EMPLOYMENT TRIBUNALS

Claimant: Dr R Smith

Respondent: The Liverpool Institute of Performing Arts

HELD AT: Liverpool **ON:** 27 February 2023

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: Mr D Robinson-Young (counsel)
Respondent: Miss R Jones (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) In relation to the question of allegations of post termination victimisation ('PTV') contrary to section 27 Equality Act 2010 and discussed at the preliminary hearing before Employment Judge Horne on 5 December 2022 and identified as PTV1 to PTV13:

(a) The claimant has withdrawn her reliance upon allegations PTV8, 10 and 13 and these will not form part of the list of issues in these proceedings relating to the complaint of victimisation.
(b) The respondent raises no issue concerning allegations PTV7, 11 and 12 which can be identified within the grounds of complaint and these will form part of the list of issues in these proceedings relating to the complaint of victimisation.
(c) The remaining allegations PTV1, 2, 3, 4, 5, 6 and 9 were identified within the grounds of complaint and do not constitute new factual allegations and will form part of the list of issues in these proceedings relating to the complaint of victimisation.

As the allegations identified within subsections (b) and (c) can be identified from within the grounds of complaint, their inclusion in the list of issues

amounts to a simple 'relabelling' exercise and no formal application to amend is required to be made by the claimant.

(2) The respondent's application that any part of the claim be struck out regarding conduct which allegedly took place after 14 January 2021 on the ground that the claimant has no reasonable prospect of success in accordance with Rule 37 of the Tribunals Rules of Procedure is refused.

(3) The respondent's alternative application that any party of the claim be struck out regarding conduct which allegedly took place after 14 January 2021 on the ground the claimant has little reasonable prospect of success in accordance with Rule 39 of the Tribunals Rules of Procedure is refused.

(4) That no part of the claim should be dismissed on the ground that:

(a) the alleged conduct formed part of an act extending over a period which ended on or after 17 November 2021, (in the case of the successful PTV allegations 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 as referred to in paragraph (1)(b) and (c) above); and,
(b) it was just and equitable for time to be extended to 10 December 2020 (which was when the grievance was brought by the claimant and which is when the allegations of discrimination identified in the grievance and which formed a series of continuing acts ended).

REASONS

Introduction

1. This was a preliminary hearing in public

2. According to the notice of preliminary hearing, dated 11 August 2022, the purpose of the preliminary hearing was:

   "To determine whether the claimant's claims are in time and if not whether an extension of time should be given."

3. The preliminary hearing was originally due to be heard by Employment Judge ('EJ') Horne on 5 December 2022. He decided that because of an initial disagreement with the parties as to what decisions are appropriate to be determined and EJ Horne discussed the differing points of view in paragraphs 3 to 5 of his Case Management Summary. He was, however, able to resolve case management orders to ensure that the case is ready for a final hearing which involved the extending of the initial hearing date and having a final hearing in two parts - **3, 4, 5 and 6 April 2023** with further hearing dates shortly afterwards on **2, 3 and 5 May 2023.** The parties confirmed that they remain able to prepare for this final hearing date of 7 days, but clearly, the resolution of the preliminary matters to be determined by me at the hearing today, was a matter of some urgency. Accordingly, although there was

insufficient time to reach a decision on 27 February 2023, I ensured that time was made available for my judgment to be provided to the parties.

Preliminary issues for determination before me

4. Following the discussion which took place before EJ Horne on 5 December 2022 the preliminary issues were identified as follows:

   a) Any amendment dispute (see 'The Claim' section below).

   b) Whether or not to strike out any part of the claim in respect of conduct allegedly occurring after January 2021 on the ground that that part of the claim has no reasonable prospect of success.

   c) Whether or not to dismiss any part of the claim on the ground that:

      i) The claimant has no reasonable prospect of successfully arguing that the alleged conduct formed part of an act extending over a period which ended on or after 17 November 2021.
      ii) It is not just and equitable for the time limit to be extended.

   d) Alternatively, whether to order the claimant to pay a deposit (not exceeding £1,000 per allegation or argument) on the ground that that allegation or argument has little reasonable prospect of success.

   e) It was also noted that the issues will be clarified in light of the amended response and further case management orders will be detailed as appropriate.

Case Summary

5. EJ Horne provided an excellent summary of this case as of 5 December 2022 in paragraphs (22) to (25) of his Record of a Preliminary Hearing. I have summarised some of the key details in this section.

6. The claimant is a woman who describes herself as 'black'. She was employed by the respondent as a Visiting Lecturer from 9 September 2019 until 30 April 2021. Her claim relates to 'concerns and complaints' which she raised from November 2019.

7. She was placed on a Performance Enhancement Plan ('PEP') on 3 December 2020 and in turn, raised a grievance on 10 December 2020. The grievance was investigated by Ms Kerstie Skeaping, partner at Hill Dickinson LLP, who completed a report and sent a copy to the respondent on 23 June 2021 and provided the claimant with a redacted copy on 12 July 2021. In summary, Ms Skeaping found the respondent to be '*institutionally racist'* and upheld many of the claimant's grievance allegations, which included allegations that she had been discriminated against because of her race and sex.

8. There then followed a meeting between Ms Skeaping and the claimant on 22 July 2021 where it was not possible to agree outcomes to resolve the

grievance. The claimant then provided a list of her desired outcomes on 20 September 2021 and although initially acknowledged, Ms Skeaping did not reply with a substantive response until 3 December 2021 and which is identified as a detriment by the claimant.

9. The claimant then notified ACAS of a potential claim on 16 February 2002, an early conciliation certificate was issued on 19 March 2022 and a claim form was presented on 28 April 2022.

The claim

10. The claim form identified the following complaints:

    a) Unlawful deduction from wages contrary to section 13 Employment Rights Act ('ERA') – *(withdrawn at the PH before EJ Horne on 5 December 2022).*
    b) Direct sex discrimination against an employee contrary to section 13 Equality Act 2010 ('EQA').
    c) Direct race discrimination against an employee contrary to section 13 EQA.
    d) Harassment of an employee related to sex contrary to section 26 EQA.
    e) Harassment of an employee related to race contrary to section 26 EQA.
    f) Victimisation of an employee contrary to section 27 EQA

11. EJ Horne noted that while most of the complaints made by the claimant are clear, two complaints of post-termination victimisation required clarification and following some discussions were recorded as follows:

    <u>Originally found at paragraph 25(c)(iii) of the grounds of complaint – described as *'Grievance Delay Victimisation'* by EJ Horne</u>

    Post-termination Victimisation ('PTV') 1 – refusal to provide the claimant with an unredacted copy of the grievance investigation report.
    PTV2 – failing to reply meaningfully to the claimant's 'outcomes' email of 20 September 2021.
    PTV3 – delaying Ms Skeaping's response between 6 October and 4 November 2021.
    PTV4 – failing to reply meaningfully to the claimant's email of 3 November 2021.
    PTV5 – delaying Ms Skeaping's response between 8 November and 3 December 2021.

    <u>Originally found at paragraph 25(d) of the grounds of complaint</u>

    PTV6 – repeating the refusal to provide the claimant with an unredacted copy of the grievance investigation report.
    PTV7 – failing to 'reassure' the claimant about the outcomes she had requested and which EJ Horne noted was described by the claimant as being *'fobbed-off'* in the email.
    PTV8 – misleading the claimant about Mark Featherstone-Witty's role.
    PTV9 – excluding the claimant from the anti-discrimination training referred to in the email.

PTV10 – misleading the claimant about the extent of student interest in an NUS branch.
PTV11 – senior management at the respondent refusing to instruct any individual employees to apologise.
PTV12 – refusal to compensate the claimant satisfactorily for the impact of those grievances which were upheld.
PTV13 – seeking to utilise the claimant as a free source of advice and guidance about equality.

12. Ms Jones at the previous hearing before EJ Horne submitted that some of these allegations in **PTV1 to 13** would require the claimant to make an application to amend her claim. Taking into account the revisions to these allegations which were discussed on 5 December 2022, EJ Horne agreed that the respondent should have time to consider its position regarding the proposed amendments.

Evidence used for determination of the preliminary issues

13. The parties produced an updated joint preliminary hearing bundle of some 205 pages for use at the preliminary hearing on 27 February 2023. The claimant provided a witness statement and attended the preliminary hearing to give oral evidence under oath.

14. Both Mr Robinson-Young on behalf of the claimant and Miss Jones on behalf of the respondent both provided skeleton arguments and separate chronologies of events and of course gave oral submissions. I am grateful to both counsel for the documentation they provided, the assistance during the preliminary hearing and the reasonable way they approached the preliminary hearing.

The claimant's evidence

The claimant was a member of a trade union GMB at the relevant time and although she advised that they did not represent her at every stage of the grievance process, she confirmed that she took advice from her trade union representative on 3 December 2020, and she raised her grievance shortly afterwards on 10 December 2020 and the grievance was written by her. She confirmed that she discussed the question of time limits which applied in Tribunal proceedings and was aware of the Employment Tribunal process at this time but was emphatic in explaining that she wished to use the grievance process. Indeed, she said she was initially positive about succeeding with her grievance and would thereby not need to issue Tribunal proceedings. However, I accept that the claimant's trade union representative was aware of the grievance process and outcome but did not attend every meeting.

15. She confirmed that she had 3 meetings with the grievance investigator Ms Skeaping and in preparation for these meetings, the claimant produced a series of prepared statements and wrote them out herself. She informed me that she liked *'to be thorough as a human being'* and explained that her focus was on the intersectionality of her two protected characteristics as a black woman

16. The claimant said that she was informed by Ms Skeaping that the grievance would *'take as long as it takes'*. This did not appear to be suggestion of delay, rather more an indication of the Ms Skeaping's intended thoroughness in the process.

17. The claimant confirmed that by the time Ms Skeaping had concluded her investigation and produced her report on 23 June 2021, many of her grievance allegations were upheld and she was aware of Ms Skeaping's decision in her email of 12 July 2021. However, the claimant still felt that she was in middle of grievance as outcomes and improvements remained to be resolved. She said that she felt very encouraged but went on to say that things changed at this point.

18. While the claimant received correspondence on 23 June 2021 from Ms Skeaping that the grievance had been completed, it should be noted that she did not have a unredacted copy of the grievance decision. The redacted copy was included in the preliminary hearing bundle and was 14 pages in length. I noted that the redactions were substantial and went far beyond simply deleting the names of individuals. While the basis of the decision was provided, it is understandable that further discussions would be required between the claimant and Ms Skeaping. I understood that despite numerous requests for an unredacted copy of the grievance decision, this was only provided in recent weeks during these proceedings. It is therefore understandable that the claimant informed me during her evidence that she sensed things were being withheld

19. The claimant confirmed that at no stage of her discussions in relation to the grievance that she was discouraged from bringing a claim in the Tribunal.

20. The claimant also confirmed that she was never told by the respondent not to worry about the Tribunal time limits nor was she misled by them about the applicability of time limits. Indeed, she confirmed that the respondent did not talk to her at all about the Tribunal process.

21. The claimant said that it was when she received a letter from the respondent on 3 December 2021 that the grievance had ended abruptly and decided to notify ACAS. However, she said that was then *'orientating'* herself as to what to do next.

22. The emails in the hearing bundle which she sent to the respondent's director and union representative on 15 December 2021 and 20 December 2021 respectively revealed her unhappiness concerning the letter of 3 December 2021 and was contemplating bringing Tribunal proceedings. When asked by Ms Jones why she did not then commence Tribunal proceedings at this point, the claimant replied that she stunned by the weight of bringing a race discrimination claim.

23. The claimant said she was ill on 23 December 2021 with the Covid 19 virus and a copy of a photograph of her PCR test result dated 26 December 2021 was included in the hearing bundle. The claimant said that she continued to

submit texts to her friend during this time about her health, but I noted that these messages had not been included in the hearing bundle. No medical evidence was provided of the impact of the Covid 19 virus on the claimant's health, although she explained that the more recent letters of hospital appointments referring her to medical specialists was indicative of the ongoing symptoms, she continued to suffer from Covid. I did not have any evidence before me which suggested that the claimant was incapacitated between the date when she received the *'triggering letter'* of 3 December 2021 and the date when she notified ACAS of a potential claim on 16 February 2022. The claimant however, said that she believed she was in time to bring her claim at this point and said that she '*did not want to go to court because of stress'.*

Law

Time Limits under the Equality Act 2010

24. Section 123(1) of the Equality Act 2010 provides that a complaint 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 Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

25. In *Robertson v Bexley Community Centre* [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they consider it just and equitable in the circumstances to do so. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with *British Coal Corporation v Keeble* [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case.

Case law provided by the parties

26. I am grateful to the parties for providing hard copies of cases as part of their final submissions:

Amendments

a) *Selkent Bus Co Ltd v Moore* [1996] IRLR 661
b) *Chandhok v Tirkey* [2015] IRLR 195

Strike out - Rule 37

c) *Mechkarov v Citibank NA* [2016] ICR 1121
d) *Croke v Leeds CC* UKEAT/0512/07
e) *Community Law Clinic Solicitors Limited v Methuen* EWCA [2011] Civ 1783

'In time' s123 EQA

f) *Hendricks v Metropolitan Police Commissioner* [2002] EWCA Civ 1686 (c)
g) *Littlewoods Organisation plc v Traynor* [1993] IRLR 154 EAT (c)
h) *Barclays Bank v Kapur* [1991] IRLR 136 (c)
i) *SW Ambulance Service NHS Foundations Trust v King* [2020] IRLR 168
j) *Veolia Environmental Services UK v Gumbs* UKEAT/0487/12

'Just and equitable' extensions s123 EQA

k) *British Coal Corporation v Keeble* [1997] IRLR 336 (c)
l) *DPP v Marshall* [1998] ICR 518 (c)
m) *Wells Cathedral School Ltd v Souter and another* EAT/2020/0008001 (c)
n) *Bexley Community Cebtre (t/a) Leisure Link v Robertson* [2003] EWCA 576
o) *Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713
p) *Robinson v Post Office* [2000] IRLR 804.

The respondent's submissions

27. Miss Jones said that allegations PTV1, PTV6, PTV8, PTV9 and PTV13 discussed with EJ Horne above, would require an application to amend as they could not be identified within the grounds of resistance and that this application would be opposed by the respondent.

28. She reminded me of the leading case of *Selkent* and that the Tribunal should take *'…into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.'*

29. Additionally, Miss Jones also asked me to take account of the case of *Chandhok* and the guidance that a claim form is not free to be *'augmented'* at any time, the need to set out the claim in a document when it began was to keep the litigation in sensible bounds in terms of costs and resources (effectively consistent with the principles set out in Rule 2 'overriding objective'), that stringent time limits applied and that issues should not be based on *'shifting sands'.*

30. Reference was made to the Presidential Guidance on Case Management and appropriately the distinction between an amendment seeking to add new claim and those which were effectively *'relabelling'* of the existing claims brought.

31. Miss Jones argued that the 5 PTV allegations referred to above, were new claims and required an application as they could not be discerned from the grounds of complaint as originally pleaded. Moreover, she argues that it would not be in the interests of justice to allow these amendments as the claimant had ben professionally represented throughout the proceedings.

32. In terms of time limits, she argued that time had long expired for bringing these new complaints and it should be noted that in terms of prejudice, the final hearing is only 5 weeks away and the respondent would be disadvantaged in the way that the *'shifting sands'* concern was criticised in *Chandhok*. In summary, she said it was not in the interests of justice to allow these amendments.

Strike out

33. Miss Jones submitted that the Tribunal should strike out the claimant's claim in respect of all conduct which occurred after 14 January 2021 on the grounds that this part of the claim had no reasonable prospects of success in accordance with Rule 37(1)(a) of the Tribunal's Rules of Procedure.

34. She reminded me of the approach to be taken as summarised in the case of *Mechkarov* which stated that discrimination complaints should only be struck out in the clearest cases, that where the hearing of oral evidence is key they should not be determined without that evidence being heard and the claimant's case must ordinarily be taken at its highest. In addition, the case may be struck out if the claimant's case is '*conclusively disproved by'* or is *'totally and inexplicably inconsistent'* with undisputed contemporaneous document, but that the Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

35. Miss Jones referred to the chronology of events and that following the raising of the grievance on 10 December 2020, the issues that it raised concluded with the last one on 14 January 2021 when the claimant's teaching allegations were postponed. Miss Skeaping was then appointed to investigate the grievance and she was given authority to make any findings, thereby different personnel were involved in the process. The grievance was upheld in June 2021 and the (redacted) report was provided on 12 July 2021.

36. She noted that the post 14 January 2021 complaints related to victimisation only and that the protected act relied upon, was the grievance presented on 10 December 2020 and which was upheld by June 2021. Miss Jones disputes that the alleged detriments can be applied to the delay in the grievance, that there was an absence of engagement or that the process continued until 3 December 2021 when the claimant decided that response given by the respondent ended that process and triggered a complaint to the Tribunal. In this respect, she referred me to the case of *Croke* where a litigant

in person found his claims of victimisation struck out because no material was available to reveal a causal link between the protected act and the alleged detriments. This was allowed she says, because the EAT noted that the complaints could be considered to be fact sensitive.

37. Miss Jones also referred to *Community Law Clinic Solicitors Limited* and Bean LJ's decision that claimants should not be allowed to pursue hopeless cases. Accordingly, she said that I should trike out any allegations post dating 14 January 2021.

Whether to dismiss any part of the claim on the basis that the conduct formed part of an act extending over a period which ended on or after 17 November 2021

38. Miss Jones referred to a series of discrimination complaints in paragraph 21 of her skeleton argument and which are listed from (a) from 2019/2020, to (l) referring to a lack of engagement by the respondent following the issue of the grievance report.

39. She reminded me that each allegation made to form part of a continuing act must be discriminatory and that they are more likely to be connected if they are linked by a common factor such as involving a particular person throughout the time period. Miss Jones reminded me of the case of *South Western Ambulance Services* found that a grievance process which was handled in a non-discriminatory manner and is upheld, is unlikely to be part of a continuing act. The point to note as well she said, is that raising a grievance should necessarily lead to a delay in the commencement of Tribunal proceedings.

40. Miss Jones concluded by arguing that the primary limitation date can be no later than 3 months from 14 January 2021 and accordingly the complaint has been presented well out of time.

Whether it is just and equitable to extend time

41. Miss Jones referred to the well-known case of *Bexley* and that a Tribunal should not extend time unless the claimant convinces them that it is just and equitable to extend time and such decisions should be the exception rather than the rule. She also referred to the discretion afforded by section 33 Limitation Act 1980 and which can apply to Tribunal decisions where it wishes to consider the factors which influence the balance of prejudice in relation to the parties when making a decision as to whether or not to extend time.

42. More specifically, she mentioned that case of *Apelogun-Gabriels* that a delay by a claimant awaiting the completion of an internal procedure may justify an extension of time, but that this will not automatically be the case. She also referred to *Robinson* on this subject.

43. Miss Jones explained that in terms of the chronology of events, she raised her grievance in December 2020, had concluded her allegations within the grievance by 14 January 2021 and by the summer of 2021, the grievance had been resolved. She noted that the claimant had the support of a union

representative throughout and could have brought her claim at a much earlier date and it was not just and equitable to extend time.

44. Alternatively, Miss Jones argued that if I was unwilling to strike out the claim, either in whole or in part, a deposit order should be made in accordance with Rule 39 on the basis that the claimant has little prospect of success.

Claimant's submissions

45. Mr Robinson-Young submitted that my decision regarding time limits would determine the prospects of the claim proceeding as they affected the Tribunal's jurisdiction to hear the claim.

46. He asserted that the respondent apparently ignores and discounts the claims which are made in the claimant's Grounds of Complaint concerning treatment, post January 2021. He noted that on the 14 January 2021 the respondent informed the claimant that her teaching hours had been moved to April 2021. This was despite the claimant having told the respondent that she was unavailable to teach during April 2021 and she argues that this was direct discrimination. Mr Robinson Young argued that this was not just a single act it was a position that the respondent refused to resile from but importantly it was linked to other previous as well as future acts that the Claimant believes were acts of discrimination.

47. He referred to the case of ***Hendriks*** and the Court of Appeal's decision that the EAT had taken too literal approach to the requirement that there be a continuing act, with the correct focus being whether the employer was responsible for an ongoing situation or continuing state of affairs in which members of the defined group were treated less favourably. The burden was on the claimant to prove, either by direct or indirect evidence or interference that the numerous alleged acts were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of *'an act extending over a period'*.

48. Mr Robinson-Young explained that the claimant had a legitimate expectation when she submitted a formal grievance on 10th December 2020, that it would be dealt with within a reasonable time. He said that this was not the case. While the claimant was informed by Ms Skeaping on 23 June 2021 that the grievance investigations were concluded and that most of her grievances had been upheld. However, she was not provided with a copy of the report despite being told that Ray Adams and Karen McHugh would be in touch regarding the report. requested a copy of the report from Kirsty Skeaping on 29th June, she received no response. He said that on 12 July 2021 the claimant contacted Ms Skeaping again and it was not until 20 July 2021 that the heavily redacted copy of the report was provided to her. The claimant sought an unredacted copy with the support of her union representative Ray Adams, but it was refused on 6 August 2021.

49. The claimant then provided the respondent with a list of desired outcomes to resolve the grievance on 20 September 2021 and on 6 October 2021 she was advised by Ms Skeaping that the respondent would be in touch in the next few

weeks. They did not reply until 3 December 2021 and this email gave rise to allegations of 8 distinct detrimental acts (the PTVs referred to by EJ Horne) and Mr Robinson-Young argued that the were evidence of a continuing discriminatory state of affairs.

50. He said that the initial view given by the respondent that her grievance was well founded left the claimant with an expectation that they wanted to put things right. However, he said that the delays in the Autumn of 2021 and the respondent's refusal to show a clean copy of the report to the Claimant was part of a deliberate strategy of delay to place her beyond Tribunal time limits.

51. He referred to *Littlewoods Organisation plc* where the EAT determined that where an employer had promised to do something to remedy a discrimination matter but did not fully honour that promise, the complaint related to a continuing act and not a single act of discrimination. He also referred to *Barclays Bank* as involving similar issues, where a failure to provide equal pension rights was classed as a continuing act lasting throughout the period of employment.

52. Mr Robinson-Young reminded me that an act of discrimination which extends over a period shall be treated as done at the end of that period, under s.123(3) EQA. The question to determine therefore, is the distinction between a continuing act which would allow the Claimant's claim to continue and a 'one-off' act. He argues that there was a continuing act which culminated in the email from Ms Skeaping on 3 December 2021, thereby resulting in the claim being presented in time.

53. He went on to say that when calculating the time limits for any claim, early conciliation is not counted in accordance with section 207B ERA, with the early conciliation period being the day after contacting ACAS to the date the Claimant is sent the Early Conciliation Certificate. He noted that where the ordinary time limit expires during the early conciliation period, the time limit is extended so that it expires one month after the Claimant has received the certificate. Applying these rules to this case, he noted that the last act the claimant identifies as a detriment was 3 December 2021, meaning the ordinary time limit would expire on 2 March 2022. However, he went on to say that as the early conciliation period started on 17/2/22 and the certificate was issued on 30 March 2022 and the normal time limit would have expired during this period, a month is added from 30 March 2022 to 30 April 2022. He therefore argues that the claim form presented on 28 April 2022 must be in time.

54. Mr Robinson-Young also addressed me upon the question of whether it is just and equitable to extend time if I do not accept the continuing acts argued above in accordance with section 123(1)(b) EQA. In this regard, he referred to *British Coal Corporation v Keeble* and the consideration of section 33 of the Limitation Act 1980 including the length of, and the reasons for, the delay, its effect upon the evidence, the conduct of the defendant (respondent in the Tribunal) and the balance of prejudice to the parties in deciding one way or another.

55. He argued that a similar situation to the present case was encountered in *Wells Cathedral School Ltd* where both claimants presented claims out of time for alleged acts of discrimination that had occurred over a 2 year period when they had waited till the grievance procedure had run its course before submitting their claims to the Tribunal. The EAT upheld the decision to extend the time limit as the Tribunal making the original decision had undertaken a balancing exercise when applying the just and equitable test.

56. Applying these principles, he said that the claimant was determined to exhaust all internal procedures before resorting to submitting a claim to the Tribunal, but while laudable, did not automatically justify an extension to the limitation period. However, Mr Robinson-Young went on to say that on a balance of prejudice the respondent would suffer very little if any if the claim was allowed to proceed as the evidence in the case is mostly document based and the respondent has already had the bulk of the documents during the grievance process.

57. In contrast, he submitted that if the claimant's claims were dismissed, she would lose her right to have the merits of her claim determined. This would take place in circumstances where Ms Skeaping had already reached the conclusion that the claimant was discriminated against and the respondent has made it known to her, that it wanted to work with her towards a resolution. He added that the grievance itself is relevant in that there was a genuine desire to use the process to resolve differences and the grievance crystalised the allegations and put the respondent on notice, which gave them the opportunity to investigate and preserve evidence.

58. On this basis, he said that a fair trial would be possible, and it would be just and equitable for the Tribunal to exercise its discretion.

Further discussions as part of submissions

59. Although Mr Robinson-Young provided his submissions first, it became clear that the complexity of the issues to be determined, that it was appropriate to allow him a reply to Miss Jones' submissions provided subsequently. This ultimately took the form of a discussion concerning the PTV allegations identified by EJ Horne on 5 December 2022.

60. He took instructions from the claimant and agreed to withdraw allegations PTV 8, 10 and 13 on the basis that having re-read the grounds of complaint, these allegations could not be identified, and it was not proportionate to make an application to amend the claim for them to be added to the claim.

61. Miss Jones said that the respondent did not take issue with PTV 7, 11 and 12. This left PTVs 1, 2, 3, 4, 5, 6 and 9 in dispute and following a short break in order that the claimant could be advised as to these developments, a further discussion took place.

62. We looked at paragraph 13 of the grounds of resistance and Mr Robinson-Young argued that in this paragraph, sufficient information was included to identify the basis of PTV1 (refusal to provide unredacted grievance

investigation report) and PTV6 (repeating the refusal to provide the claimant with an unredacted copy of the grievance investigation report – or as Mr Robinson Young suggested, a *continuing* refusal). Miss Jones confirmed that she had no formal instructions to agree that these allegations could constitute a relabelling requiring a formal application to amend with time limits being considered and I recorded that they were not accepted today.

63. PTV2, 3, 4 and 5 related to delays in responding to claimant's grievance outcomes letter, but Miss Jones did not have instructions to accept these allegations as amounting to a relabelling. The remaining PTV9 (excluding the claimant from anti-discrimination training) was confirmed by Miss Jones as remaining in issue, but I noted that by withdrawing PTV13 (seeking to utilise the claimant as a free source of advice and guidance about equality), these two seemingly contradictory allegations no longer required further consideration together as only PTV9 remained.

Discussion and decisions

Any amendment disputes

64. Following our discussions of the post termination victimisation detriments identified by EJ Horne on 5 December 2022 numbered PTV1 to 13, I did not have formal applications before me, by those instructing Mr Robinson-Young seeking to amend the claim to include all of these allegations applying the usual principles as described in ***Selkent.*** Instead, Mr Robinson-Young confirmed that the claimant would not rely upon PTV8, 10 and 13 as they could not be identified within the raw particulars provided in the grounds of complaint.

65. In relation to the other allegations, namely, PTV1, 2, 3, 4, 5, 6, 7, 9, 11 and 12, his argument was that there were sufficient particulars within the grounds of complaint to place the respondent on notice of these allegations and thereby, these remaining PTVs could be included as allegations within the list of issues and as they amounted to a simple relabelling exercise, no formal application to amend was required.

66. Miss Jones' helpful concession as instructed by the respondent that no issues were taken with PTV7, 11 and 12, meant that my focus should only turn upon PTV1, 2, 3, 4, 5, 6 and 9. While I have taken into account the relevant caselaw, I have also considered the Presidential Guidance – General Case Management and the overriding objective in determining what is in the interests of justice in accordance with Rule 2.

67. In relation to PTV1 and PTV6, I accepted that these allegations were not entirely new factual allegations as consideration of paragraph 13 of the grounds of complaint and did not constitute new complaints requiring a formal application to amend with the consideration of time limits issues arising from a late amendment, its timing and the question of prejudice. This was something discussed by the parties with EJ Horne on 5 December 2022 and paragraph 13 of the grounds of resistance clearly alludes to failure to provide an

unredacted copy of the grievance report and this was a continuing matter up to 3 December 2021 and continuing into relatively recently.

68. In relation to PTV2, 3, 4 and 5, I have also accepted that these allegations were not entirely new factual allegations. This is because they relate to the progressing of the grievance process arising from the claimant's outcomes email sent on 20 September 2021 and while the claimant only had a redacted grievance in her possession. Paragraphs 13 to 17 discuss these matters and the alleged failures on the part of the respondent, and I do not accept that PTV 2, 3, 4 and 5 constitute new complaints and are simply relabelling of the raw allegations contained within the claimant's original particulars. No formal application to amend is required and as this information was available to the respondent when the proceedings were initiated, there is no prejudice to them in allowing this relabelling as discussed with EJ Horne on 5 December 2022.

69. This leaves me with PTV9 and which remains in dispute. I did not hear significant submissions regarding the placing of this allegation from within the original particulars of the grounds of complaint. However, I believe I have properly begun my consideration of this matter by revisiting the grounds of complaint myself. I noted that paragraphs 15 and 17 of the grounds of complaint identified that the claimant submitted a list of outcomes including a recommendation *'…implementing changes to overcome the institutional racism highlighted in the Grievance Report…'* (paragraph 15) and the respondent then indicating in its email dated 3 December 2021, that *'…they would not be engaging with the Claimant's settlement terms and stated that they did not need to consider the recommendations proposed by the Claimant.'* I determined on balance that these two paragraphs when read together made clear an allegation of the respondent's unwillingness to involve the claimant in reviewing its activities following the findings in the grievance, despite the claimant offering to assist in implementing these changes.

70. Accordingly, I also accept that allegation PTV9 is not an entirely new factual allegation and does not constitute a new complaint requiring a formal application to amend as it is simply a relabelling of the particulars providing in paragraphs 15 and 17 of the grounds of complaint.

<u>Whether to strike out any part of the claim relating to conduct arising after 14 January 2021</u>

71. Rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 provides that the Tribunal has the power to strike out all or part of a claim that *'…has no reasonable prospect of success…'.*

72. It is a draconian sanction for a Tribunal to impose and especially so, when dealing with allegations of discrimination which may be fact sensitive, and it is in the interests of justice to determine these issues at a final hearing once both parties have provided oral evidence under oath to the Tribunal. The claim in this case of course, relates to allegations of discrimination. However, it is important that I do not to close my mind to applications of this nature and there may be reasons why it is in the interests of justice to impose a Rule 37 strike out in relation to some or all of the allegations arising after 14 January

2021, which was the final grievance identified for consideration in the grievance process.

73. Miss Jones essentially argues that the relevant allegations are victimisation complaints only and relate to the protected act of the claimant raising her grievance. This she says, involves a grievance which was carried out by an independent expert Ms Skeaping and which was concluded by June 2021 and the allegations concern the way in which the grievance was dealt with once it had been finalised. She says it cannot be correct that the grievance process is treated as continuing until a claimant achieves the demands that she has sought.

74. However, while this argument is in some ways attractive and could be considered to be within the interests of justice, I do consider that this is case which is slightly unusual and involves a decision which appeared to be favourable to the claimant, but which was explained in a report which was provided in a heavily redacted state and which was not provided in full until a much later stage during these proceedings. While it will be necessary to hear the parties' witness evidence at the final hearing, it does seem that the claimant may well convince the Tribunal at that hearing, that the way they respondent engaged with her following the provision of the redacted grievance report and which I understand upheld many of her allegations of discrimination, could amount to detriments of victimisation. The respondent was involved within the process following the grievance report being provided in the summer of 2021 and there appeared to be promises of cooperation which did not arise in the way that the claimant had asked and as such, the claimant has raised arguable grounds to be considered at a final hearing with her evidence and that of the respondent witnesses being evaluated at that forum.

75. Accordingly, I cannot conclude that these victimisation detriments as alleged show no reasonable prospects of success and must be allowed to proceed to final hearing.

76. Additionally, I would also say that these arguable grounds cannot even be considered as showing little reasonable prospect of success. Accordingly, in relation to the respondent's alternative application that a deposit order be made under Rule 39 and this part of their application, I am not convinced that such an order should be made in respect of any of the surviving PTV allegations. The claimant's willingness to withdraw PTV8, 10 and 13 during this preliminary hearing was a reasonable and appropriate step to take as it involved the removal of the weaker elements of the claimant's post termination victimisation detriment complaints, and which did not feature in the original particulars

<u>Time limits</u>

77. Under section 123(1) EQA, a complaint 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 Tribunal thinks just and equitable.

78. The claim form in these proceedings was presented to the Tribunal on 28 April 2022 following a period of early conciliation from 16 February 2022 to 29 March 2022. The claim form was presented within 28 days of the early conciliation certificate being issued and no difficulties appear to have arisen from this presentation and the real question in relation to this issue involves when allegations of discrimination took place and whether they can be considered as part of series of continuing acts if they arose more than 3 months before the early conciliation period began on 16 February 2022.

79. Taking into account these dates, any alleged act of discrimination which took place before 17 November 2021, was potentially presented out of time.

80. Miss Jones noted that some of the allegations made in the grievance by the claimant went back as far as the academic year of 2019/2020 with the rejection of requests for overtime payments as asserted in paragraph 22(a) of the grounds of complaint. This was followed in the grounds of complaint with allegations of direct discrimination in September 2020 (b), October 2020 (c and d), December 2020 (f) and 14 January 2021 (h). Complaints of indirect discrimination, harassment and victimisation are also made in paragraphs 23, 24 and 25 of the grounds of complaint, some of which provide specific dates and some do not.

81. There are then of course the detriments connected with the victimisation complaint relating to the grievance brought in December 2020 and which appear to relate to detriments arising in June 2021 (PTV1) and continuing to PTV5 when Ms Skeaping's response was allegedly delayed until December 2021.

82. Dealing with the allegations in reverse, clearly some of the PTV allegations arose after 17 November 2021 and as they are all connected to the grievance decision being provided to the claimant in July 2021 in unredacted form (PTV1), I do accept that they form a series of acts of conduct extending over a period and ending at a date that is within time in accordance with section 123(3)(a) EQA. As such, I do accept that these complaints were presented in time by the claimant.

83. The earlier complaints identified in paragraphs 22 to 25 of the grounds of complaint are more problematic however, as they appear to crystallise when the grievance is brought, and which is finalised in January 2021. This is well before 17 November 2021 and the claimant appears to identify no further allegations between that date and July 2021 when the PTV allegations first materialise. Moreover, the claimant's termination of employment on 30 April 2021 did not prompt her into notifying ACAS. Her first threat to bring proceedings is not actually notified to the respondent until December 2021 and it was only at this point that she became determined to present a Tribunal claim. These allegations therefore do appear to have taken place more than 1 year before the early conciliation process began on 16 February 2022 and more than 9 months before 17 November 2021. In terms of the primary limitation period that applies under section 123(1)(a) EQA, these complaints are out of time.

84. This does of course leave the question of whether it is just and equitable to extend time to a date which would bring some or all of the allegations in time in accordance with section 123(1)(b) EQA.

85. The claimant of course was very clear in her evidence at the preliminary hearing before me that she had faith in the grievance process, was aware of the Tribunal time limits following discussions with her trade union representative but wanted to resolve the grievance process as she believed an appropriate outcome could be achieved.

86. Both counsel in their submissions were clear that while parties may decide to delay taking any action in relation to Tribunal proceedings while they exhaust a grievance process, this should not be assumed as an excuse which is sufficient to justify a just and equitable extension where time limits under section 123 had been missed. Each case must turn on its own facts and I must exercise my discretion on the basis that an extension is not something which should be granted as a matter of course so as to rescue a claimant because of unwise choices that they made in relation to time limits.

87. I would say, that in terms of evidence, I found the claimant to be a credible witness when she gave her reasons for delaying the presentation of her claim. She did not seek to place blame upon the respondent, Ms Skeaple or her union representative and suggest that she had been misled or '*fobbed off'* (as was put earlier). Instead, she explained that she had confidence that the grievance process was something which should be used and which she felt was something which would produce a result recognising the treatment she complained of. Indeed, this appeared to be the case taking into account Ms Skeaple's findings in June 2021. This certainly did not appear to be a case where a claimant simply uses the grievance process to prevent any later criticism that internal processes were not followed when the inevitable Tribunal claim was brought.

88. However, I also have to take into account the fact that ordinarily, an employee who has trade union advice and is aware of the Tribunal process including time limits, would be expected to present protective Tribunal proceedings, (potentially seeking a stay at the same time), within 3 months of commencing the grievance process. Accordingly, we would have expected in normal circumstances for early conciliation to have begun in early April 2021 and this was of course not the case in these proceedings for the reasons given by the claimant in her evidence.

89. I am aware that the respondent should be expected to have certainty. It is not fair for an employer to left hanging for what can be many months or even years with the possibility of proceedings being brought long after a date when they should reasonably have expected an employee to have committed themselves to a Tribunal complaint. This could arguably be the case here.

90. However, although finely balanced, I am aware that this is a case where the claimant has been involved in raising issues with the respondent on an ongoing basis and ultimately, in late 2020 when a process was contemplated

against her, she brought her grievance making allegations of discrimination on grounds of race and sex. These allegations appeared to have linkages with each other, each one relating to forms of discrimination applying to these protected characteristics and where the respondent instructed an external expert to consider these allegations in detail. It indicated to me that not only where they are taking these allegations seriously, but also understood that this was a case where Tribunal proceedings could result.

91. They would have been aware that the grievance outcome would be a trigger for a potential Tribunal complaint and the delays which took place in late 2021 in dealing with the redacted grievance and the claimant's proposed outcomes kept them involved in a process, where the allegations of discrimination had received a positive hearing by Ms Skeaple.

92. Ultimately, I have to consider the balance of prejudice to both parties, and I am left to conclude that to deprive the claimant of the right to have a hearing of the long-established allegations which Ms Skeaple found to be largely well founded would produce a greater unfairness to her, than to the respondent, who ultimately could have resolved the issues arising from the grievance in late 2021 and thereby avoided the proceedings being brought.

93. On this basis, I am willing to extend time back to the 10 December 2020 when the grievance was brought. In making this decision, I would also say that the earlier allegations form part of a series of continuing acts which ended on 14 January 2021 when the grievance allegations were finalised and as such, all of the complaints were brought in time by reason of my decision above and the extension of time which I believe is just and equitable to grant.

94. It is still the case that the claimant must prove her case in relation to allegations brought and which remain resisted by the respondent. There is no guarantee that she will succeed in proving these allegations at the final hearing and the respondent is still afforded a defence to the claims which are resisted.

Conclusion

95. In relation to the question of allegations of post termination victimisation ('PTV') contrary to section 27 Equality Act 2010 and discussed at the preliminary hearing before Employment Judge Horne on 5 December 2022 and identified as PTV1 to PTV13:

    (d) The claimant has withdrawn its reliance upon PTV8, 10 and 13 and these will not form part of the list of issues in these proceedings relating to the complaint of victimisation.
    (e) The respondent raises no issue concerning PTV7, 11 and 12 and these will form part of the list of issues in these proceedings relating to the complaint of victimisation.
    (f) The remaining allegations PTV1, 2, 3, 4, 5, 6 and 9 were identified within the grounds of complaint and do not constitute new factual allegations and will form part of the list of issues in these proceedings relating to the complaint of victimisation.

96. The respondent's application that any part of the claim be struck out regarding conduct which allegedly took place after 14 January 2021 on the ground that the claimant has no reasonable prospect of success in accordance with Rule 37 of the Tribunals Rules of Procedure is refused.

97. The respondent's alternative application that any party of the claim be struck out regarding conduct which allegedly took place after 14 January 2021 on the ground the claimant has little reasonable prospect of success in accordance with Rule 39 of the Tribunals Rules of Procedure is refused.

98. That no part of the claim should be dismissed on the ground that:

(c) the alleged conduct formed part of an act extending over a period which ended on or after 17 November 2021, (in the case of the successful PTV allegations 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 as referred to in paragraph (1)(b) and (c) above); and,
(d) it was just and equitable for time to be extended to 10 December 2020 (which was when the grievance was brought by the claimant and which is when the allegations of discrimination identified in the grievance and which formed a series of continuing acts ended).

99. I would note that the case management orders for the preparation of this case have already been set by EJ Horne on 5 December 2022 and I was not specifically asked to vary these orders or make new ones at this preliminary hearing. The parties should of course jointly notify the Tribunal in accordance with the overriding objective if they believe any further case management orders should be made.

100. Finally, although we did discuss the decision made by EJ Horne in accordance with Rule 50 on 5 December 2021 and the claimant confirmed that she had no objection to her current name being used (as opposed to her previous name which she has since changed) or that of the respondent, I make no variation to the Rule 50 order. As the final hearing will potentially be held in public and any judgment will be a matter of public record, this is something which should be revisited by the Judge at that hearing as part of the opening discussions on day 1 of that hearing.

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Employment Judge Johnson

Date: 2 March 2023

JUDGMENT SENT TO THE PARTIES ON

3 March 2023

FOR THE TRIBUNAL OFFICE