



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000055/2022

Heard in Edinburgh on 28 March 2023

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Employment Judge J Young

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Ms Anita Mann

**Claimant
In Person**

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**Greater Glasgow Health
Board**

**Respondent
Represented by:
Mr C Reeve, Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

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1. although the claim was presented out with the three month period provided for in s123 of the Equality Act 2010, the Tribunal is satisfied that in all the circumstances of the case it is just and equitable to extend time to 5 September 2022;

2. the respondent lodges with the Tribunal (copy to the claimant) an amended ET3 response within 28 days of the date this Judgment being sent to parties;
3. the claim will be continued to a full hearing on the merits and parties to be sent a date listing letter to find suitable dates for a final hearing.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal on 5 September 2022 with accompanying ACAS Certificate issued 24 August 2022 following receipt by ACAS of early conciliation notification on 22 August 2022. The claimant defined herself as an “Indian” for the purposes of her protected characteristic of race and complained of direct discrimination and harassment related to her protected characteristic under sections 13 and 26 of the Equality Act 2010 (EqA). The claimant advised that the initial incident founding her claim occurred in May 2020 and that the last incident of discriminatory behaviour occurred 10 February 2022.
2. In its response the respondent denied that it discriminated against the claimant and raised time bar as a preliminary matter. It was contended that as the most recent allegation identified by the claimant occurred 10 February 2022 early conciliation notification should have been made before 9 May 2022 but it was not made until 22 August 2022. That exceeded the 3 month time limit under section 123(1) of EqA and the subsequent presentation of her claim on 5 September 2022 was also out of time. The issue then became whether it was just and equitable to extend the time.
3. Subsequent to preliminary hearings for case management purposes on 4 November and 21 December 2022 it was ordered that this preliminary hearing on time bar be held.
4. The parties had helpfully liaised in providing a chronology of events and a paginated joint file of documents. A further document being a letter to the claimant from the Employment Tribunal of 5 May 2022 was allowed to be

received in the course of the hearing (the paginated file referred to as J4-163). The respondent also provided to the claimant in advance of the hearing a skeleton argument.

- 5 5. The claimant gave evidence and from the relevant evidence led, documents produced and admissions made I was able to make findings in fact.

Findings in fact

- 10 6. The claimant graduated from Kings College London in 2018 and after a search for employment and a period of work experience in Ninewells Hospital took up a post with the respondent as a Maxillofacial Prosthetist as from 30 March 2020.

- 15 7. The claimant was signed off with work related stress by her GP on 23 October 2020 as a result of asserted discriminatory behaviour in the workplace. The claimant explained that she had been diagnosed with depression as a result of the incidents of October 2020 and that she “struggled a lot mentally”. Initially she was prescribed sleeping pills and then
20 antidepressant medication.

8. She returned to work on 16 December 2020 when an informal back to work meeting was held. She maintains that a complaint was issued to the respondent regarding this behaviour at that time but that further
25 discriminatory issues took place and affected her thereafter and the medication continued through to February 2022.

9. By May 2021 the claimant intimated her resignation effective from 20 July 2021 (J4). On 2 June 2021 she submitted a formal grievance under the
30 respondent’s “workforce grievance policy” (J5/6) giving details of alleged discriminatory behaviour. The grievance form indicated she was in receipt of advice from her trade union representative. By letter of 8 June 2021 the respondent acknowledged the “stage 1 grievance” and indicated that a grievance hearing would be arranged. (J7).

10. Thereafter the grievance proceeded to an informal meeting between the respondent and the claimant on 5 July 2021. The claimant accepted that the respondent's grievance policy sought to resolve grievances informally but
5 advised that at the time she did not appreciate that was an option she need not take and could have proceeded to a formal hearing as notified in her initial notification form.
11. The claimant received no outcome to the informal hearing prior to leaving the respondents employ albeit a response should have been made within 14
10 days and by emails of 21 July and 6 August 2021 the claimant sought a response to the informal meeting advising that she felt the respondent had sufficient time to advise of an outcome given that she considered the matters raised were "very serious" and indicated that she would "*like to raise a formal grievance*".(J13/14)
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12. An outcome letter was then received by the claimant on 12 August 2021 (being letter dated 6 August 2021 at J15/17). That letter indicated that the grievance would now be "*closed following this outcome letter in line with the NHS GGC grievance policy section 1.5.8*" and that if the claimant wished to
20 initiate formal procedure under the policy she required to submit a grievance notification form within 4 working weeks from receipt of that letter (J18/21).
13. The claimant was not satisfied with the response and initiated the formal
25 grievance procedure by resubmitting a grievance notification form on 25 August 2021 (J23/25). She regarded the outcome letter as misstating the position that she had wished time to consider options regarding the grievance process and did not consider that her complaints had been treated seriously. The fresh grievance notification gave some further detail of alleged
30 discriminatory behaviours and those involved beyond that contained in the initial grievance form.
14. By letter of 13 September 2021 the respondent advised the claimant that matters would be taken forward by a new Manager within the laboratory and

5 albeit the respondent considered that matters were now *“concluded”* in terms of the grievance policy and *“closed as you are no longer employed by NHS Greater Glasgow and Clyde”* did advise that *“However with respect to the points you raise I will progress separate enquiries and undertake the actions noted”*.

15. The claimant commenced fresh employment as a Maxillofacial Prosthetist with NHS Lothian on 11 October 2021 and continues in that employment.
- 10 16. By email of 21 October 2021 the claimant raised a further complaint regarding *“the behaviour of some of my fellow members of staff”* with the Interim Clinical Service Manager when she was employed by the respondent. She stated that her grievance was *“heard at the informal level and I was unhappy with the written response I received. However under the grievance*
15 *policy as I had left GGC employment I was unable to take this matter any further. I spoke with my Union representative and decided to raise a complaint to the Health Board Equality and Diversity Officer. During my correspondence with the HR Department they asked if I had further evidence that I would like to add to my complaint which I do. HR have asked that I*
20 *refer this complaint back to yourself for further investigation with additional evidence before I take my complaint to the Equality and Diversity Officer at GGC...”* She then detailed various matters which she considered to be discriminatory of her (J30/32).
- 25 17. By letter of 3 November 2021 the respondent acknowledged the receipt of the *“more detailed and comprehensive information ...”*. The letter advised that it was not possible to take *“this matter forward as a grievance however I would like to assure you that the Department has taken these allegations very seriously and I can confirm that we have initiated an investigation”* as was
30 noted in the letter of 13 September 2021 and that the respondent would write to the claimant once *“investigations had been completed”*.
18. By letter of 10 February 2022 the respondent provided a response to the complaint made by the claimant. The investigation found no evidence to

support the allegations made by the claimant. The letter concluded by indicating that as *“noted in my letter of 13 September 2021 as you no longer work for NHS GGC your internal grievance process is now closed. Likewise further to your letter from 29 October 2021 (sic) I now consider the matter to have been fully investigated and consider this to be closed”*.

19. She regarded the response of 10 February 2022 as inadequate particularly as the new Manager referred to within the correspondence from the respondent had worked before for the respondent with *“colleagues who were of longstanding friendship”* and against whom complaint was made and considered that there was *“potential bias because of that”* in the response. She considered that the investigation should have been independently conducted. She considers there has been continued less favourable treatment in this respect.

20. The claimant presented an ET1 claim form on 23 March 2022 against the respondent complaining of discriminatory treatment (J42/53). The claimant advised that presentation of this claim came about as a result of discussion with her union representative as to any further avenues which could be explored given that she was dissatisfied with the response to her complaint of alleged discriminatory behaviours. She advised that prior to receipt of the outcome report of 10 February 2022 she had not been aware of the possibility of taking her claim to an Employment Tribunal; had no knowledge of the workings of ACAS; and had not been advised or discussed proceeding to an Employment Tribunal with her union representative.

21. The claim form presented by the claimant did not include an ACAS Early Conciliation Certificate number noting as a reason *“ACAS doesn’t have the power to conciliate on some or all of my claim”* (J43). Within the claim form the claimant advised of incidents beginning in May 2020 and that *“overall I felt excluded during my employment at Glasgow and this was directly related to the colour of my skin and my beliefs”* and that the discrimination *“is no longer taking place as I was forced to leave my job”*.

22. The ET1 form was completed by the claimant without input from a Trade Union official (explaining she was told previous advice was unavailable as she had moved to another branch) or other adviser. At the time the claimant had health issues which occasioned the necessity of keyhole surgery. She was hospitalised for 2 days and off work for 2 months to end April 2022. The procedure was not entirely successful and further health issues have arisen.
23. The claimant advised that the reason for stating that she did not consider the EC Certificate was necessary was due to her belief that she had gone through an early resolution process with the respondent in consequence of initiating a grievance procedure. However on reflection that *“did not feel right”* and she made further enquiry and ACAS advised that she should initiate early conciliation. She did so on 23 March 2022 and ACAS issued the Early Conciliation Certificate on 25 March 2022 (J54). The claimant advised that in telephone discussion with both ACAS and a Tribunal clerk she was told that seeking amendment of the claim form was an appropriate way to proceed to cure the lack of reference to Certificate number on the claim form.
24. On 29 March 2022 the claimant emailed the Tribunal advising of the Certificate number and stating:-
- “Could I kindly ask that I amend my claim to include my ACAS Certificate number. This was accidentally missed out on my form and there is no other way of amending this and me sending the document back. Alternatively I can resubmit my claim under a new claim and add the Certificate number to this. If you could please email me back with acknowledgment of receipt of this email I would be most grateful”*
25. By letter of 1 April 2022 the Tribunal advised the respondent of the claim that had been received and that there would be a preliminary hearing held by telephone conference call on 27 May 2022 to discuss procedure (J56/59). At the same time the respondent was advised that while the claim was accepted

it was noted that the claim *“appears to have been submitted outwith the period within which claims of this type should normally be brought”* and that the Tribunal would require to decide as a preliminary issue whether the claim should be allowed to proceed and that the claimant had been so advised.

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26. The respondent presented their response on 29 April 2022 (J71/73). The Grounds of Resistance made reference to the lack of EC Certificate number on the claim form which breached the requirements of section 18A(8) of the Employment Tribunals Act 1996 and that in any event the claim was out of
10 time given the last dated events relied upon by the claimant.

27. By letter of 5 May 2022 the claimant was advised that a Tribunal Judge *“has considered the file and has not dismissed the claim or the response on initial consideration. The claim will now proceed and the Employment Judge has ordered...”* that the case would continue to a case management preliminary
15 hearing on 27 May 2022.

28. The preliminary hearing of 27 May 2022 made various Orders (J75/89) including that a preliminary hearing should take place on the respondent's
20 submission that the Tribunal had no jurisdiction given the absence of an EC Certificate number within the initiating ET1. By Judgment issued to the parties on 22 August 22 (J90/101) the claim presented by the claimant on 22 March 2022 was rejected because it did not contain an EC Certificate number.

25 29. On the same date the claimant raised EC proceedings and ACAS issued an EC Certificate on 24 August 2022 (J102) followed by the claimant presenting an ET1 on 5 September 2022 with grounds of claim (J103/115). In this claim the claimant made reference to the grievance hearings and investigation concluding in February 2022. In respect of the outcome of 10 February 2022
30 it was stated that *“a close friend of the colleague who had displayed the majority of these discriminative behaviours was asked to investigate my concerns regarding direct discrimination. However the individual investigating the situation was not independent given they were close friends with my colleague and therefore creating bias. By asking a friend and*

colleague to the person who displayed discriminatory behaviour meant the investigation was unfair towards me and therefore nothing was resolved.

- 5 30. The respondent lodged their response to the ET1 including a request for Further and Better Particulars. Again they raised the issue of time bar and sought a preliminary hearing in that respect. In preliminary hearings for case management purposes of 4 November 2022 and 21 December 2022 136/141 and J150/154) there was approved a list of factual and legal issues (J155/160; the claimant was allowed to amend her claim in line with the amendment presented (J142/144); also allowed to lodge her response to 10 the Further and Better Particulars (J146/149); and it was determined that the issue of time bar should be considered at this preliminary hearing.

Submissions

15 **For the Claimant**

- 20 31. The claimant submitted that the claim should be allowed to proceed. It would be just and equitable to do so as it would be more prejudicial to her than the respondent. She felt that she had done all she could to progress matters and that her grievance had not been handled well by the respondent. She felt that there was prejudice toward her because of the seriousness of the allegations she was making against individuals within the Department.

For the Respondent

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32. Mr Reeve had helpfully produced a written submission which he referred to. No disrespect is intended in making a summary.
- 30 33. It was stated that the most recent allegation identified by the claimant in her fresh claim form was 10 February 2022 being the outcome of the investigation conducted by the respondent. In those circumstances the claimant should have raised early conciliation notification on or before 9 May 2022 but did not do so until 22 August 2022 which was over 3 months out of time and accordingly presentation of the claim form on 5 September 2022

was also over 3 months out of time. The issue then was whether or not it was just and equitable to extend time.

5 34. He made reference to the chronology of events and that it was necessary to determine the date of the act of discrimination complained of as that set the time limit running. In terms of the agreed list of legal and factual issues the latest harassment allegation was stated to have taken place on 6 July 2021. In terms of direct discrimination there was an allegation concerning the investigation completed on 10 February 2022. That later allegation was said
10 to be an act of direct discrimination and not harassment. Accordingly it did not form a course of ongoing conduct with the previous harassment allegations.

15 35. The allegation of direct discrimination of 10 February 2022 concerned an individual who was not employed by the Board while the claimant was employed. That individual was asked to carry out an investigation after the claimant had left. There was no previous allegation against that individual. Importantly there was a gap of 7 months between that allegation and the previous stated allegations against different individuals and it was submitted
20 that distinct allegation could not be said to form a continuing act. It was separate from the other allegations which all related to the period when the claimant was employed and related to her employment.

25 36. In any event even if it was considered to be a continuing act and the period up to 10 February 2022 was taken into account more than a year had elapsed since then and crucially the complaint made by the claimant was 4 months out of time when lodged in September 2022. It was not just and equitable to allow that separate and in any event very late claim to be artificially used to link the much earlier acts.

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37. Reference was made to the discretion for Employment Tribunals to allow an extension of time under the just and equitable test and that the courts have made it clear the exercise of that discretion is not a foregone conclusion (**Robertson v Bexley Community Centre t/a Leisure Link** [2003] IRL 434).

38. Under reference to **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 it was submitted that the best approach for a Tribunal in considering the exercise of discretion was to assess all the factors in a particular case that it considered relevant including in particular the length of and the reasons for the delay. It was emphasised in this case under reference to **Secretary of State for Justice v Johnson** [2022] EAT1 that a consideration was whether a Tribunal would be required to make a determination about matters that had occurred long before the final hearing. In this case that was a very relevant factor.
39. Additionally in this case as a result of response lodged in December 2022 to request for Further and Better Particulars significant new claims were made which had not been raised earlier in the grievance process or March 2022 claim.
40. It was submitted under reference to **Perth and Kinross Council v Townsley** (UKEATS/0010/10/BI) that where a claimant professed ignorance of a right to complain to an Employment Tribunal it was necessary to consider whether that ignorance was reasonable. The claimant was capable of corresponding with and promoting her complaints with the respondent and should have known or looked into her rights to bring legal proceedings at a far earlier stage in the chronology of events. In the course of dealing with her grievance the respondent had consistently advised that the grievance process was concluded albeit the matter was being investigated as an informal complaint.
41. It was also submitted under reference to **Apelogun-Gabriels v Lambeth London Borough Council** [2002] ICR 713 that there was no general principle that it will be just and equitable to extend time where a claimant seeks redress through a grievance procedure before embarking on legal proceedings. While that may justify an extension of time it is only one factor. In this case the claimant had been told expressly that her grievance procedure was concluded. The fact that the claimant continued to raise

complaint did not mean that it was reasonable for her to wait until the end of that process before lodging a claim.

42. It was also submitted that in this case there was prejudice to the respondent given the age of the complaints made. The respondent's witnesses would be required to provide evidence about matters going back to May 2020 and only full specification of the details of the claim were made in December 2022. One of the witnesses had moved to a new employer in September 2021.

10 Discussion and conclusions

43. Complaints of unlawful discrimination require to be presented to an Employment Tribunal before the end of the period of 3 months beginning with the date of the act complained of - s123(1)(a) of EqA. This time limit applies to all work related discrimination complaints brought under Part 5 of the EqA (other than equal pay claims) which covers discrimination because of race (amongst others). There is however an escape clause which allows a Tribunal to consider any such complaint which is out of time provided that is presented within "such other period as the Employment Tribunal thinks just and equitable" - s123(1)(b) of EqA.

44. In order to establish whether a complaint of discrimination has been presented in time, and to assess the extent of any delay, it is necessary to determine the date of the act complained of. Conduct extending over a period is to be treated as done at the end of that period (s123(3)(a) of EqA).

45. Where there is a series of distinct acts the time limit begins to run when each act is completed whereas if there is continuing discrimination time only begins to run when the last act is completed. A Tribunal should consider whether the substance of a claimant's allegations is an ongoing situation or a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts. This can sometimes be a difficult distinction to make in practice.

46. In this case it is submitted that:-

5 (1) In relation to the complaint of harassment the last alleged act of harassment is said by the claimant to take place on 6 July 2021 in terms of the agreed list of legal and factual issues (J155/160) and there is no further issue of harassment thereafter and any consideration of time limit on harassment should be from that date.

10 (2) that there is an allegation of direct discrimination arising out of the outcome of investigation which was issued on 10 February 2022. It is stated that matter formed a distinct allegation and so did not form part of a continuing act. Accordingly there should be a separate assessment of extension of time in relation to acts essentially involving allegations against individuals in the period
15 May 2020-6 July 2021 and separate consideration in relation to the complaint on the investigation completed on 10 February 2022.

47. There are separate initial questions posed as a consequence being:-

20 (a) should Tribunal consider different types of discrimination complained of (eg direct discrimination, harassment) as a totality when considering whether they were part of an ongoing situation or state of affairs?

25 (b) what is the test at preliminary hearing stage as to whether an act is part of that ongoing state of affairs and so continuing conduct?

30 (c) applying the test was the act of 10 February 2022 relied upon by the claimant part of an ongoing state of affairs and so the continuing conduct ended 10 February 2022.

48. On (a) above I consider following what was said in **Robinson v Royal Surrey County Hospital NHS Foundation Trust** (UKEAT/0311/14/MC) that continuing conduct can comprise acts which fall under different headings of discrimination (such as victimisation and direct discrimination in that case and harassment and direct discrimination in this case) and that it would be an error to consider that different types of discrimination separately. Of course it is necessary that the factual matters relied on do indeed form a continuing state of affairs. **Robinson** is only authority for the principle that the mere fact the legal label for the discrimination changes during the period is not itself sufficient to break what would otherwise be a continuing act. On that basis it would be appropriate to consider whether there was a continuing course of conduct up to the last act of alleged direct discrimination being the outcome report of 10 February 2022.
49. On (b) above the Court of Appeal authorities of **Aziz v FDA** [2010] EWCA Civ 304 and **Hendricks v Commissioner of Police of the Metropolis** [2003] IRLR 96 (as followed in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548) make clear that where the question of time limits arises at a preliminary hearing and there is a question as to whether or not there is “*conduct extending over a period*” the Tribunal must be satisfied that the claimant has a *prima facie* case that the various complaints are so linked as to amount to a continuing act or “*ongoing state of affairs*”.
50. In **South West Ambulance Services NHS Foundation Trust v King** [2020] IRLR 168 it was observed that an act that is found at a final hearing not to be an act of discrimination cannot form part of a continuing act for the purposes of the provisions of time limits. For that reason it is not normally possible at a preliminary hearing to make any final determination on whether or not something is a continuing act because in order to make any final determination the Tribunal would have to make a final determination on the merits of the claims. So the test at preliminary hearing stage is not conclusive but whether an act is capable of being part of an act extending over a period. I shall return to that aspect of matters.

51. In deciding (c) **Hendricks** made it clear that it is not appropriate for Employment Tribunals to take too literal an approach to the question of what amounts to “*continuing acts*”. The focus should be on the substance of allegations made and whether the respondent was responsible for an ongoing situation or continuing state of affairs in which the claimant was treated less favourably. Thus Tribunals should look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.
52. in addition to the general guidance it is also necessary to note that the fact that different individuals may have been involved in the various acts of which complaint is made is one relevant but not conclusive factor as to whether there is a continuing act (**Aziz**).
53. The issue then is whether the claimant has a *prima facie* or arguable case that there was a conduct over a period culminating in the outcome report of 10 February 2022. The allegation of discrimination is that the individual asked to investigate the claimant’s concerns was a good friend of an individual against whom the claimant had a complaint and the investigation completed on 10 February 2022 was less favourable treatment of the claimant because of her race.
54. Clearly the issue is not determinative of the claim was being presented within the primary 3 month limitation period. Whether or not there was a continuing act to 10th February 2022 the claim was still out of that primary limitation period. However it is a relevant factor in considering the reasons for and extent length of the delay in the presentation of the claim.
55. I have taken the view that the claimant does have a *prima facie* basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs.
56. .The claimant alleges that the discriminatory behaviour commenced May 2020 and (excluding the 10 February 2022 allegation) ended 6 July 2021

(legal and factual issues J156/160). It was not argued (and I think rightly) that these events through to 6 July 2021 could not form continuing conduct. In the course of that period the claimant had raised a grievance concerning the alleged series of discriminatory behaviours dealt with informally prior to
5 employment terminating. Post termination of employment the respondent had invited her to raise a formal grievance (J21) on the same issues, if dissatisfied on the informal outcome, which she did. When told that of that outcome which she considered was unsatisfactory she continued to correspond with the claimant on those issues with some amplification and
10 was advised in the letter of 3 November 2021 there would be continuing investigation.

57. A continuing act of discrimination can begin during the employment relationship and continue into post termination conduct. The claimant's
15 position is that on the outcome report being issued on 10 February 2022 she became aware that the investigator was friendly with an individual who the claimant considered a prime actor in the allegations made; thus the investigation was not "*independent*"; and this was further and continuing less favourable treatment of her because of her protected characteristic.

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58. I am conscious that in the claim presented on 23 March 2022 no reference is made to this alleged discriminatory behaviour which must undermine confidence in the claimant's belief. But it is stated in the present claim and the investigation concerns and considers the various complaints of treatment
25 by various individuals in the period May 2020-July 2021 and so is closely bound with the substance of the allegations made. I consider then there is sufficient connection to mean that the claimant has an arguable or *prima facie* case of conduct extending over a period of time to 10 February 2021.

30 59. As indicated however that does not mean that the claim is in time. On continuing conduct to 10 February 2022 the claim should still have been lodged by 9 May 2022 whereas Early Conciliation proceedings commenced 22 August 2022 with the claim being presented 5 September 2022. It is necessary to consider if the escape clause assists the claimant.

Just and equitable extension

5 60. I have to bear in mind that the burden is on the claimant to convince a Tribunal that it is just and equitable to extend time (**Robinson v Bexley Community Centre**). I have to consider all factors but importantly the length of and reasons for the delay and weigh up the relative prejudice to both parties extending or refusing to extend time.

10 Length of and Reasons for the Delay

61. Given the finding on continuing conduct the period of delay is the period between 10 February 2022 and presentation of this claim of 5 September 2022. The claimant had presented her first claim on 23 March 2022 but had
15 failed to initiate the EC proceedings until that date. Thus she had no Certificate when presenting the ET1. She was at fault in that respect. While unrepresented there were many ways that she could have researched and become aware of the EC process. I did not consider her health concerns impacted on the process. She was no longer on anti depressant medication
20 at this point and she herself said that on presentation of the form she felt there was a misstep and entered the EC process. He took advice from ACAS and the Tribunal office and on 29 March 2022 emailed the Employment Tribunal to ask that her claim form be amended to include the ACAS Certificate number. She realised that as an alternative she could submit a
25 new claim and add the Certificate number. She asked if the Tribunal could please *“email me back with acknowledgement of receipt of this email”*.

62. It would not appear any action was taken on the request for amendment. The respondent was then asked for its response to the claim. One of the Grounds
30 of Resistance was breach of the early conciliation requirements and that the claim should be rejected on that basis as well as raising the issue of time bar generally under section 123(1) of EqA. After that ET3 response had been lodged the claimant received a letter of 5 May 2022 which stated that an Employment Judge had *“considered the file and has not dismissed the claim*

or the response on initial consideration. The claim will now proceed and the Employment Judge has ordered ...” a case management preliminary hearing for 27 May 2023. The preliminary hearing of 27 May 2022 expressly advised that a hearing would take place on the issue of the failure to undertake early conciliation and to record the Certificate number on the claim form.

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63. That hearing took place on 22 July 2022 and written Judgment issued on 22 August 2022. That dismissed the claim on account of the failure to follow early conciliation procedures. On that date the claimant notified ACAS of early conciliation and received a Certificate on 24 August 22. Reconsideration of the Judgment which had dismissed her claim was refused and she then presented this claim on 5 September 2022.
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64. The claimant's position is that on receipt of the letter of 5 May 2022 she believed that her claim had been accepted and was proceeding. I can understand there being some confusion for the unrepresented claimant in that respect. While she had noted in her email of 29 March 2022 that she could either seek amendment or alternatively lodge a fresh claim with the ACAS Certificate number there was no ruling on that matter given to her. The letter of 5 May 2022 could be understood as allowing the claim to proceed.
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65. However at the preliminary hearing of 27 May 2022 that matter of amendment did not appear to be raised and it was clear that the case was proceeding to a preliminary hearing on the issue of whether or not the claim could proceed because of the lack of EC Certificate number. That would be enough to shake the claimant's belief that her claim was amended. However I did accept in this period that the claimant could have considered there was no need for her to raise a fresh claim because of the existence of the March 2022 claim and that claim was before the Tribunal pending a decision on the issue of lack of EC certificate. In that respect therefore I could accept delay in presenting this claim was caused by belief that there was a claim proceeding before the Employment Tribunal. Once it was known that claim was dismissed then the claimant took prompt steps to institute fresh proceedings.
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Prejudice

- 5 66. Prejudice is an important but not determinative factor. The respondent clearly suffers prejudice in the cost and the hassle of having to meet a claim which would otherwise have been defeated by a limitation defence if the period is extended. The claimant would be deprived of having her complaint adjudicated on its merits and the chance of being awarded compensation or other available remedy if successful if time is not extended. These
10 considerations are in play in every case where time bar is argued.
67. The principal issue on prejudice relates to the age of the allegations going back to May 2020. Consideration has to be given as to whether or not the respondent would suffer prejudice on the evidence being less cogent
15 because of late claim or in requiring investigation of events which took place some time ago.
68. In this case there has been investigation into the complaints raised by the claimant through the grievance and investigation process. I was advised that
20 of those involved one individual had left the employ of the respondent but that individual's whereabouts was known and it did not appear that would be an inhibiting factor in a fair trial. Reference was made to the possible difficulty in extracting archived emails but no persuasive technical issue was given as to why that should be the case. On that basis therefore it could be said that
25 there was no real prejudice to the respondent because they had already investigated these matters and come to a conclusion and contemporaneous evidence would be available to which reference could be made on the alleged discriminatory behaviours.
- 30 69. However the respondent's position is that the claimant has raised new allegations against named individuals that had not been previously raised within the grievance/investigation process. These new allegations were listed at paragraphs 7.1.10 and 7.1.12 of the Note of the preliminary hearing of 27 May 2022 (J80). Considering the terms of the grievances raised and

further information provided by the claimant in her email of 19 October 2021 these incidents appear to be better particulars of general assertions of name calling or negative comment and verbal attack which was referenced by the claimant and within the claim of March 2022. Those particular matters were
5 identified within the note following the preliminary hearing of 27 May 2022 and so these allegations have been with the respondent for some time.

70. Similarly it was stated that on the claim form presented 5 September 2022 3 additional issues were raised regarding a statement on the murder of
10 George Floyd in America; comments on how Indian and Asian took all the health care jobs in the UK; and an assertion regarding the investigation leading to the outcome letter of 10 February 2022.

71. Additionally the respondent had sought Further and Better Particulars of the
15 claims raised and had now received more detail as condensed within the List of Legal and Factual Issues (J156/160). These allegations are certainly more detailed and that detail will require to be investigated. However it would not appear to expand the number of individuals who will have been involved in the investigation process conducted by the respondent. Also while accepting
20 that more detail is now given the general nature of these allegations has been canvassed through grievance/investigation. While there is always a fear that the cogency of evidence will be affected the allegations made are now precise and I would say it should be memorable for the witnesses concerned. There was no suggestion that witnesses would not be contactable and able to
25 respond to particular allegations.

72. In all the circumstances I consider that there did appear to be a credible reason for the claimant to consider that the complaint presented 23 March 2022 had been accepted and there was no reason for her to lodge a fresh
30 application until its rejection; and that while prejudice is clearly the difficult issue on balance I do not consider that the prejudice to the respondents is such that it would not be just and equitable to extend time to presentation of the claim on 3 September 2022.

73. That would mean that the complaint can proceed to a hearing on its merits. The work to date has clearly identified the legal and factual issues. The case would be ready to proceed to a final hearing. The respondent should be allowed 28 days from the date this decision is sent to parties to present its amended response. A date listing letter should now be sent to parties to find suitable dates for a final hearing.

74. This Judgment is of course dependent on the finding that there was a continuing act of discrimination in the investigation culminating in the report of 10 February 2022. As explained that is only a finding on a *prima facie* basis. As was noted in **South West Ambulance v King** above once the Tribunal has made full findings in fact at a substantive hearing the conclusion may be that there was no continuing act at all. Given the fundamental importance of time limits to the jurisdiction of the Tribunal if it were found that there was no continuing act at all in February 2022 the claim would fail, unless the Tribunal at final hearing considers it would be just and equitable to extend time in respect of any acts that are proven but out of time.

Employment Judge: J Young
Date of Judgment: 19 April 2023
Entered in register: 20 April 2023
and copied to parties