EMPLOYMENT TRIBUNALS

Claimant: Ms B Sam

Respondent: Department for Work and Pensions

Heard at: Manchester Employment Tribunal (by CVP)

On: 6 March 2023

Before: Employment Judge Holmes

Representation
Claimant: In Person
Respondent: Ms E Hodgetts (of Counsel)

JUDGMENT AND REASONS ON PRELIMINARY HEARING

It is the judgement of the Tribunal that :

1.The claims at (a) to (ww) in the agreed List of Issues were presented out of time, and there is no reasonable prospect of the Tribunal finding that it would be just and equitable to extend time for their presentation, save in respect of claim (ss). They are accordingly struck out as having no reasonable prospects of success, pursuant to rule 37(1)(a) of the rules of procedure.

2. Claim (ss), however, does have reasonable prospects of success, and will not be so struck out. That claim may proceed. The Tribunal does not, however, determine whether the claimant be granted an extension of time for the presentation of that claim as preliminary issue.

REASONS

1. Reasons were given orally at the hearing, but by a request made on 27 March 2023 the claimant sought written reasons, which are now given. Where there is any divergence with the reasons announced orally in the hearing, these written reasons take precedence. By a claim form presented on 2 August 2021 the claimant brings claims of race discrimination, sex discrimination and disability discrimination against the respondent, her former (now, not at the time of the presentation of the claim) employer.

2. At a preliminary hearing held on 25 April 2022 Employment Judge Butler ordered that there be an open preliminary hearing to consider the following:

   2.1 Whether acts 2(a)-(ww) (using the numbering on the respondent's list of issues) should be struck out pursuant to Rule 37 because the claimant has no reasonable prospect of success of showing that they are part of conduct extending over a period of time, with the last act being in time and/or that time should be extended on a just and equitable basis. Or whether the claimant should pay a deposit, pursuant to Rule 39, as a condition for pursuing these allegations.

   2.2 Whether the complaints of race discrimination relating to allegations 2(a)-(nn), (qq)-(rr), (tt)-(ww) and 4(a)-)d) should be struck out, pursuant to Rule 37, because the claimant has no reasonable prospects of success of showing that they were because of her race or related to her race. Or whether the claimant should pay a deposit, pursuant to Rule 39, as a condition for pursuing these allegations.

   2.3 To make case directions, as appropriate, and list the final hearing.

3. The parties duly prepared for the hearing, the respondent producing a hearing bundle of some 714 pages, and a skeleton argument, and the claimant a witness statement, signed and dated 30 November 2022.

4. The respondent's case is that in respect of claims (a) to (ww) in the List of Issues (pages 111 to 117 of the bundle), the last of which is alleged to have arisen on 2 May 2020 (subject to discussion below), the claims were all submitted out of time. The claimant accepted that was the case, and, therefore that the first issue for the Tribunal at the final hearing will be whether to grant her an extension of time on the basis that it would be just and equitable to do so, under s.123(1)(b) of the Equality Act 2010.

5. The basic chronology is that the claimant initiated ACAS early conciliation on 24 May 2021, obtaining a certificate on 5 July 2021. She, or rather, solicitors acting for her, presented the claim form on 2 August 2021.

6. The last date, accordingly, of any act or omission that would render the claims, or at least the last of them, in time was accordingly 25 February 2021. On the basis that the last act or omission relied upon was 29 May 2020, the claims were presented just under 9 months out of time.

7. Whilst not discussed in the hearing, the Employment Judge would add one caveat to that analysis. That is in relation to claim (vv), an allegation that Gavin Roberts failed to take action following the claimant's complaint of sexual harassment, which allegedly occurred on 2 May 2020. The claimant appears (from her interview for the purposes of the grievance procedure on 10 November 2020, at pages 414 to 420 of the bundle) to contend that the incident was reported to Gavin Roberts by the Police on 21 May 2020.

8. In terms of time limits, the provisions of s.123(3) of the Equality Act 2020 provide that time begins to run, in the case of an act, from when that act was done, or in the case of a failure to do something, the time when the person in question decided on it. Under s.123(1)(4) a person is taken to have decided on failure to do something either when he does something inconsistent with doing it, or upon the expiry of the period in which he might reasonably have been expected to do it.

9. On the respondent's case (see para. 62 of the Amended Grounds of Resistance, page 105 of the bundle) Gavin Roberts took advice from HR on 22 May 2020, which was to take no action against Stephen Fairclough the alleged perpetrator of the matters that the claimant complains of. That would appear to be the date on which he decided not to act, and probably the date from which any time limit should begin to run. If, however, the Tribunal were wrong on that, as the claimant's whole claim in this regard is based upon his failure to take timely action, the date by which he might reasonably have been expected to take such action would be 4 weeks from the date he was made aware of the allegations, on 21 May 2021, so that would be 18 June 2021 at the latest. If so, that would make this claim slightly less out of time, by 4 weeks.

10. The claimant gave evidence, and the parties made submissions. After the conclusion of the first day of the hearing, and the submissions had been heard, the Tribunal received further documents, in the form of a letter sent by the claimant's solicitors dated 17 June 2021, which has been added at pages 600A to 600I of the bundle, and an email and the grievance outcome letter of 15 March 2021, which have been added at pages 597A to 597B . Further, in response to a query raised by the Tribunal, the claimant confirmed by email that she had made a Subject Access request on 1 July 2020 and referred the Tribunal to page 558 of the bundle, which is the first page of a three page letter dated 27 July 2020 from the respondent, acknowledging her request. The Tribunal heard further submissions on these further documents. The Tribunal makes the following findings of fact relevant to the issue of whether there was any reasonable prospect of the Tribunal granting an extension of time to the claimant for the presentation of these claims.

    10.1 The claimant's first claim chronologically (j) relates to an allegation that Elaine Verdin had told her that sending a message by Skype, and a personal text to Jonathan Geil to his mobile over a weekend ,could be a Police matter. The date of this allegation is given by the claimant as 15 June 2018, but it may be earlier as there is a note of an informal meeting on 12 June 2018, between Elaine Verdin and the claimant (page 212 of the bundle). That was followed by a meeting between Louise Andrews and the claimant on 19 June 2018. In that meeting (note at page 213 of the bundle) Louise Andrews recorded the claimant as having said that she had spoken to the union (the PCS, of which the claimant, save for a subsequent period when she resigned from it, was a member) to get some advice regarding discrimination, and they had sent her "the forms".

    10.2 The claimant denied that she had used the word "discrimination" in that meeting, although she may have done a few days later.

10.3 The claimant's claims (j)(j) and (k)(k) relate also to this period, where the claimant alleges that Louise Andrews put pressure on her not to take any further action in respect of the meeting that Elaine Verdin had with her, and then sent her an email about her standards of behaviour. The claimant, however, did not take the matter any further until her grievance on 11 August 2020.

10.4 When interviewed for the grievance on 21 December 2020, the first time the matter had been raised with her since 2018, Elaine Verdin said (pages 218-222 of the bundle) at para. 14:

"I kept notes of all of these meetings for a reason, as I had been warned by Keith Jones her Trade Union rep who has since retired, that I should keep records of all interactions with Brenda to protect myself"

And at para. 23:

"I then had a meeting with Brenda on 12 June 2018. I believe Jack Hewitt took the minutes. Brenda's Trade Union rep, Keith Jones came with her even though it was an informal meeting."

10.5 One of the allegations that the claimant makes against Elaine Verdin is that she threatened her with involving the Police over the incident with Jonathan Geil In her interview on 21 December 2020 Elaine Verdin, in para. 28 , denied any mention of the Police. The claimant maintains that she did.

10.6 One of the claimant's claims, at (m), is that Jack Hewitt refused on two occasions in June 2018 to supply these notes to her. When interviewed for the grievance on 10 December 2020, he said this (page 248 of the bundle):

"14. I remember the meeting on the 15 June 2018 but I can't recall refusing to provide Brenda with the notes. I can't remember the details of the meeting at all but generally the notes would go to the member of staff, the TU rep, if they were there and the manager. I would keep the notes for a certain length of time and then delete them but I can't recall any details. There would be no reason for me to refuse to provide the notes to Brenda."

10.7 In relation to the claims that the claimant makes about events in September 2019, involving David Holt, claims (f), (g), (h), (i) , he made a note of a meeting with the claimant on 27 September 2019 (pages 313 to 315 of the bundle). In that note he set out an email he had received from the claimant that day, in which she said this (page 313 of the bundle) :

"I am aware of conversations being had about me on your team please don't encourage it as I am being subjected to bullying and if I have to take this matter all the way to a tribunal I will do and all those involved will be mentioned and investigated I have had it with this place."

10.8 David Holt looked into the claimant's complaints , and spoke to members of his team. He discussed the matter with the claimant , and she accepts that she may have used the term "racist". At the end of this process he sent her

an email (page 315 of the bundle) offering to take the matter if she wished, but saying that if she did not, he wanted her to inform him of any further instances with any other members of staff. The claimant replied that she would rather "it be left at that for now", with her situation hopefully improving, but she would see how things went.

10.9 The claimant had made reference to another employee from an ethnic minority, (Sangha) Mitra Pandit also being treated discriminatorily, and considered this was racist treatment.

10.10 The claimant accepted that she was in a position to bring an Employment Tribunal claim in September 2019.

10.11 The claimant makes a number of claims in respect of the conduct of Kate Pye, who managed the claimant for some of the periods in question. Claims (p) through to (hh) all relate to her conduct between March 2019 and May 2020. Kate Pye was first asked about these matters in the grievance investigation on 15 December 2020 (pages 366 to 374 of the bundle). In a number of instances Kate Pye states that she cannot recall matters, or has no recollection of them. For example, in relation to an allegation that she rang the claimant three times, in November 2019, she could not recall doing so, but she had had a discussion with her, and was not sure when this was, so it may have been another occasion.

10.12 The claimant makes one allegation against John Jones ,(o), about a comment he allegedly made in October 2019, and the first time that he was asked about this was in his grievance interview on 16 December 2020 (page 337 of the bundle). He could not remember saying what the claimant alleges, but did think he recalled another conversation with her, but he also said he could not remember what he said.

10.13 A witness Clare Friend, who was a witness in respect of an allegation relating to Kate Pye, she, when interviewed in the grievance process on 21 January 2021 (page 392 of the bundle) , said that she did not recall her saying what the claimant alleges, and that she had no recollection of her putting the claimant under any pressure.

10.14 Lee Howard is the subject of the claim at (ii) , that he left the claimant out of the opportunity to bring in a takeaway order from McDonalds, said to be "towards the end of 2018". When interviewed for the first time about this in the grievance process on 16 December 2020 (page 237 of the bundle) he said that the incident was two years ago and that he had no recollection of it at all.

10.15 In relation to Vicky Boland, the claimant brings claims (qq) and (rr) about her conduct in March/April 2018 and March to May 2019, and (yy) about the respondent's failure to locate her so she could be interviewed. It is clear that as at November 2020 when the HRMIS team took on the investigation , it was discovered that she had left the respondent. Attempts to locate her by reverting to the claimant, to former colleagues, and to Shared Service in January 2021 came to nothing, so she could not be interviewed. It is unclear

precisely when she left the respondent, but by the time that the claimant raised her grievance in August 2020 some of the matters relating to her conduct were at least one year, and in one case, two years, old.

10.16 In addition to the alleged perpetrators, potential witnesses Erika Montenegro (page 268 of the bundle) , and Alma Meaden (page 454 of the bundle) expressed in their grievance interviews difficulty in recollecting the events they were being asked about.

10.17 The claimant initially involved her trade union the PCS. She did discuss with them the relevant time limits for bringing a claim. She also consulted the CAB, around April 2020. She was aware from both these sources of the three month time limit.

10.18 On 1 July 2020 the claimant made a Subject Access Request, which is not in the bundle, but the first page of the respondent's response is (page 558), The claimant had sought information in relation to her dealings with Jack Hewitt, Kate Pye, Gavin Roberts, Clare Friend, Paul Atherton , Lyn Kelly, Hayley Gilmour, Angela Jones, and David Holt, which was provided, and Louise Critchlow, John Jones, Stephen Fairclough, Jayne Davies, Clarke Crilly and Carl Rooney, which was not as there was no information to provide.

10.19 Clare Ross, however, the PCS rep. that she was later assigned, who was based in Newcastle, had also told her that she had 12 months to bring a claim. The claimant received the outcome of her grievances on or about 3 March 2021, with a letter summarising the position dated 15 March 2021 (now added to the bundle at pages 579A to 597B) All but three had not been upheld , and the remaining three were to be referred to Decision Makers.

10.20 The claimant agreed that she was at this point in a position to present her claims to the Tribunal. She had been provided with copies of her interviews as part of the grievance process. The claimant also instructed solicitors to advise her, as a back up. She did this around April 2021.

10.21 Under the grievance procedure the claimant had the right of appeal. The claimant did appeal, initially by a letter from her solicitors dated 17 June 2021 (pages 122 to 130 of the bundle) , in which the broad basis for much of her claims to the Tribunal is set out. She sent in her own appeal form GA1, dated 5 August 2021 (pages 510 to512 of the bundle), in which she referenced her solicitors' letter.

10.22 The claimant went to ACAS to start early conciliation on 24 May 2021.In fact her solicitors did this for her. They must have indicated that the claimant wished ACAS to contact the respondent, as a certificate was not issued immediately, and the respondent was probably contacted.

10.23 It was during this early conciliation period the claimant's solicitors wrote to the respondent on 17 June 2021. In the letter the claimant's solicitors set out over 8 pages some details of her proposed claims, and that she has gone to ACAS. They invited a reply by 21 June 2021. The claimant has

provided a copy of an email of 18 June 2021 from the respondent acknowledging receipt, but no substantive reply.

10.24 In the Grounds of Claim, the claimant's solicitors have pleaded this under the heading "Time Limits":

"114. The Claimant has been subjected to a relentless campaign of repeated acts of discrimination and/or harassment. Should the Respondent aver that any aspects of the Claimant's allegations are out of time, which is denied, the Claimant contends that her claims are in time by way of continuing act, section 123(3)(a) EqA 2010.Further and/or in the alternative it would be just and equitable to extend time, section 123(1)(b) EqA 2010 in view of the Claimant's serious claims, fear of reprisals and her attempts to resolve matters through the grievance process and ACAS early conciliation."

10.25 The claimant's witness statement contains these (and only these) paragraphs in support of her application for an extension of time:

"22. I felt not fully supported by TU Reps who are also employees of the respondent (conflict of interest). Please see ET Bundle pages 530-536, page 539-540, Page 553-557 and page 598-600. I was told by Maurice Brasier I had no case and not to put forward a grievance in January 2020. In July 2020 he changed his tune but by this point I no longer trusted him. Clare Ross (TU Rep) was trying to deter me from putting forward an appeal. The Union has now stopped me from getting Legal Aid, Moe did not tell the truth for why I reached out to him but instead told Legal Aid in October 2022 that I "was facing action from the employer as a result of my absence," hence why he was supporting me. This can be confirmed by the respondent as not true please see ET Bundle pages 537-538. The Union and the department have made it very difficult for me to get this far.

23. I have provided many other additional evidence in the ET Bundle pages 601-643 such as medical records, counseling sessions, prescriptions and medical procedures as a result of the bullying and harassment and discrimination I faced at work and the toll it took on my mental health. Though encouraged by friends, family and doctors that nothing was wrong with me I took part in invasive procedures as I wanted to try everything to feel safe in my work environment and to be certain of the reasons as to why I felt I was being targeted."

10.26 In terms of why the claimant did not present her claims until 2 August 2021, she has provided a number of different reasons. She was originally supported by Moe Brasier of the union, but he changed his mind and would not support her bringing a claim. She therefore wanted a new representative, and Clare Ross was found for her. At one point she resigned from the union, but re-joined. She has suggested that she was misled by advice from Clare Ross that she had twelve months to bring a claim, although she had advice from other sources that it was three months. She has also blamed the respondent for the flawed grievance process, and the failure to investigate properly. She has also said, often, that she thought that

she had to give the respondent a chance to put the matters right internally before going to a Tribunal.

10.27 The claimant has not said that her solicitors were responsible for the delay in issuing the claims from April 2021 to August 2021. She agreed that they would await her instructions, and has not contended that they gave her incorrect advice, or that they failed to act with reasonable speed upon her instructions.

10.28 The claimant has disclosed some of her medical records (pages 608 to 637 of the bundle). These cover the periods from January to June 2020, June 2021 to August 2021 (they go beyond that into 2022, but that period is immaterial). These do show that she had anxiety and depression, but there is this gap. Some of her records (it would seem of counselling treatment , pages 616 to 637) are undated. Of note is that as of 5 February 2021 (page 620) she is recorded as having moderate anxiety and depression. By 16 March 2021, however, (page 622) this had reverted to severe for both conditions. The entry on 13 July 2021 (page 626) refers to the claimant having a bad day, and records a history given by her, in which she makes reference to having taken her case to a barrister who advised her that she would have a case. It is recorded that he has support from her GP and legal team.

10.29 Other, undated, but probably earlier , entries talk of the claimant having solicitors' advice, and in one entry (page 634 of the bundle) which appears to relate to 10 July 2020 , when the claimant has her fourth telephone appointment for counselling, there is a reference to her focusing on coping strategies, as "the case may go to court".

11. The parties made their submissions. The Employment Judge explained to the claimant how she should not be concerned at the legal terminology and caselaw cited by Ms Hodgetts, it was his role to ensure that the law was correctly applied.

12. For the respondent, Ms Hodgetts followed her skeleton, and supplemented it by making some observations upon the evidence given by the claimant . She set out the law, and the limitation timeline, submitting that the clock stopped ticking on 25 February 2021. The main points made were :

(a) Even the last in time of allegations 3(a-ww), (uu), is 9 months out of time;

(b) The burden is on the claimant to show why time should be extended;

(c) Even on the evidence available, the claimant had access to advice throughout:

(i) On 19/6/18, the claimant asserted to Louise Andrews that following a conversation with Elaine Verdin - about her sending an inappropriate message to Mr Geil: allegations (j, m, jj and kk) – the claimant had "spoken to her trade union on Friday afternoon to get some advice regarding discrimination" (p213);

(ii) On 27/9/19, the claimant referred in an email to David Holt to the possibility of taking matters to a tribunal (pages 317 and 322);

(iii) On 3/6/20, in a meeting with Jack Hewitt, the claimant stated that she was "not using PCS [the Trade Union] anymore" and she was "speaking to lawyers" (page 293);

(iv) The claimant told Louise Critchlow that the Union had a file on her regarding complaints that others made about her body odour (page 401);

(c) Even now, despite the claimant filing a witness statement for this hearing, the claimant has not advanced any reasonable explanation for the huge delay;

(d) The prejudice to the claimant is negligible:

(i) As appears below, the claimant has not even pleaded a prima facie case of race discrimination in relation to the vast majority of allegations (a-ww);

(ii) Further, again as appears below, given the evidence, it is overwhelmingly likely that a Tribunal would reject the claimant 's subjective account in relation to (a-ww) in any event;

(iii) If the claimant had taken advice as early as her statements referred to above denote, but was advised against presenting a Claim in respect of allegations (a-ww) earlier (which her witness statement suggests might be the case), she can pursue a remedy elsewhere;

(iv) The claimant moved to a different office after the grievance was raised, and therefore no longer worked with the 18 alleged perpetrators when she presented the Claim;

13. Ms Hodgetts added to this. She additionally invited the Tribunal to consider the prospects of success of the claims, for this purpose, quite independently of the applications that were to potentially to come. She referred to the claimant's lack of prospects in establishing her claims, given the result of her grievances (or most of them). Her perspective on matters was not borne out by some 33 other witnesses, and her claims accordingly had little or no prospects of success, a matter the Tribunal can take into account when deciding whether to exercise the discretion to extend time. She had been taking legal advice since April 2020, a fact she had not mentioned in her witness statement. She had trade union advice from the outset, and had discussed the possibility of discrimination claims. She had not explained why matters she had raised in September 2019 with David Holt had simply been left until her grievance 18 months later. There were gaps in her medical records. The claimant had given a partial and selective explanation for the delay.

14. The Tribunal had to weigh up the respective prejudice (citing ***Abertawe Bro Morgannyg University Local Health Board v Morgan [2018] EWCA Civ 640***) and there was evidence of real prejudice to the respondent by the passage of

time. ***Chandhok v Tirkey*** showed that where a claimant cannot establish a basis for extending time, a claim should be struck out.

15. The claimant , understandably made rather factual submissions. She contended there was evidence of Moe Brasier telling her that she had no case, and then changing his mind. He had stopped responding to her. She had had suicidal thoughts at times, and mental health issues. She ended up with Clare Ross as her representative, but it was difficult, and she struggled with the union. Her medical records were incomplete because she had only registered in 2019, and had only included relevant ones. Mitra 's statement at pages 282 to 285 may not have been accurate as she struggled with English sometimes. She had reasons not to trust David Holt, and in terms of the names they were discussing, he suggested them. She had tried to explain on many occasions what was happening to her, and she took notes on some days, but not on others. Sometimes she had precise dates, others she did not. In terms of the grievance investigation she felt that the respondent had been selective in who was interviewed, for example they did not fully explore the Black History month issue, as only management were questioned. There were major flaws in the process, which put her at a disadvantage.

16. In the further submissions, Ms Hodgetts addressed the further documents, briefly. The claimant's SAR request showed that she was capable of preparing the grievance and therefore a Tribunal claim. The grievance outcome letter showed the reality of the opportunity that the claimant had to appeal, and she contrasted this with what the claimant has pleaded in her second claim form.

17. She also, at the invitation of the Employment Judge, addressed whether there was any reason why applying a "merits" test as a factor should not work the other way in respect of any response that was considered to have no, or little , reasonable prospects of success, into which category claim (ss) in respect of Clarke Crilly may fall. He also raised the question of whether the respondent was relying upon the statutory defence in s.109(4) of the Equality Act 2010 that the respondent had taken all reasonable steps to prevent Clarke Crilly from doing the alleged act of discrimination. She confirmed that the respondent was not. She accepted that in principle the merits test was equally relevant to the response, but did not concede that the Tribunal was bound to find that Clarke Crilly did unlawfully discriminate against the claimant , as opposed to the respondent having a reasonable belief that he did. The issue was, she submitted, more nuanced.

18. The claimant , after a short break , made her further submissions. Dealing with the latter point about the grievance appeal, her concern had been that Julie Anderson who sent the letter of 15 March 2021 should not have been determining the grievances , and this is one of the complaints. She had disclosed relevant medical records where they existed, but would sometimes have telephone consultations , or catch-ups which would not be documented. Whilst she had seen solicitors since April 2020, they were not acting for her, she was still relying upon the union. In relation to Clarke Crilly, his Facebook had been liked by two other members of staff, whom the respondent had covered up.

Discussion and Findings.

The Law.

19. In considering whether to exercise the discretion to extend time , a Tribunal should consider all the relevant circumstances including the delay and explanation for it and the respective prejudice to the parties: ***Robertson v Bexley Community Centre [2003] EWCA Civ 576,*** per Auld LJ [24-25]. As for the s. 33 Limitation Act 1980 'checklist' recommended in ***British Coal Corporation v Keeble [1997] IRLR 336***, it is not necessary to go through the full checklist in every case, the only requirement being that the Tribunal should not leave a significant factor out of account: ***London Borough of Southwark v Afolabi [2003] EWCA Civ 15*** approved in ***Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23***.

20. The factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh): ***Abertawe Bro Morgannyg University Local Health Board v Morgan [2018] EWCA Civ 640***]. The failure to put forward a good (or any) reason for the delay does not necessarily mean that time should not be extended; the most that can be said is that whether there is any explanation or apparent reason for the delay and the nature of any such reason are relevant matters to which the tribunal ought to have regard.

21. Most recently the EAT has considered these issues in ***Concentrix CVG Intelligent Contact Ltd (appellant) v Obi (respondent) [2023] IRLR 35*** . That case has confirmed that the correct approach to take in such cases. The Tribunal there had exercised its discretion to hear the claimant's claim of harassment related to sex, which was presented a day late. On appeal, the employer argued that, as no explanation had been given by the claimant for the delay, The Tribunal was bound to reach the conclusion that time could not be extended. The EAT rejected this ground, finding that it would cut across Tribunals' wide discretion as described in ***Morgan*** . However, it upheld a second ground of appeal relating to the tribunal's approach to the 'forensic prejudice' the employer would suffer as a result of time being extended. The Tribunal had limited its consideration to the effect that the single day of delay would have on the availability of witnesses and evidence. Yet the claimant's claim comprised three discrete acts of harassment which together amounted to conduct extending over a period of eight months. Furthermore, the Tribunal had refused to extend time to hear a claim of racial harassment arising from one of those incidents, and had included forensic prejudice among its reasons for doing so. In those circumstances, it was an error of law for the Tribunal not to have considered the issues of forensic prejudice arising in respect of the earlier two incidents of harassment related to sex. The case suggests also that if there is a claim which is less out of time than others, the Tribunal can and should consider whether that could proceed, and consider what prejudice there would be in respect of that, later, but still out of time, claim.

22. The merits of a case are an important factor when considering the balance of prejudice: ***Donald v AVC Media Enterprises Ltd UKEATS/0016/14***, citing ***Baynton v South West Trains Ltd UKEAT/0848/04*** and ***Bahous v Pizza Express Restaurant Ltd [2011] UKEAT/0029/11; Kumari v Greater Manchester Mental Health NHS Foundation Trust [2022] EAT .***

The length of and reasons for the delay.

23. Turning to the factors to be considered, this is clearly an important one, described in Harvey on Industrial Relations and Employment Law, a leading textbook, as being in most cases the "pre- eminent" one. In ***Adedeji*** Underhill LJ approved the Tribunal considering this factor "in particular".The length of the delay in lodging the claims (in the most generous sense of starting the ACAS early conciliation process, which is not actually starting the claim by presenting it) is in all but one case, 9 months , i.e from May 2020 to February 2021. In the one other case it is arguably a little less, but is still 8 months. That is a very significant period of delay, being three times the time limit for the presentation of such claims.

24. The Tribunal now turns to the reasons for that delay. The claimant has, with respect to her, and allowing for her unrepresented status, been less than clear on what her reasons actually were. A highly significant factor in this application is that these claims (ie. the ones being considered for an extension of time) are all ones that she advanced in a block grievance presented in August 2020. The events to which they related at that time were already of some age. Even the most recent was May 2020, already three months after the events being grieved about, and consequently the time that the claimant was putting in her grievance was the very time that she should have been presenting her Tribunal claims to ensure that at least the most recent would be in time.

25. Instead, however, the claimant chose to go through the internal grievance process. That was her prerogative, but, as she accepts that she had been advised of the three month time limit by both ACAS and the CAB (although this had been contradicted by the advice of her later union representative Clare Ross) , she was taking a big risk in relying upon the grievance process, and delaying the presentation of what were already increasingly stale claims.

26. Delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings may justify the grant of an extension of time but it is merely one factor that must be weighed in the balance along with others that may be present: ***Robinson v Post Office [2000] IRLR 804***, approved by the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth[2002] IRLR 116***. In the latter case, Peter Gibson LJ observed (at para 36) that 'It has long been known to those practising in this field that the pursuit of domestic grievance or appeal procedures will normally not constitute a sufficient ground for delaying the presentation of an appeal'. The Court of Appeal also expressly rejected the suggestion, emanating from Morison J's judgment in ***Aniagwu v London Borough of Hackney [1999] IRLR 303***, that there is a general principle that an extension should always be granted where a delay is caused by a claimant invoking an internal grievance or appeal procedure, unless the employers could show some particular prejudice.

27. In ***Robinson*** the same point was made that missing a primary time limit because there is an ongoing internal grievance will not normally be a good reason 'of itself and without more', to exercise the just and equitable discretion to extend time. However, the EAT in ***Wells Cathedral School Ltd v Souter EA-2020-000801 (previously UKEAT/0836/20)*** (20 July 2021, unreported) was careful to point out that ***Robinson*** (and by extension, ***Apelogun-Gabriels***) had not established any rule of law and that each case would turn on its facts regarding reliance on an internal process as the reason a claim was late.

28. Thus consideration would be required of the extent of the lateness and the prejudice, if any, caused to a respondent. In cases involving a delay whilst a claimant pursues internal processes, HHJ Auerbach in ***Souter*** described the need to strike a balance between the desire to encourage the internal resolution of disputes without the need to issue a Tribunal claim, and the need for finality in legal proceedings, especially where any delay causes unfairness to the respondent.

29. Here, however, the grievance process was itself a late exercise. It was already compromised by the passage of time since some of the matters being considered had occurred. There was already prejudice to the process at that stage, which got worse with the longer the delay in then issuing the claims.

30. Once the grievance process was ended, which it largely was by March 2021, when the rejected grievances were known to her, that was clearly the time at which the claimant should have taken action and presented the claims. She has given no real explanation as to why she did not do so. She instructed the solicitors who did then submit the claims for her in August 2021, but there is no explanation why she did not even start ACAS early conciliation until 24 May 2021. Given that she was aware of the three month time limit, and by then had lost contact with Clare Ross who was the source of the rather odd advice that the claimant had 12 months to bring a claim (which, of course, would have expired in May 2021 in any event) , the claimant has failed to explain why she simply did not start the claims. She accepts that she had everything she needed to do so, as the claims were , and are, based upon her 18 grievances. She has not blamed her solicitors for any incorrect advice, or for not carrying out her instructions promptly. Quite why, when the time limit had already expired, they wrote the letter that they did on 17 June 2021, in which they threatened Employment Tribunal claims, and the claimant had already commenced ACAS early conciliation, they then waited for that process to end with the certificate issued on 5 July 2021, and then waited almost another month, to 2 August 2021 to finally present the claims remains unexplained. It cannot have been because they lacked the information to do so, they were in possession of it for the purposes of writing their letter of 17 June 2021. The claimant had been in possession of it for months, only the grievance outcome was needed, and she had that , effectively, by mid - March 2021.

31. It is of note that the claimant has not relied upon any alleged fear of reprisals mentioned in para. 114 of the Grounds of Claim drafted by her solicitors (page 43 of the bundle). Nor can the fact that claims are particularly serious be a relevant factor – it is not referred to in any of the caselaw as being relevant.

32. In terms of her mental health, the Tribunal notes that this hardly features at all in the claimant's witness statement, but it has considered her medical records in the bundle. It is right that she did at times present with severe anxiety and depression , and she underwent counselling. As the respondent points out, there are gaps in the medical records. The claimant has said that she has only included relevant entries , so it is safe to assume that there are none in the missing periods. This is particularly the case between mid 2020 and mid 2021.

33. Further, it is to be recalled that the claimant was able to prepare and present her grievance, seek advice from lawyers and the CAB, liaise with her union, and participate

in the grievance process in 2020 and into 2021. She had moved home , and her workplace, away from the location where she had the issues which led to these claims.

34. The Tribunal has considered whether it can pick out some of the claims where there are specific , identifiable issues relating to the cogency of the evidence, and those where there is not. Should the Tribunal only consider refusing the extension of time sought in respect of only those claims where specific instances of prejudice have been identified? Following the approach in ***Concentrix*** cited above, the Tribunal does not consider that it should. The potential forensic prejudice to the respondent in having to deal with fact sensitive discrimination claims, where inference is very important in respect of stale complaints is obvious, and would be a major consideration in any event. That the respondent cannot identify specific instances of specific prejudice in each instance does not mean that the Tribunal should limit the scope of this factor solely to those specific claims. As it is there is evidence that even at the time of the grievance investigation, some witnesses were finding recall difficult. The Tribunal's conclusion, therefore, is that there is no reasonable prospects of the claimant persuading a Tribunal to extend time for the presentation of these claims, and , save for one exception, they will be struck out.

The exception – claim (ss).

35. Finally, and on the observe side of the "merits" argument, the Tribunal does consider there is one claim where there is more than a reasonable prospect that the claimant could persuade a Tribunal that it would be just and equitable to grant the extension of time sought. That is in relation to claim (ss) , which relates to the conduct of Clarke Crilly. The claimant's grievance in respect of his conduct was upheld, and he was dismissed. His conduct was found to have been racist. That may not have been in the slightly wider terms in which the claimant now puts her case in respect of his conduct, but that was the outcome of the grievance. The respondent has not pleaded the statutory defence under s.109(4) of the Equality Act 2010 that it took all reasonable steps to prevent the act of discrimination by its employee, and so remains vicariously liable for Clarke Crilly's actions.

36. Just as lack of merit can be taken into account in deciding to refuse an extension of time, so too can the fact that a claim is likely to be meritorious in deciding to grant it. Ms Hodgetts has conceded this as a principle. This goes to the balance of prejudice. A claimant with a weak claim loses little if not granted an extension, but one with a strong claim does, and a respondent who would otherwise be liable gains a windfall if the extension is refused. Forensically there is little or no prejudice. The Crilly allegations are not ones specifically identified where there is any issue with recollections, or the availability of records or witnesses. The respondent, in both the grievance process, and the ensuing disciplinary process , was clearly able , in mid 2021, to assess Clarke Crilly's conduct, and make findings that it was indeed racist, the essence of the claimant's claim.

37. In this one case, therefore, the Tribunal is satisfied that it would be just and equitable (and hence there are reasonable prospects) to grant the extension of time sought, and would do so. In all the others, however, the Tribunal would not so find, and there are no reasonable prospects that time would be extended. It is on that basis that the Tribunal finds that the claims lack reasonable prospects of success. It has not, therefore been necessary to consider any other grounds relied upon , such as the merits as a whole,

though there are likely to be evidential difficulties there too. The claims , therefore, at (a) to (ww) in the agreed List of Issues , save for claim (ss), are struck out.

Employment Judge Holmes

7 March 2023

Sent to the parties on:
12 April 2023

For the Tribunal Office: