the delay caused in dealing with her complaint and appeal, the pandemic, financial resources and her struggle to find representation.*" That paragraph continues, "*The claimant asserts that given the severe discrimination and treatment she has received it would be just and equitable to allow the claims to proceed*." She thus puts in issue the merits of her claim as a factor for this preliminary hearing.

61. In its Grounds of Resistance the respondent says (paragraphs 15 and 16) (**page 30**) "*The Respondent's Mental Health Standards for Recruits Guide for Force Medical Advisers ("the Guide") sets out that the estimation of the mental health of a potential recruit should be based upon an assessment of the individual, and should take into account the applicant's functional competence, together with an assessment of risk, and an assessment of the recruit's ability to meet core psychological competencies. The Guide states that the assessment of risk should take into account whether the recruit has a mental health problem that will result, if they were to serve as a police officer, in them being or becoming a risk to their own health; a risk to colleagues, themselves or members of the public; and a risk to the efficient functioning of the organisation. Under the Guide, if an individual with a history of depressive illness seeks appointment whilst still taking antidepressant medication, any decision to appoint should be deferred until they have been off medication and remained well in a normally stressful environment for at least 24 months*." While not saying so expressly, in the context of the claimant's ET1 the obvious inference is that the claimant's offer was withdrawn for the reason quoted from the Guide.

62. The four statutory grounds of claim relied on by the claimant have the same factual basis; the withdrawal of the offer.

63. The respondent conceded that the last act which could give rise to a claim in this case was 8 April 2020, the date of the letter from Optima Health (**pages 59 and 59**). Before that date, and indeed by 7 February 2020 the claimant felt that she had been discriminated against. It is clear from what she said then that she understood the connection between the actions of the respondent in withdrawing the offer and that discrimination. It is also clear that she sought a remedy at that time.

64. Understandably, Ms Moscardini in her submission responded to each of the factors outlined in paragraph 15 of the claimant's paper apart. I deal briefly with some of them, out of turn. In my view, there was no evidence that the impact of the decision on her mental health played any real part in the admitted delay. Nor was the issue of financial resources. Separately, given

the respondent's position on the date from which time began to run (8 April 2020) any delay before that date on the part of the respondent (or its advisers) was of no relevance. There was no delay by the respondent after that date in the provision of relevant material. I accept that the claimant struggled to find representation but given that by late 2021 she was well aware of a right to claim discrimination and its basis in her case, and by that time she had had advice (from Citizens' Advice Bureau) to present a claim herself, the absence of representation in itself does not provide an explanation for the whole period. By late 2021 the advice was to present the claim herself. While the pandemic created a number of difficulties for the claimant at home it is not in itself a reason not to have brought her claim before 31 October 2022. It was in my view a minor, marginal contributing factor.

65. There were, in my assessment of the evidence, two real reasons for the passage of time between April 2020 and 31 October 2022. They were (i) the fact that the claimant was unaware of a time limit for the claim and (ii) her reluctance to progress it without the confidence from an adviser to say that the claim had some merit. On the first of those, I accepted her evidence that she was not aware of the time limits. I also accepted her evidence as to her own confidence in her case, and her need to have it bolstered by external advice. Both of those issues are, in my view, supported by the steps that she took when she read the Sun newspaper article. She immediately contacted the solicitors named in the article; she then, and also immediately applied to ACAS and presented her claim. Her confidence was bolstered by the article which carried a "*mirror*" of her claim. She acted immediately thereafter.

66. I took account of what is said in ***Southwark***; the length of, and reasons for, the delay are almost always relevant, as is whether the delay has prejudiced the respondent. The delay in this case is just over two and a half years. That is substantial. I accepted that the claimant was unaware of the time limit until she instructed her current solicitors. I therefore accepted that she was unaware until the end of October 2022 that her claim was out of time. In her submission Ms Moscardini suggested that a relevant question was whether that delay was, in the circumstances, reasonable. She drew to my attention

what was said at paragraph 9 of the decision of the EAT in the case of ***Hunwicks v Royal Mail Group Plc*** UKEAT/0003/07/ZT. "*The fact that a claimant may have been unaware of relevant time limits does not necessarily make it just and equitable to extend them, particularly where, as here, the claimant is a person of some intelligence and some education with access to legal advice. It will frequently be fair to hold claimants bound by time limits which they could, had they taken reasonable steps, have discovered.*" I agree. It is clear from that text, that it is in principle possible to extend time in such circumstances. In this case, the claimant was likewise a person of intelligence and education. She was also a person who had some degree of conviction that she had been wronged. But she had not accessed any relevant legal advice before October 2022. She had taken some steps, albeit not consistently over the period to seek legal advice. Despite attempts from three potential advisers she had not made any progress. Ms Moscardini posed the question; was it reasonable for the claimant in this case to be unaware of the time limit? The question itself accepts that she was unaware of it. In my view it was reasonable for her to have been unaware where despite some efforts to satisfy herself as to the merit of her claim by trying to get advice she had not been successful.

67. As noted above from ***Miller***, the factors which are relevant to the exercise of the discretion, and how they should be balanced, are for the tribunal. The length of the period of delay counted against the claimant, but the counter-balance was her explanations for it. Again, as noted in ***Miller***, the prejudice which a Respondent will suffer from facing a claim which would otherwise be time barred is "*customarily*" relevant. The point is an obvious one. A respondent is always to some extent prejudiced by having to answer a claim which it need not answer if it were time-barred. In this case, Ms Moscardini argued that the respondent faced further prejudice. Any final hearing is likely to be about 4 years after the circumstances which give rise to it; there is (she argued) a real risk that the respondent's witnesses' recollection of important facts will be impaired by that passage of time. I do not readily accept that argument for two reasons. First, the kernel of this case is the operation of the respondent's Guide. Its terms do not appear to be in dispute. Nor does there

appear to be a dispute about the application of the Guide by the respondent's medical adviser to the claimant's application based on what she told them on 6 December. That evidence is in short compass. Second, the relevant contemporaneous documentation should provide a reliable point of reference for any witnesses giving oral evidence.

68. In my view a relevant factor weighing in favour of the claimant is the merit of the claim. While I cannot form anything other than a tentative view based on the parties' pleadings and the evidence that I have heard, it appears to me that there is at least a triable issue in this case. The clear focus of that issue will be the respondent's "*policy*" (see **page 53**) of deferring or withdrawing offers in circumstances such as the claimant's. In the case of ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** EA-2020-000833-VP judgment dated 26 April 2022 in the EAT the claimant argued that it was in wrong in law for the tribunal to take account of its view of the merits, of a complaint which it did not consider were so weak that it had no reasonable prospect of success, when deciding whether it was just and equitable to extend time, and when deciding whether to allow an application to amend. In that case and in that context at paragraph 58 the EAT said "*It is not, in principle, necessarily always wrong, in that context, to consider and assess the merits of that proposed claim, and to weigh these in balance, even if the tribunal is not in a position to say that it is so weak as to have no reasonable prospect of success*." In my view the merits of this case are a relevant factor to consider. Given that in my view they raise a triable issue, they weigh in favour of exercising discretion for the claimant.

69. The tribunal has jurisdiction to hear these claims. The judgment reflects my view on the issue.

70. While I was not addressed on what should follow if I found for the claimant, it appears to me that a short case management preliminary hearing should be fixed with a view to appointing the case to a further preliminary hearing on the question of disability. To my knowledge neither party has lodged the (usual) agenda. Nor has there been a case management preliminary hearing.

71. I direct accordingly and shall request that pro forma agendas are issued.

Employment Judge: **R Bradley**
Date of Judgment: **28 February 2023**
Entered in register: **01 March 2023**
and copied to parties