EMPLOYMENT TRIBUNALS

Claimant Mr Richardo Parkes

Respondent Whitbread Group Plc

HEARD AT: Watford (by Cloud Video Platform) **ON**: 31 January 2023

BEFORE: Employment Judge J Lewis KC

Representation

For the Claimant: Pyrcy Morson (Solicitor)

For the Respondent: Morag Dalziel (Solicitor)

JUDGMENT

(Having been requested pursuant to Rule 62 of the Employment Tribunal's Rules of Procedure)

1. The Claimant's claim of unfair dismissal is out of time and it was reasonably practicable to present it in time and it is therefore dismissed.

2. The Claimant's claims of discrimination, victimisation and harassment are out of time and it is not just and equitable to extend time and accordingly they are dismissed.

REASONS

1. This was a hearing to determine whether the Claimant's claim was received in time and it was listed to also determine whether it would be just and equitable to extend time. There are claims under the Equality Act 2010 ("EqA") to which the just and equitable extension would apply and also a claim of unfair dismissal for which the test is a different one of whether it was reasonably practicable to present the claim in time, and if not whether it was presented within a reasonable period thereafter. Both parties were content for me to also determine the issue as to whether the unfair dismissal claim

was in time and the reasonable practicability issue in relation to the extension of time for that claim. On that basis I have determined both issues.

2. I heard oral submissions from Mr Morson for the Claimant and Ms Dalziel for the Respondent. I also heard evidence from Ms Senait Mebrahtu who is the office manager with the Claimant's solicitors. I also read and considered a witness statement from the principal solicitor dealing with the matter on behalf of the Claimant, Ms Saimah Malik. Ms Malik was going to be presenting this case and would have been available to give evidence at this hearing. I was informed, and I accept, that she was unable to because of a last minute emergency that she had to attend to with her mother. Mr Morson has stepped in late in the day to represent the Claimant. I canvassed expressly with Mr Morson whether in those circumstances he was seeking a postponement. He confirmed that he was not doing so.

3. I also have not had evidence, whether written or oral, from the Claimant. I canvassed with Mr Morson during his submissions, although there had been directions for witness statements, whether he wished to seek to contact his client, the Claimant, for him to give evidence in relation to the delay. He declined to take up that opportunity.

4. Mr Morson had also originally not been intending to call evidence from Ms Mebrahtu. After further exploration of that during his submissions, indicated that she was available and he would seek to call her, and her evidence was interposed, with the consent of both parties, during his submissions.

5. The Claimant was employed from 20 January 2017 until his resignation on 12 July 2021, taking effect on 19 July 2021. He contends that the resignation was a constructive dismissal and also that the constructive dismissal was an act of discrimination, or in other words that the alleged repudiatory conduct on which he relies was discriminatory and the dismissal was therefore also discrimination. He brings claims, in addition to unfair dismissal, under the Equality Act 2010 of discrimination, harassment and victimisation.

Date of expiry of the primary time limit

6. There was an ACAS notification on 4 October 2021 and the certificate was issued on 6 October 2021. I will return to the chronology leading up to that in due course. It is accepted that the Claim Form was presented on 9 November 2021, being the date shown on the date stamp. It follows that the Claimant does not have the benefit of the extension of time for claims presented within a month of the certificate.

7. It was expressly accepted by Mr Morson that there is no claim of post-termination of employment discrimination in this case. Nor does it appear on the Claim Form in any event. Therefore on the most generous construction, the last date for bringing the Claim was 6 November 2021 (in relation to discriminatory dismissal, and in relation to previous matters if they were part

of a continuing act until termination). That is common ground.

8. In the event the Claim was presented three days later, which outside the primary time limit. It requires an extension of time.

9. It might be said that, given the Claimant was not presented within the month after the certificate, the only relevant extension is for the period of ACAS conciliation. On that basis it would have had to be presented by 20 October 2021. However I accept, and this was not challenged, that when looking at the period of extension needed, one can look at the difference between when it would have been in time and when it was presented, so it is the difference between 6 and 9 November 2021 which matters in considering whether it is just and equitable to extend time.

Principles applicable to extension of time

(1) Just and equitable extension

10. There was no dispute before me as to the principles to be applied in relation to extension of time. Dealing with the discrimination claim first, under s.123(1) EqA, proceedings may not be brought after the end of three months starting with the date of the act to which the complaint relates or "such other period as the employment tribunal thinks just and equitable."

11. I briefly mentioned to the parties the case of ***Adedeji v University Hospitals Birmingham*** [2021] EWCA Civ 23, which provides a summary of some key principles that were not disputed before me. These include that the Tribunal has "a very broad general discretion" and should "assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time". There is no presumption in favour of granting an extension but nor is there any requirement for exceptional circumstances in which to do so. All that is required is that it is just and equitable in all the circumstances that the extension be granted. The burden though rests on the Claimant to show that is the case. There is a public interest in time limits being observed.

12. As explained in various decisions, including ***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICS 1194 (CA) (but again this was not in dispute), although I must take into account all relevant circumstances, there are at least two factors which are almost always regarded as relevant and to be taken into account. One is the length of, and reasons for, the delay. The second factor is whether the delay has prejudiced the respondent. So far as prejudice is concerned, there is absolute requirement as such for a respondent to show what might be referred as forensic prejudice, such as fading memories, loss of documents, losing touch with witnesses. Clearly if the Respondent can show any of these things, it is an important factor for me to take into account when it comes to assessing whether it is just and equitable to extend time. On the other hand, if the Respondent cannot show that it may still be considered not just and equitable. I have to consider the issues in the round.

13. Another factor which comes out from ***Adedeji*** is that when I look at prejudice I am not only looking at what happened between 6 and 9 November 2021. I can and should have regard to the period of that delay. But the prejudice to the Respondent in losing a limitation defence may relate to points that would have applied even if the claim had been in time. It might be that the Respondent would have the same difficulties forensically of fading memories and such like if it had been presented on 6 November 2021. That does not mean that there is no prejudice in having to deal with a claim going back over a considerable time for which there would otherwise be a limitation defence. In the ***Adedeji*** case itself the claim was three days out of time, but it would have involved consideration of events a year prior to the claim. The Tribunal was not required to consider only the prejudice caused by the additional 3 days rather than prejudice from dealing with events a considerable period of time prior to the claim.

14. Ignorance of rights is a relevant consideration but it is necessary to consider whether the ignorance is reasonable if relied upon.

15. In so far as reliance is placed on having relied on the solicitor, that is a factor that I can take into account if the solicitor is at fault and the Claimant reasonably relied upon the solicitor. That may provide a reason to weigh into the balance in the overall assessment unlike, as I will come to, the position in an unfair dismissal claim. Again, it is not conclusive; I must consider all the circumstances of the case.

16. The merits of the case may be relevant, and I was addressed on them by both. If I can form a clear view as to the merits of the case one way of the other than that is something I can and would take into account. However I have very limited underlying documents material to the underlying merits before me. I have the Claim Form and the Response and further particulars. I do not have the underlying documents referred to other than a letter of 20 May 2019 relied upon as the protected act and the letter of 12 July 2021 raising a grievance. In those circumstances I should exercise caution when I come to consider any view I can form as to the merits.

17. The points above do not provide a limit to the relevant factors that I can taken into account. I must consider all the material circumstances. I have considered all the submissions made by Mr Morson and Ms Dalziel. I have considered for example (though tied to the point about delay) Mr Morson's point about delays in the tribunal system, first with the reasons for the first preliminary hearing not being effective, and then the present hearing going off on a previous occasion when the judgment recused himself following an objection (which I accept the Claimant was entitled to make). I have considered those matters along with other submissions.

(2) Reasonably practicable extension (unfair dismissal)

18. I turn to the applicable principles in in relation to reasonable practicability relating to the unfair dismissal claim. Section 111(2) of the Employment

Rights Act 1996 ("ERA") provides that the claim must be brought withing three months of the effective date of termination or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months (plus the extension related to ACAS conciliation provisions).

19. Reasonably practicability essentially means reasonably feasible. It would not be sufficient for a claimant to show that it was reasonable to delay bringing the claims; reasonable practicability sets a higher hurdle.

20. The important point here is that where a claimant retains a solicitor to act and fails to meet a time limit because of the solicitor's failure to act with reasonable care, those failures will ordinarily be attributed to the claimant. It may be it can be shown that the solicitor has a reasonable excuse or has acted reasonably then that will not be held against the claimant. But otherwise where there are failings on the part of the solicitor those will typically be attributed to the claimant on the issue of reasonable practicability.

21. The question of whether the Claim was brought within a reasonable time thereafter would only arise if I am satisfied that it was not reasonably practicable to present the claim in time. I would then be looking at that issue in the context of the three month time limit.

Overview of Material facts

22. I turn to comment further on the material facts. For this purpose I take dates from the Claim Form and Response. Whilst this includes matters which are the subject of dispute, it helps to provide an overview of the issues arising in this case if allowed to proceed.

23. It is common ground that the employment started on 20 January 2017. The Respondent states that the Claimant started his apprenticeship in December 2017 (Grounds of Resistance ("GoR") para 3).

24. The Grounds of Resistance assert that on 9 March 2019 Chris Coombes joined the Respondent part time as a Grill Chef (GoR/4). The Respondent claims he had extensive experience working as Head Chef with previous employers. The Claimant relies on him as a comparator and complains of his being appointed as Head Chef ahead of him. The Claim Form appears to indicate this happened in July 2021. However the Respondent says it was on 16 May 2019 that Mr Coombes was promoted to Head Chef on a full time basis (GoR/4). It says that the Claimant was not qualified for the role at that time and had not applied for it (GoR/4).

25. The Claimant states that on 20 May 2019 he raised a compliant of race discrimination to Alison McCaig-White. That is relied upon as a protected act. A copy of the grievance letter was produced in the course of this hearing by Mr Morson. The Respondent had previously been unable to

locate a copy of that grievance. Within it there was a complaint as to not having been promoted to the position of Head Chef. It is not said in terms whether it was Mr Coombes that was promoted. But it is consistent with the Respondent's case that Mr Coombes had been promoted already by that stage. There were other matters of complaint made and, relevantly to the case that this was a protected act, there was express reference to having been discriminated against. It did not say in terms say this was on grounds of a protected characteristic, but I accept that it is (at least) reasonably arguable that the letter if sent it involved a protected act.

26. The first that Ms Dalziel saw of this letter was in the course of submissions at a late stage in the hearing today and as such there was not the opportunity to have taken instructions on it. The Respondent states that the letter could not be located when dealing with the grievance in July 2021. Its pleaded case is that it denies that the Claimant raised a complaint of race discrimination in May 2019 (GoR/30). The Claimant's own position in his letter of 12 July 2021 is that the letter was completely ignored. On the face of it the respective position point to potential issues, going back to May 2019, as to what happened to the letter, whether it was sent and received, whether in context the reference to discrimination implicitly meant on grounds of race and was understood as such, what action was taken in relation to it, and if none why not.

27. Continuing with the chronology as it appears from the pleadings, the Respondent states that the Claimant completed his apprenticeship of 16 December 2020 (GoR/3). (In the Claimant's Further and Better Particulars ("FBPs") it is stated that the apprenticeship started in February 2018 and was completed in February 2021).

28. The Respondent says that on 28 May 2021 Mr Coombes stepped down from the Head Chef role to become Grill Chef. The Respondent says that was at his own request so as to reduce his hours (GoR/5)

29. The role of Head Chef was advertised. The Claimant says this was in May 2021. The Respondent says that the Claimant was encouraged to apply for the role by the Kitchen Manager (Marc Munday).

30. Both the Claimant and one his comparators, Emily Collins, applied for the role. The Respondent states that on 23 June 2021 there were interviews conducted for the role by Nichola Sumner (General Manager) and Marc Munday (Kitchen Manager) (GoR/8). Both the Claimant and Ms Collins were interviewed separately that day for the Head Chef role. The Respondent claims that the Claimant performed poorly. Its case is also that neither of those two people were appointed to the role and that she too was not able to demonstrate the behaviours and skills required. In the FBPs the Claimant states she was offered the role.

31. The Respondent states that it refreshed the advertisement role in around July 2021 because it was only good for a limited period of time. The Claimant's case is that the role was readvertised because Mr Coombes, who

had been appointed, had stepped down or his employment terminated in the light of disciplinary issues. He states that Ms Collins was informed that it had been re-advertised but that he was not informed of this.

32. The Claimant stated in his Claim Form that he applied for the vacancy on 2 July 2021. In his FBPs he states the interview was on that date. As noted above, on the Respondent's case the interview for both the Claimant and Ms Collins was on 23 June 2021 and indeed Mr Coombes had been appointed two years before. The Respondent says that rather than the Claimant applying for the role on 2 July 2021, that was the date that he resigned in protest at not having been made Head Chef and the Mr Munday explained why he had not been appointed and offered additional training. The Claimant's case is that he was given distressing feedback about why he had not been appointed and that he gave notice to terminate on 12 July 2021 with effect from 19 July 2021.

33. I note that the letter of 12 July 2021 states that the Claimant was told on 2 July 2021 that he was not suitable for the Head Chef role (or possibly that he had received in response to a request for clarification on that date). That is consistent with the Respondent's case. Whereas the Claimant states he applied on that date, the letter indicates that it was on that date that he was told that he was not suitable for the role. It does appear likely therefore that the timeline that the application for the Head Chef role did take place before the 2 July. It might be that both the application and rejection was on the same date, but the letter on its face would seem more readily to fit with the Respondent's timeline.

34. The letter of 12 July 2021 gave one week's notice. It says the last day of employment was in fact 17 July, but both parties accept, presumably on the basis of the being one week's notice, that the employment in fact terminated on 19 July 2021.

35. It is also said by the Claimant that he received feedback involving what he contends was an unconvincing response. He states that he was accused of not putting into practice what he had learnt in his apprenticeship and also that he was criticised for the amount of time taken to complete the apprenticeship. He says that both of those criticisms were wrong. There are factual disputes in relation to that.

36. The Respondent says that Mr Coombes left on 21 July 2021 at his own request (GoR/6).

37. Following the grievance raised by the Claimant on 12 July 2021, the Respondent states that there was a grievance hearing on 29 July 2021 before Mr Akshay Agarwal, the Regional Operations Manager (GoR/17). It is not clear on the material before me as to why if there was a hearing the Respondent was unable to locate or the Claimant did not produce the letter of 20 May 2021 or whether he was asked for it.

38. There was a report of 5 September 2021 but it appears from the Grounds of

Resistance that it was not sent to the Claimant until 21 September 2021, together with a letter rejecting his grievance. The ACAS notification then followed on 4 October 2021.

39. I will come back to say some more about the matters in dispute when I come to deal with the issues bearing upon whether to grant an extension of time.

40. I turn to factors bearing on extension of time.

Extent of the delay

41. I have addressed above the extent of the delay. It might be said that strictly that since the month extension did not apply that the period of delay was strictly from 20 October to 9 November. But since the claim would have been in time on Saturday 6 November, and I consider it right to regard the relevant period as being from then to Tuesday 9 November 2021.

Explanation to the delay

42. I accept that for some of the period, although I did not have direct evidence about this, it is a reasonable inference that the fact that there was an outstanding grievance provides an explanation as to why the Claim was not presented before then. It is not essential in every case to await the outcome of the grievance but it would have been reasonable to do so, and to see what was said, on the basis that it was delivered within the limitation period. That is subject whether it could be said that any parts of the discrimination claim would have been out of time by then. Even in relation to that it would be an important factor (in assessing whether to allow a just and equitable extension) that the grievance outcome had been awaited.

43. That takes matters until 21 September 2021. It does not explain however why matters were left to the last minute after this. The ACAS notification as was on 4 October. The Claimant did not take advantage of the full ACAS conciliation period. That was a matter of choice for him, but it meant that the clock was then again running. The evidence that I have from the principal solicitor dealing with the matter is that she diarised the time limit, she noted it on Monday 1 November and that it expired on 5 November 2021 (although as I've indicated it is now common ground the last date was 6 November 2021). But nowhere in her witness statement does she explain why matters were left so late, to the final week for present the claim, or what had been happening in the prior period. Mr Morson was not able to assist in relation to that, and in any event it should have been addressed in the witness evidence.

44. The explanation offered for what then happened is that Ms Malik attempted on Wednesday 3 November 2021 to submit the form online but that when she tried to do so the screen did not change and so she was unable to do so. She had pre-scheduled leave in any event from 1pm on Wednesday 3 November to Monday 8 November 2021 because her mother was returning to Manchester from India. Ms Malik had booked the time away to stay with

her for a few days and had planned to leaver earlier that her mother's arrival to prepare her home, laundry and cooking. So not only was filing left to the last week, but also to the last day Ms Malik was at work before pre-scheduled leave.

45. On that Wednesday, when Ms Malik found she could not send the form, she prepared and printed it out and passed it to the office manager, giving the Tribunal address and asked to ensure it was posted (and I emphasise posted) on the same day. There is no further written evidence by Ms Malik as to any follow up steps that she took. The further evidence is provided by Ms Mebrahtu (office manager) who explained the steps she took to have the Claim Form posted. In oral evidence Ms Mebrahtu also said (this not having been raised before) that she had a conversation with Ms Malik to say that it had been posted. Ms Mebrahtu cased for receipts from the company which managed the office (but not the Tribunal). She said she had been told by Ms Malik to send the letter by recorded post. That was not in Ms Malik's statement or Ms Mebrahtu's statement. Indeed in Ms Mebrahtu's statement she said that she could not remember whether she (Ms Mebrahtu) asked for the letter to be sent by recorded post.

46. In any event there were no steps to be taken to contact the Tribunal to check whether it had been received. It was not Mr Mebrahtu's evidence that she had not done so and there is no evidence of Ms Malik checking this, although she was still in the country, in Manchester. Instead there was reliance on the post.

47. That falls, very considerably in my view, below the standards to be expected of a reasonable solicitor. There was a deadline approaching. It was Ms Malik's responsibility on behalf of the Claimant to ensure that the claim got in on time. It may not have been unreasonable in the first instance to send the Claim by post. In the absence of further explanation it was certainly unreasonable to simply rely upon that without checking on the Friday if it had been received, and if it had not been received to take steps to ensure that it was received. Steps could have been taken. The solicitor's offices were in Finchley, not very far from Watford. I was told that Mr Morson was off at the time and that the only other person working at the solicitor's offices was the office manager. There was no explanation as to why the office manager could not have delivered it or taken further steps to check with the Tribunal whether it had been received. There was no explanation as to why further attempts could not have been made on the Thursday or Friday to file it by email. No explanation as to why no one else could have been asked to deliver or the Claimant asked to deliver it himself. There is no satisfactory explanation as to why it was simply left on the Wednesday to be delivered by post without any further steps to ensure that it was delivered on time. That is even before getting to the issue, which was not explained as to why it was left to the last minute. I am therefore wholly unsatisfied that there has been a satisfactory explanation.

48. As noted, I have heard no evidence from the Claimant and there is no statement from him. It is a fair inference that having instructed solicitors he

may have placed trust in the solicitors to deal with it. But I do not have any evidence as to what enquiries he made about the deadlines, what he was told or knew about them, what he was told about what had been or was being done, what he did to chase the position up or to check if the Claim had been received by the Tribunal, whether he was told that it had simply been posted or whether he made any enquiries to check that it had been presented on time. Nor do I have any evidence as to whether the fact that matters were left to the last minute was down to the Claimant or the solicitors or why that was done. I cannot simply infer that it was the solicitor's fault that it was left so late. There is no evidence as to this other than that Ms Malik had diarised the deadline. The evidence in relation to these matters is unsatisfactory. Whilst I accept therefore that it is to be expected that he placed trust in his solicitors, the evidence concerning that in the round, and bearing on Claimant's involvement and why he did not do more himself, is less than full or satisfactory.

Reasonable practicability

49. It clearly was reasonably practicable to present the claim on time. There is no evidence that it needed to be left to the last minute. I have already addressed why the explanation given as to relying on the post is inadequate. There is no evidence as to why having sent it by post there were no checks with the Tribunal that it had been received or further steps to ensure that it arrived on time. I am not satisfied that it was an adequate approach simply to trust that the post would arrive on time

50. In those circumstances, applying the approach to reasonable practicability in unfair dismissal claims, I am satisfied that it was reasonably practicable to present the claim within the primary time limit. The unfair dismissal claim is therefore out of time and is dismissed.

Just and equitable extension
(1) Extent and reason for delay

51. I turn to the issue of a just and equitable extension.

52. I accept the delay is relatively short, between when it could have bene on time and when it was presented just two working days later on Tuesday 9 November 2021.

53. I also take into account that this is not a case in which it is right to approach the matter on the basis that there is no explanation at all for the delay. Although I have not heard from the Claimant, I accept as I have indicated that it is a reasonable inference that matters were placed in the hands of his solicitor and also that within the context of discrimination that is something that he can rely upon. I weigh in the balance that the Claimant was let down by his solicitor. However as I have also noted, that falls short of a full and satisfactory explanation on the Claimant's part.

(2) Prejudice

54. As I have indicated, the Respondent is not limited to having to identify prejudice between 6 and 9 November 2021. However I do regard it as relevant to weigh in the scale that there is no evidence that delay over that particular period made a difference. That does not meant that there is no prejudice in extending time. But it is a factor I take into account.

55. It is also relevant to look more broadly at what prejudice there is and as to how the evidence as to this has developed, which I have also taken into account. Whilst submissions were made by Ms Dalziel, there has been no witness evidence from the Respondent.

56. Ms Dalziel was though entitled to point out on the material, that the matters raised by this claim are not limited to July 2021 or even June 2021. They go back considerably further than that, measured in years. I have already referred to the issue about what happened with the protected act. There are also issues going back a considerable time. As is apparent from paragraphs 6 to 8 of the Grounds of Claim, in the context of challenging the reasonableness of the explanations given to the Claimant, and inferences to be drawn from this, there are issues raised as to matters going back to the period of the apprenticeship which ended in December 2020 or February 2021. It is said that learnings had been extensively examined by City & Guild during the apprenticeship (without giving dates when that was done), that there was a lack of required assistance by the Kitchen Manager and the General Manager, that there were other delays over the period of the apprenticeship so that it was unfair to blame the Claimant for the time that it took, partly due to covid but also to the changeover of trainers and also an alleged failure on the part of the Respondent to complete its role, “including but not limited to unreasonably delaying in assisting with MICROS, ordering and shift writing”. Those are in dispute as the Response show.

57. These are factual issues going back to the period of the apprenticeship both raised directly and indirectly. They are raised indirectly in the sense that they go to what that the Claimant says as unreasonableness in the reason he was given for not being appointed and inferences to be raised from this. In addition there is a distinct head of claim that there was a failure to support his apprenticeship (para 12.1). That is relied upon as an act of discrimination, harassment and victimisation and is also relied upon in support of para 12.4 (the criticism of the amount of time taken to complete the apprenticeship.

58. I have considered whether it is possible to hive off other elements of the discrimination, harassment and victimisation claim from the parts going so far back. However, the dismissal relies upon the matters in conjunction as repudiatory acts. Further, the Claimant’s case, even if not relying on the other matters as pleading claims, would be part of the background and context. It seems to me that differentiating parts of the claim is difficult in this case. On any view there are disputes about matters going back quite some time.

59. In addition to the impact on the cogency of evidence and recollections to be expected when going so far back, I was informed Ms Dalsziel that key relevant witnesses had left the Respondent's employment. In particular this referred to:

    59.1 Christopher Parr left in January 2022. He was the Regional Operations Manager who it is said spoke with the Claimant about his resignation and grievance in July 2022 (see paragraph 16 of the Grounds of Resistance).
    59.2 Ms Sumner in May 2022.
    59.3 Mr Munday (Kitchen Manager) in July 2022

60. Ms Sumner and Mr Munday in particular appear to be central in relation to the Claimant's claims including going back to the time of his apprenticeship.
61. It is necessary to qualify what is said about that and the weight to be given to this. It was quite properly raised in submissions, on the basis of Ms Dalziel having taken further instructions in response to a question that I raised. However Ms Dalziel went a step further and submitted that given the context of the hospitality industry there may be difficulty in contacting those witnesses. I do not accept that is a matter I should take into account. If it were to be said that there were difficulties in contacting witnesses there should have been evidence given of that. In addition there was a grievance that was investigated between July and September 2021 and I would expect as a matter of due diligence that contact details would kept. It might also be expected, given that the claim was started before they left, that knowing individuals would be leaving, there would be notes made of what there evidence was and their contact details. Whilst its possible that they left in a hurry without allowing for that, again that would require evidence.

62. As against that it is the case that the Respondent will be relying for the key aspect of its evidence on individuals who are no longer in its employment. I note and take into account their departure, whilst also balancing that with the absence of any specific evidence as to the impact of that in this case for example as to any specific issues with cooperation from those witnesses.

63. I also note that whilst I have no details of the grievance process other than the initial letter of 12 July 2021, it is to be expected that there was an element of refreshing memory from the grievance having been raised in July 2021 and looked at following that between July and September 2021.

64. There is however in my view force in the point that in addition to witnesses no longer being employed (with the caveat I have explained above) that there is a necessary prospect of the cogency of evidence being affected by the passage of time given how far the issues go back – to the period of the apprenticeship and to some extent the event of May 2019. If the matters the Claimant complains about, being the appointment of Mr Coombe as the Head Chef, rather than the Claimant, that is a further matter bearing on the issue of prejudice. Even if that is not something relied upon as a particular of discrimination, whilst there may be less weight attached to it, the

circumstances of not been appointed in 2019, which was alleged to have been discriminatory, and what happened leading to that appointment, is likely to be relevant background.

65. Further by the time this comes on for hearing significantly more time will have passed. I accept that part of the time has been taken up in relation to the preliminary hearing and another where the judge recused himself. However the reality remains that by the time this case would be heard it would be likely to be at best much later in 2023, and the reality is with the claim of this nature and the number of witnesses, it would probably be well into 2024 (unless a gap fortuitously emerged in the tribunal diary at the time of listing). Even without that the matters go back and considerable time and Respondent is entitled to point to the likely impact on the cogency of evidence.

66. I turn to a point raised by the Claimant in relation to prejudice. It is said that the Claimant has been put to additional cost in having to answer further and better particulars. Mr Morson submits that was an unnecessary and unreasonable request, and more so given the cost incurred despite the time limit point. Although it is said the particulars were disproportionate, there was an order made in relation to them and therefore cost had to be incurred in answering them. At one point it was suggested by Mr Morson that there was a threat of an unless order but that was not shown to me and in any event I do not think that anything turns on it.

67. Those requests for particulars were made in the context of the Respondent having already taken a point in its Response that all or part of the claims were out of time. That was dealt with at paragraphs 20 to 23 of the Response. Amongst the things dealt with in the request for particulars are details of the particular matters that are relied upon in relation to discrimination and harassment, details of the failure to support the apprenticeship, of specific elements in relation to MICROS, delay in ordering and the particular criticisms of the time to complete the apprenticeship and whether there was reliance on actual or hypothetical comparators. (I interpose that particulars in the bundle appeared to be cut off on the third page without it being clear at the end but both Mr Morson and Mr Dalziel did not consider that there was anything material missing).

68. The short point is that these were proper requests to make. It has been a relevant factor assessing matters to know what was relied upon and how far back. If I take the points that arise here:

    68.1 Paragraphs 2, 7 and 13, was in response to the allegation of failing to support the Claimant's apprenticeship. It has been relevant in considering prejudice to know what was being said about that failure. It goes to the issue of how far things go back and likely bearing on recollections and cogency of evidence. It is said that the apprenticeship started on February 2018 up to 12 February 2021 and that as part of this there should have been a schedule of appointments that were required to be signed off, that Ms Sumner and Mr Munday

never attended evaluation appointments, and it was not dealt with until Mr Sumner was on maternity leave and there is an allegation about Mr Sumner having said on the final evaluation that the Claimant was "not there yet; needs more training" without greater particularisation of the complaint about that. It was relevant to know what was being said about that. It raises evidential issues about what it is alleged was said or done and whether in all the circumstances inferences can be drawn from that going far back.

68.2 In relation to the paragraphs 3, 8 and 14, relating to the MICROS training it is said this was not provided and that the Claimant asked Mr Munday about that many times (without giving particulars of when this occurred). That is raising on the face of it a factual issue as to what was said over an unspecified time during the apprenticeship. That is relevant when considering the potential impact of having to go far back on the cogency of evidence and recollections. It is also said that Ms Sumner refused to train the Claimant. Again it was relevant to know what was said about that and to identify the factual issues going back quite some time.

68.3 Paragraphs 4,9 and 15 concerned a delay on ordering and shift writing. There is a complaint as to the delay in the apprenticeship alleged to have been caused by the Respondent's failure to sign off on the Claimant's evaluations. That raises an issue as to why there was a delay in signing off if that is what happened. It refers to it being likely to have bene the responsibility of Mr Munday or Ms Sumner.

68.4 In paragraphs 5, 10 and 16 the Claimant was asked to detail when the Respondent criticised the Claimant for the length of time it took him to complete the apprenticeship. Paragraph 8 of the Grounds of Claim contained an allegation as to such criticisms having been made without specifying when or by whom they were made. The Respondent was entitled to seek that clarification, and in response the particulars clarified that it was referring to feedback in relation to the failed interview (which was now said to have taken place on 2 July 2021).

69. In all I do not accept that the fact that the Claimant was put to the expense of answering these particulars is a factor to be weighed in his favour in assessing prejudice. The information was relevant in identifying what was being said and that information was material in relation to the assessment of what prejudice there would be to the Respondent if the case were permitted to proceed despite being presented outside the primary time limit. It has been relevant in this hearing to have information as to the nature of the factual issues, including the various criticisms made of Mr Munday and Ms Sumner, going back to the period of the apprenticeship.

(3) Merits

70. I turn to the issue of merits. On the face of it the Respondent's chronology appears to fit better around the limited documents before me. It would be surprising if the Respondents were to get wrong how long Mr Coombes had been the Head Chef, and the grievance in 2019 refers to the Claimant not having been made Head Chef. Of course if it was right the 20 May 2019

grievance followed the appointment of Mr Coombes rather than the Claimant than that could hardly be victimisation since it preceded that alleged protected act. There are however other claims that could flow that are currently pleaded including as to the appointment being discriminatory (though not in the time frame pleaded).

71. The 12 July 2021 letter does tend to provide support for the Respondent's chronology in relation to interviews having taken place prior to 2 July 2021. In addition to there being likely force in the point as to Mr Coombes having been appointed a considerable time earlier, the Respondent also says Emily Collins was not appointed or seen as suitable for the role as Head Chef.

72. It does not seem to me however that this a case in which I can form on the limited material that I have a sufficiently clear view for the merits to be a strong factor in relation to my decision. I certainly do not accept Mr Morson's submission that I can find this to be a strong case of discrimination, victimisation or harassment and treat that that as a reason in favour of allowing the extension. In fairness to him the point may have been being made is that if the claims were to be made out including adverse inferences as to victimisation, discrimination and harassment over time, that would be serious and in itself is a reason to allow the claim to go forward. That is a point which I do take into account. But it is not the case that I have formed or been able to form the impression that it is in fact a strong case.

73. Nor do I accept the Respondent's contention that I can form a clear view that this is a clearly weak claim. There are indeed issues about the timing and the chronology. There are also issues on the face of it which call into question the Claimant's case in seeking to make a direct comparison with Mr Coombes. However I do not have all the evidence in relation to that. There remain the question as to whether inferences can be drawn from the alleged inadequacies of explanations given to the Claimant, whether there were failings in the period of the apprenticeship and whether inferences can be drawn from that, and whether inferences can be drawn in the light of those matters following after what is alleged to have been a protected act in May 2019. In all, it does not seem to me that I can safely conclude that it is an obviously weak claim. My impression on the papers, and taking into account the submissions to me, is that there are significant challenges for the claims in that there look to be real difficulties in the particular comparisons raised. But I do not regard this as a case where I can safely come to a sufficiently firm view as to weakness on the merits such that I consider it appropriate to attach substantial weigh to this in spite of limits of the material before me.

Conclusions

74. Whilst I accept that there is something that the Claimant can point to as to the explanation given, for the reasons I have explained I do not regard the explanation provided as either sufficiently full or satisfactory. I have been given no satisfactory explanation as to why matters were left so late in the day, and the explanation for the late presentation of the Claim is unsatisfactory not just in relation to the solicitor's role but also in the absence

of evidence on the Claimant's part.

75. I accept that if I do not grant the extension there is the obvious and considerable prejudice that the Claimant will have lost the ability to pursue a discrimination. harassment and victimisation claim. That is an important factor that I take into account. I also take into account the short period between 6 and 9 November 2021. As against that I accept that there is significant prejudice to the Respondent in dealing with this claim going back a considerable period of time, giving rise to the real prospect of cogency of the evidence and recollections being affected. I also take into account the departure of key witnesses, albeit with the caveat I have stated as to the evidence bearing on that.

76. Stand back looking at the circumstances in the round, and the importance of time limits in tribunal claims, I am not satisfied that it is just and equitable to extend time so as to allow the claim to proceed. I therefore decline to extend time and the claim is dismissed.

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Employment Judge J Lewis KC
Date: 1 February 2023

ORDER SENT TO THE PARTIES ON:

Order sent to the parties on:

9 March 2023

NG

FOR THE TRIBUNAL OFFICE: