EMPLOYMENT TRIBUNALS

Claimant: **Ms P Kosobucka**

Respondent: **Alexir Co Packers Limited**

Heard at: **London South Hearing Centre (in public by CVP)**

On: **13/01/2023**

Before: **Employment Judge McLaren**

Appearances

For the claimant: In Person
For the respondent: Mr I Steel, Solicitor

JUDGMENT

It is the decision of the Employment Tribunal that:-

I. It has no jurisdiction to hear the claim for discrimination. It is not just and equitable to extend the time limit.

II. The claim for unfair dismissal is struck out as it has no reasonable prospects of success.

REASONS

1. This was a remote open hearing to consider the time bar issue raised in the ET3 and any other case management required. The hearing had originally been listed for 6 April 2022 as a telephone hearing but could not proceed because of technical problems. It was then listed as a video hearing on 25 July 2022. That was converted into a preliminary hearing as it became apparent that the claimant required an interpreter. The case has been listed for a third time for today, with an interpreter.
2. The interpreter and the claimant confirmed they could understand each other, and the language was Polish.
3. The parties referred to a bundle of 90 pages. Additional fit notes were provided during the hearing which I accepted, taking the bundle to 110 pages. The

claimant confirmed she had been sent an electronic copy of the entire bundle and these fit notes.

4. The claimant and the respondent's Managing Director, Jeremy Keable, gave evidence. In reaching my decision I have taken account of the evidence to which I was taken and the helpful written submissions of both parties which were sent to me after the hearing.

Jurisdiction/time bar issue

5. The complaints noted by the Tribunal are of sexual harassment and unfair dismissal with the last date of employment being set out in the narrative part of the ET1 as 15 December 2020. The claim form was submitted on 15 December 2020 following a period of ACAS early conciliation from the 16 to 17 November 2020.
6. The Reply did not respond to the unfair dismissal aspect of the claim. The respondent did, however, submit within its grounds of resistance that the claim for discrimination had not been submitted within the three months time limit as extended by the ACAS early conciliation process case.
7. The matter had originally been listed as a public hearing to determine whether the tribunal had jurisdiction to consider "whether any complaint was presented outside the time limits and if so, to be dismissed on the basis which had jurisdiction to hear it? Further or alternatively, because of those time limits (and not for any other reason) should the complaint be struck out under rule 37 on the basis it has no real prospect of success and/or should one or more deposit orders be made under rule 39 on the basis of little real prospects of success."
8. At the hearing on 25 July the issues to be considered today had been restated as

    8.1. which acts pleaded under the Equality Act are time barred?

    8.2. Does any time barred act form part of a continuing act under section 123 (3) (a) of the Equality Act 2010?

    8.3. Is it just and equitable the tribunal to exercise its discretion and allow the time-barred conduct to be included out of time under section 123 (1) (b) of the Equality Act 2010?

    8.4. Any further case management that is required

9. At the outset of the hearing, I raised the question of unfair dismissal with the respondent. They respondent's representative indicated that this claim had been brought as a mistake and that had been agreed with the claimant. It was the respondent's position that the claimant had not been dismissed, had not resigned and was still employed by it. The claimant said that was not the case and she was pursuing a claim of unfair dismissal. She had resigned.
10. I therefore agreed with the parties that I would also consider the respondent's application that the claim for constructive unfair dismissal should be struck out or in the alternative that a deposit order should be made. I explained this application to the claimant.

The issues

The issues I have to consider are as follows:

For the discrimination complaint time limits

10.1. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will need to decide:

10.1.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
10.1.2. If not, was there conduct extending over a period?
10.1.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
10.1.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

10.1.4.1. Why were the complaints not made to the Tribunal in time?
10.1.4.2. In any event, is it just and equitable in all the circumstances to extend time (i.e. why did the claimant present his claim for outside the time limit)?

For the unfair dismissal claim

11. Should this part of the claim be struck out as being scandalous, vexatious or having no reasonable prospect of success.

12. Does the claim for unfair dismissal have little reasonable prospect of succeeding?

Findings of Facts

The incident and initial investigation

13. The claimant first reported the sexual harassment incident to Mr Keable and Joan Paxton on 24 June 2020 via email (p 21). This email identifies that the incident that she is raising took place on 25 May 2020 and that it had taken a while for her to think about what she should do about it. The bundle showed that on 24 June the claimant was invited to an urgent meeting.
14. The claimant accepted that she waited for almost a month before reporting the incident and also that she had been coming to work for five days a week throughout this. She did this because she needed to earn her money and she was simply hoping that someone would help her. It was because she had no help with the situation that she then raised it to Mr Keable. Notes of this meeting were at page 21 A. It was agreed this was the first time she had made him aware of what she said had happened.
15. Mr Keable told the claimant at the time that what she had reported was totally unacceptable behaviour and that he would investigate. he was adamant that the claimant had said she did not want an investigation and certainly did not want this to be made public because it was a very close community. I find that the

claimant did say this, and it was for that reason that no formal investigation was launched, nonetheless, Mr Keable did take some steps to find out what happened as this was taken by him as a very serious allegation.

16. The claimant was accompanied at the meeting by a work colleague and friend who was also able to act as an interpreter for her. On 25 June 2020 the claimant received a response email from Joana Paxton HR confirming that the investigation was in progress and that as soon as it was completed Mr Keable would meet up with her again.
17. Whether the incident had occurred as the claimant set out or not, Mr Keable told me that he wanted to take immediate steps to safeguard the claimant. He met with the operations manager and agreed with him a reorganisation of the production rooms where the claimant worked. the workplace was reorganised so that there was no need for the claimant to come into contact with the individual about whom she had complained. While the business premises are small and it was not possible to ensure that their paths never crossed, the reorganisation was carried out to ensure that there was no reason for the two to work together.
18. Mr Keable asked the operations manager to look out for the claimant. He also spoke to Mr Skwierawska, who is in charge off one of the production teams and told him that the claimant would now be in his team. It was his daughter who had accompanied the claimant when she had raised the complaint with him. Mr Keable was aware that the claimant was a friend of the family and therefore considered that they were also available to provide support to her.
19. He also told me that 3 days after the initial meeting he met the claimant in a corridor and asked to speak to her. They went into his office, and he explained to her what he had put in place, that is the reorganisation of the production rooms. He checked that she was comfortable with the operations manager being there to support her and the claimant confirmed that she was. Mr Keable also gave the claimant his personal mobile number and made it clear that she could contact him day or night.
20. As far as he was concerned, he had put in place appropriate steps to support the claimant and she was happy with these. He believed this was the follow up meeting that the claimant had been told would happen. He did not report separately to the claimant on the results of the investigation, as she had not wanted a formal investigation to be carried out but had limited his update to her to the steps he had put in place to protect her.
21. Nonetheless, Mr Keable interviewed staff, in particular the manager on 26 June 2020 and the individual who was the subject of the complaints on 2 July 2020 after he'd returned from a two-week holiday. He was not able to determine exactly what happened and the individual denied it, but Mr Keable made it very clear that any such conduct was entirely unacceptable. He felt that he had taken all necessary steps.
22. The claimant gave evidence that she was not told the outcome of any investigation, the reorganisation was not explained to her, and she had no second meeting with the managing director. During questioning she did accept that there had been a second conversation with the managing director but stated that as she had no interpreter present, she would not have been able to understand it. Mr Keable gave evidence that he had worked with the claimant for a number of years and had many conversations with her without an interpreter. He was very careful in his use of English when talking to her and he

believed that she had understood what he had said to her when he explained the reorganisation. He accepted that he had not expressly told the claimant that he had briefed the operations manager, Sandra and her father to keep an eye out for the claimant's welfare but confirmed that these conversations had occurred.

23. On the balance of probabilities, I prefer the respondent's evidence on this point. I accept Mr Keable's account of what he did and his meetings with the claimant. I do so because his evidence has been consistent throughout, whereas the claimant's account has varied. The respondent's recollection of events is also consistent with an e-mail sent on the 4th of November 2020 which refer to the claimant knowing that measures had been put in place to make sure she felt comfortable. I also note that in a text sent by the claimant on the 1st of July (see below) she refers to a meeting in which he had made it clear she could contact him.
24. I find, therefore, that some three days after the incident had occurred the respondent had dealt with it and had reassured the claimant about this. I also accept that the claimant had not wanted a formal investigation and therefore find that she was not waiting for any such investigation outcome. I find that matters were in effect resolved by the 27th of June 2020.

Second complaint

25. On 16 July the claimant provided a detailed written statement setting out all the incidents of harassment about which she complained. This is at pages 24 to 25 of the bundle. It included new information about incidents that had occurred in early June. The bundle also contained a text the claimant had sent Mr Keable reporting a problem with the same colleague. This was not dated in the bundle but was agreed to have been on 1 July 2020.
26. Mr Keable could not recall the specific text but did recall that the claimant had sent him a couple of messages which he had passed on to the operations director to deal with. He also believed that he had asked the operations director to deal with the other matters that were referred to in the letter of the 16th of July. When I asked him why he thought the claimant sent this further document if everything had been dealt with, he thought that perhaps it was because it was a follow up from the operations manager checking in with the claimant. He did not carry out any further investigation himself. He had tasked the operations manager with dealing with any additional allegations as they came up.

The claimant's ill health

27. On 29 June 2020 the claimant attended the first appointment online with a psychologist Katarzyna Teslenko, who could conduct therapy in Polish for her. The claimant explained that her mental state, as well her command of English, was not good enough to attend NHS counselling. This was followed up on 07.07.2020-with a second therapy online appointment with the psychologist Katarzyna Teslenko.
28. The claimant then went on sick leave sick leave from 27July 2020 until 8 August 2020. She returned to work but was then signed off sick from 29 August 2020 and never returned to work.

29. The claimant set out that her mental state was not well, and she was deeply depressed and could not make any decision by herself. Therefore, she decided to see the psychiatrist Dr. Robert Wojciechowski on 29 August 2020.On 26.09.2020. She had a second appointment with psychiatrist Dr. Robert Wojciechowski.
30. The bundle shows that the claimant submitted a doctor's certificate on 26 September 2020. Mr Keable emailed the claimant, having received this, to enquire about her health.
31. The claimant replied on 12 October 2020 stating that her health situation had got worse, and she had to have help from a specialist. She had felt when she came back from holiday in a good position to work once again, but she was observed by the individual she had complained about and he did not feel safe coming back to work (p27).
32. The bundle also contained a medical report at p 71 dated July 2021 which set out the history of the claimant's contact with her doctor. This shows there was a mental state examination on 29 August 2020 when the claimant was suffering from low mood and anxiety and sleep disturbance. This is diagnosed as a stress reaction. The claimant was put on some medication, although it was identified that she did not require regular medication at that point.
33. There was a review on the 26 September 2020 following a sick note that had been given stating stress reaction. The notes of this review indicate that the claimant's condition had deteriorated. She was started on antidepressants.
34. On 24 October 2020 there was another review in which the claimant said she does not feel any better, was tired in the mornings and had no strength for anything. The dose of antidepressants was increased.
35. At a review on 21 November the claimant was reporting that she did not have the will to do anything. When she wakes up in the morning, she has energy then she loses all her energy and does nothing for herself. The next visit identified was after the ET3 had been submitted.

Communicating with the respondent

36. On 30 October 2020 the claimant wrote to Mr Keable asking why she had not received a payslip or information about her payback and complained that she had not received full pay. The email stated that she was unfit due to her mental health issues because of work-related incident that had not been sorted out as of yet. She also asked for a full explanation about the payment and stated that she unable to pay her bills and that was affecting her mental health and well-being even more. (p30)
37. Mr Keable replied on 04 November 2020, reassuring the claimant that she did not need to worry about her job, which would be kept open until she felt better. This email confirmed that measures had been put in place to reassure her and, despite the fact the investigation had found no evidence relating to the incident that she had reported, the measures would remain in place permanently.
38. I find that there was no reason while the claimant felt that matters had not been resolved. She had been made aware three days after the incident about what was going to happen, and the permanency of the measure was notified to her on the 4th of November.

Contacting ACAS.

39. On 16.11.2020 ACAS were informed and the Certificate was granted. On 15.12 2020 the application to the Employment Tribunal was made. In her written statement the claimant said that the application to ACAS was made in November as she was waiting for the investigation to be finished and the outcomes of such being presented to her. Moreover, the situation with the harassment itself as well as neglect from the employer influenced her mental health in such a way that she couldn't think rationally about complaints at that point.
40. In answer to questions the claimant suggested that it was her doctor who told her to go to ACAS. She was very uncertain about the date but agreed that the notes were a complete record of all contact she had with the doctor. As the contact with ACAS was made on the 16th of November, it follows that the suggestion must have been made by the doctor prior to that and therefore it can only have been at the very latest on the 24th of October 2020. The claim was adamant that it was not in September or August. The claimant therefore had knowledge of the process by the latest on the 24th of October 2020.
41. There is no medical evidence to suggest the claim was unable to access the Internet or to search her employment position. The claimant held down a responsible post and had done so for some six years. On the balance of probabilities, I find it unlikely that she was unable to obtain any information about the employment tribunal process this before her doctor mentioned it to her.

<u>Ongoing employment</u>

42. The claimant accepted that she had not at any time told the respondent that she was resigning her employment. She had referred to the EDT of the 15th of December 2020 in her claim form but there was no other reference to her employment ending.
43. The Claimant continued to act as if she were still employed. She submitted sick notes from her GP which covered until the end of December 2022. the claimant was contacted by HR and cooperated in providing a copy of her medical report, doing so in around July or August 2021. In October 2021 the respondent was trying to get the claimant to agree to an occupational health review so they could consider what the next steps were. These actions are consistent with an individual who remains employed and the respondent believing that to be the case.
44. The respondent is organised in such a way that staff share the profits and an annual declaration is made of the amount of bonus/dividend to be paid to staff. Mr Keable gave evidence on this point which I accept. While the claimant disputed the position, I find that he, as the managing director is it a much better position to know how the financial arrangements work than the claimant who received information about this only in English. I accept, therefore, that only staff who have been employed by the business for the whole of the prior financial year are eligible for any payment. I also accept that in November 2022 the claimant was sent a letter informing her she was made a payment for the year 1st of August 2021 to 31st of July 2022. The claimant accepted this money. I was sent a copy of this letter with the written submissions and I find it is clearly for staff.

45. The claimant explained that she had not understood that she needed to tell anybody that she had treated her employment at an end. She was not able to describe any particular reason why she picked the 15th of December as the date on which this happened. I find that this was simply the date on which she put her claim in and it did not reflect any final straw. There is no reason given, nor have I been presented with any evidence as to what any final trigger could have been. Even if it were reasonable for the claimant to believe there was an ongoing investigation, she last raised this in October and nothing further occurred after that point.
46. I find that the claimant's actions are consistent with her believing herself to be still employed until the present day. She continued to provide sick notes, she accepted statutory sick pay for the full 28. Part of which fell after her apparent dismissal, and she accepted a bonus twitch was only entitled has she been employed at least up to 31st of July 2022 the only inconsistent act is the filing of a claim which referred to unfair dismissal. It did not, however, give any explanation as to how or when the claimant felt that she had been constructively dismissed.

Prejudice to the respondent

47. Mr Keable explained that the respondent would be in significant difficulties if the claim were to be allowed to proceed. The two key witnesses have both left the respondent. One has emigrated. The respondent would have been in a position to take witness statements had the claim been put in within three months of the incident, that is by September 2020. They could now not do so.
48. Other staff including two individuals who worked in the office when the claimant worked, who would have been likely to have been aware of the incidents, have also left.

Relevant Law

Limitation period -just and equitable

49. S123 Equality Act provides that

> "….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.
>
> ……..
>
> (3) For the purposes of this section –
>
> (a) Conduct extending over a period to be treated as done at the end of the period

50. The Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.
51. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, the time only begins to run when the last act is completed. There is a distinction between a continuing act and an act that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, then such a practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time.
52. The Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA Court clarified that the correct test in determining whether there is a continuing act of discrimination is that set out in Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. Thus, tribunals should look at the substance of the complaints in question — as opposed to the existence of a policy or regime — and determine whether they can be said to be part of one continuing act by the employer.
53. I was directed by the respondent to (*Hutchinson v Westward Television Ltd [1977] IRLR 69*) identifying that he tribunal is entitled to take into account anything that it deems to be relevant. I was also directed to Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576,where the Court of Appeal confirmed that a tribunal has a wide discretion when considering whether it is just and equitable to extend time. It was submitted that However, the guidance is that time limits should be applied strictly in employment cases, and there is no presumption in favour of extending time. Tribunals should **not** extend time unless the claimant convinces them that it is just and equitable to do so. The exercise of discretion to extend time should be the exception, not the rule. This was followed by the Court of Appeal in Department of Constitutional Affairs v Jones [2008] IRLR 128.
54. I also considered the EAT (British Coal v Keeble) which suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: 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 requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of

action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

55. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).
56. In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,[2021] ICR D5, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980). The Court of Appeal described that 'The best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular “the length of, and the reasons for, the delay”'.

Strike Out

57. The power to strike out all or part of the claim comes from Rule 37 of the tribunal rules of procedure. That rule says that a Tribunal can strike out all or part of a claim or a response for a number of reasons. It includes there being no reasonable prospect of success.
58. Striking out is something to be considered carefully. The test is not whether the claim is likely to fail, nor is it a question of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.
59. In general, tribunals will be expected to assume any key disputed facts in the claimant’s favour before concluding that the claim has no reasonable prospect of success and striking it out on that basis. Only in an exceptional case will it be appropriate to strike out claims for having no reasonable prospect of success where the central facts are in dispute – for example, where the claimant seeks to establish facts that are totally and inexplicably inconsistent with the contemporaneous documents. Whenever there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing.

The power to make deposit orders

60. A tribunal's power to make a deposit order is set out in section 9 of the Employment Tribunals Act 1996. This provides that regulations may authorise a tribunal to order a party to pay a deposit of up to £1,000 as a condition of continuing to participate in proceedings or pursuing any specified allegations or arguments.

61. At a preliminary hearing, if an employment judge considers that any specific allegation or argument in a claim or response has "little reasonable prospect of success", they can make an order requiring the party to pay a deposit to the tribunal, as a condition of being permitted to continue to advance that allegation or argument (rule 39(1) of the Employment Tribunals Rules of Procedure 2013 (ET rules)).The test is not as rigorous as the "no reasonable prospect of success" test in rule 37(1)(a) under which the tribunal can strike out a party's case.
62. A tribunal has a greater leeway when considering whether or not to order a deposit than when deciding whether or not to strike out. However, the EAT in Tree v South East Coastal Ambulance Service UKEAT/0043/17 expressed the obiter view that, when considering whether to make a deposit order, similar considerations will potentially arise to the exercise of discretion in strike-out orders.
63. The tribunal should be wary of making an assessment of the strength of a party's case from a review of the documentary evidence where key facts are in dispute. In Sharma v New College Nottingham UKEAT/0287/11, the EAT held that it was wrong for a tribunal to make a deposit order in respect of a race discrimination claim where the contemporaneous documentation did not support the claimant's version of events.

The amount of a deposit order

64. Where a tribunal considers that a specific allegation or argument has little reasonable prospect of success, it may order a party to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument (rule 39(1)). Whether or not to make a deposit order is a matter of discretion for the tribunal and does not follow automatically from a finding that a claim has little reasonable prospect of success.
65. The EAT in Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14 confirmed that £1,000 is not the overall total that a party can be required to pay in respect of a deposit in proceedings, rather the tribunal has the power to order a deposit of up to £1,000 for each specific allegation or argument in a claim or response that it considers has little reasonable prospect of success.

The party's ability to pay

66. Prior to making any decision relating to the deposit order, the tribunal must make reasonable enquiries into the paying party's ability to pay the deposit, and must take this into account in fixing the level of the deposit (rule 39(2)).
67. It is not the purpose of a deposit order to make it difficult for the paying party to find the sum payable or to make it difficult to access justice or effect strike out via the back door. The amount of a deposit order should reflect the party’s means and it should also be high enough to stand as a warning that the matter had little reasonable prospect of success.

Conclusion

68. Having considered the submissions and relevant law, the parties to the fact that I found them and concluded as follows.

Discrimination time limit

69. This is an allegation about specific events that occurred between 25 May 2020 and 10 June 2020 at the hands of one individual and I conclude that they form a series of acts so that the time limited is calculated from the last act. The complaint to the Tribunal should therefore have been made 3 months after the 10 June 2020, so by 9 September, but then extended allowing for a one-month ACAS extension. It was brought on 15 December 2020, more than 2 months outside the time limit. This is a lengthy delay.
70. I have considered whether it is just and equitable to extend the time limit. I have considered the length of and reasons for the delay. The claimant has suggested up to three reasons for her delay.
71. She has suggested that she believed that the investigation was still ongoing and she was therefore waiting for the conclusion of the internal procedure, it was only once she despaired of that ever happening, that she went to the tribunal.
72. The first complaint was brought to the respondent's attention on 24 June 2020, while she provided details of further incidents on the 16 July 2020. I have found that the original complaint was investigated as far as was practicable and consistent with the claimant's wishes, and I am satisfied that she was informed of appropriate measures to protect her which she agreed to and accepted around the 27 June 2020. I have found that there was no ongoing investigation after that time, and the claimant was made aware of this by the latest on 4 November 2020 when I have found this was made clear to her. The claimant still took no steps until she contacted ACAS on the 16 November.
73. The claimant made reference to her poor mental health. While the medical evidence does show that it deteriorated over time, I find that there is insufficient medical evidence to indicate that she was incapacitated between September and the end of October so as not to be able to bring a claim at an earlier period. There is also no evidence to suggest that her health improved allowing her to do so in December. I conclude that her health is not a sufficient reason for any delay.
74. The claimant also suggested that it was only once she was made aware of the ACAS procedure by her doctor that she knew she could bring a claim. On her evidence this must have happened by the 24 October 2020 at the latest. The claimant still takes no action until the 16 November. I have also found it unlikely the claimant could not have investigated the position earlier. I conclude that ignorance of her rights is not a reason that would justify the delay. I conclude that the claimant did not act promptly once she knew of the possibility of taking action.
75. I am also satisfied by the evidence given by the respondent that in this case the delay has caused significant prejudice to the respondent. I am satisfied that it would not properly be able to defend its position as its key witnesses have left, statements were not taken at the time, and one of those key witnesses now lives abroad.
76. Stepping back and looking at all factors in the round I conclude that on this occasion it would not be just and equitable to extend the time limit I am particularly persuaded of this because, there is greater prejudice to the

respondent on these facts bearing in mind the difficulty with witnesses and what appears to be the comparative weakness of the claimant's case.

77. For these reasons I found the tribunal to hear the claim for discrimination.

Complaint of unfair dismissal

78. I have considered first whether there is no reasonable prospect of success and whether the claim should be struck out. This is a high test. The central fact, did the claimant resign on the 15th December, is in dispute with the claimant saying that, while she took no steps to notify the respondent that she had done this, this was the position. Based on my findings of fact, however, I find that this is one of the exceptional cases where a strikeout is appropriate. Even taking the claimant's case at its highest, she is seeking to establish facts that are totally inconsistent with her actions. Other than the reference on the claim form to unfair dismissal, the claimant acted at the time she put a claim form in and continues to act as if she was employed. She has continued to accept payments from the employer and has engaged in their process to establish whether she can return to work. I'm satisfied that on this occasion there are no reasonable prospects of her claim of unfair dismissal succeeding.
79. For these reasons her claim of unfair dismissal is struck out.

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Employment Judge McLaren
Date:27/2/23