# EMPLOYMENT TRIBUNALS

| **Claimant:** | | **Respondent:** |
|---|---|---|
| Mr M Din | **v** | BMW (UK) Manufacturing Limited |

**Heard at:** Reading (in person) **On:** 29 June 2023

**Before:** Employment Judge Hawksworth

**Appearances**
**For the Claimant:** Represented himself
**For the Respondent:** Ms N Gyane (counsel)

## RESERVED JUDGMENT

1. Mr Din's claim was properly presented on 23 December 2020.

2. Mr Din's claim was presented within three months of 15 September 2020 (after an extension for Acas early conciliation). Complaints about matters which occurred on or after 6 September 2020 are in time.

3. It is just and equitable to extend time to allow Mr Din to bring complaints about BMW's failure to identify a suitable role for him which meant that he could not continue to work there. That failure occurred on a date between 9 June 2020 and 15 September 2020, but was only communicated to Mr Din on 15 September 2020.

4. This means Mr Din's complaints of discrimination arising from disability and failure to make reasonable adjustments have been brought in time and can proceed to the final hearing.

5. The respondent's application for costs is dismissed.

## REASONS

**Introduction**

1. This is a summary of the case and the things which have happened so far, to explain the background to this judgment.

2. Mr Din was employed by Gi Group Recruitment Ltd, an employment agency ('GI'), under a contract dated 8 August 2014. On 2 January 2018 he was placed by GI in a role with BMW (UK) Manufacturing Limited ('BMW'), initially as an assembly operator and later as a production operative. Back and hand/wrist conditions meant that Mr Din had difficulty working on the production line. He last worked at BMW on 29 May 2020. He says that the ending of his assignment with BMW amounts to discrimination arising from disability and that reasonable adjustments should have been made to find him alternative work that he was medically able to do.

3. Mr Din notified Acas for early conciliation on 7 October 2020. The Acas early conciliation certificate was issued on 26 October 2020 and named only BMW as the prospective respondent to the claim. Mr Din started his employment tribunal claim on 23 December 2020, complaining of unfair dismissal and disability discrimination. In his claim form, Mr Din named both BMW and GI as respondents to the claim.

4. BMW and GI submitted responses to the claim on 26 and 27 July 2022. Both denied the claims.

First preliminary hearing

5. At a preliminary hearing by telephone before Employment Judge Anstis on 24 January 2023, Mr Din's complaints were clarified as:

    5.1. unfair dismissal (against GI only, he does not suggest that he was employed by BMW); and
    5.2. disability discrimination (against both respondents), namely complaints of failure to make reasonable adjustments and discrimination arising from disability.

6. The tribunal ordered the parties to provide further information about the claim and the responses, and so did not make a 'list of issues' identifying in detail the questions the tribunal will have to answer at the final hearing.

7. Judge Anstis decided that the next hearing would be another preliminary hearing to decide whether the claim had been brought in time. He said the next hearing:

> "… will be to determine whether all or any of the claimant's claims were brought within the usual time limit and, if they were not, whether that time limit should be extended ('the preliminary issue')."

Second preliminary hearing

8. The second preliminary hearing took place by video on 12 May 2023 before Employment Judge Reindorf KC. There were some practical difficulties because Mr Din had an email copy of the bundle, but he only had his mobile phone which he needed to use for the hearing. It was not possible to use his phone to look at the documents as well. Mr Din applied for a postponement of the hearing on the basis that he was not ready to deal with the time point.

9. At the hearing GI's representative raised the question of whether the claim could proceed against GI, when only BMW was named on the Acas certificate (this was referred to as 'the Acas point'). Mr Din said he was able to deal with the Acas point, because he did not have to look at any documents.

10. Both BMW and GI also said that the tribunal should order Mr Din to pay some of their legal costs because of the delays.

11. Judge Reindorf decided to start by considering whether the claim against GI could proceed. She heard evidence and closing remarks from all parties. After that, there was not enough time for her to make her decision, or to decide whether the claim had been brought in time, or to decide whether Mr Din should pay any legal costs.

12. Judge Reindorf scheduled another preliminary hearing. She said the next hearing would be to decide:

> "a whether all or any of the Claimant's claims were brought within the usual time limit and, if they were not, whether that time limit should be extended ("the preliminary issue");
> b whether the Claimant should pay any or all of [BMW's] costs of the proceedings to date; and
> c case management as appropriate."

13. After the second preliminary hearing, Judge Reindorf's judgment in relation to the claim against GI was sent to the parties. She decided that the claim against GI had no reasonable chance of succeeding, because Mr Din had not complied with the rules about notifying Acas for early conciliation before starting his claim against GI. He had only notified Acas about BMW. Mr Din has made an appeal to the Employment Appeal Tribunal against that decision.

Third preliminary hearing

14. The third preliminary hearing was on 29 June 2023.

Dates of final hearing

15. The final hearing has been scheduled for 5, 6 and 7 February 2024.

**The hearing before me**

16. The hearing before me was the third preliminary hearing. It was an in-person hearing at Reading tribunals on 29 June 2023.

17. BMW's legal team prepared a bundle for the second preliminary hearing which we used at the third preliminary hearing. It had 137 pages, and references to that bundle are by page number. They also prepared a supplementary bundle with documents dated after the second preliminary hearing, including witness statements. The supplementary bundle had 55 pages, references to that bundle are in the form page SB1, SB2 etc. Mr Din was provided with paper copies of both bundles and he had them with him at the hearing. He found it much better than using electronic versions of the bundle. I am grateful to BMW's legal team for these helpful preparations which assisted with the smooth conduct of the hearing.

18. At the hearing, I first identified the issues in the claim as explained below. I then heard evidence on the question of whether the claim had been brought in time. Mr Din gave evidence, followed by Mr Murphy on behalf of BMW. Both had prepared witness statements. Ms Charlton also prepared a witness statement and this was in the supplementary bundle. Ms Charlton works for GI as People Partner. She did not attend to give evidence.

19. Ms Gyane had prepared written documents explaining why BMW said the claim was not brought in time ('Respondent's skeleton argument') and BMW had also written to Mr Din and the tribunal to say why they thought Mr Din ought to pay some of their legal fees ('costs'). We took some time at the start of the hearing so that everyone could read these documents.

20. Ms Gyane and Mr Din both made verbal closing remarks about whether the claim had been brought in time. Both then made closing remarks about the request that Mr Din be ordered to pay some of BMW's legal fees.

21. There was not enough time for me to make my decisions and tell the parties my decisions at the hearing. I told the parties I would send my decisions in writing.

22. At the end of the hearing I explained the steps that everyone would have to take to prepare for the final hearing if I decided that the case could go ahead. These are called case management orders. They have been sent to the parties in a separate document. The dates we discussed for these have been changed because of the delay in sending this judgment. I apologise to the parties and their representatives for this delay. It happened because of absence from the tribunal over the summer, and the current workload in the tribunal.

**The issues in the claim**

23. At the hearing we started by discussing and identifying the questions the tribunal will have to answer at the final hearing to decide whether the claim

succeeds or not. I have recorded these 'issues' in the case management order which has been sent separately.

24. In summary, Mr Din makes complaints of discrimination arising from disability and failure to make reasonable adjustments. The key questions for the tribunal to answer are below. There are other questions, for example concerning the respondent's knowledge of Mr Din's disability and any disadvantage, and they are listed in full in the case management order document. The questions below are those which are the most relevant for me when looking at the time point.

25. In the complaint of discrimination arising from disability:

    25.1. Did the respondent treat the claimant unfavourably by ending his assignment because of his inability to fulfil the normal duties of his role as a production operative?

    25.2. If so, did the claimant's inability arise in consequence of his disability?

    25.3. If so, was the treatment a proportionate means of achieving a legitimate aim?

26. In the complaint of failure to make reasonable adjustments:

    26.1. Did the respondent have a requirement for a production operative to work on a moving production line, and was that a 'PCP' (or alternatively a physical feature of the workplace)?

    26.2. If so, did the PCP (or the physical feature) put the claimant at a substantial disadvantage compared to someone without the claimant's disability? The claimant says he was disadvantaged because he was unable to work on a moving production line because of his hand and back conditions.

    26.3. Was it reasonable for the respondent to have identified an alternative role for the claimant which did not have a requirement to work on a moving production line, and if so, when? The claimant has suggested 9 possible roles.

    26.4. Would that have avoided the disadvantage the claimant was at?

**The issue for me on the time point**

27. I clarified with the parties at the start of the hearing that, as is clear from the summaries of both earlier case management hearings, what I have to do is to decide <u>as a preliminary issue</u> (on a 'once and for all' basis) whether the claim was made in time ('the time point'). That requires me to hear evidence, make findings on relevant factual matters, and apply the legal tests to decide whether the claim has been made in time. I am not considering this on a summary basis under rule 37. (Rule 37 is the rule on

'strike out', striking out means stopping the claim from going ahead.) I am not looking at whether I should strike out the claim because I consider there to be no reasonable prospect of Mr Din showing that the claim was made in time.

28. Ms Gyane agreed that the time point was being decided as a preliminary issue, not as a strike out issue. She said that although her skeleton argument referred to strike out, the arguments on behalf of the respondent were in substance the same when considering the time point as a preliminary issue.

29. After identifying the issues in the claim and clarifying the issue for me on the time point, I went on to consider whether Mr Din's claim had been presented in time.

**Findings of fact relevant to the time point**

30. Mr Din was assigned to BMW by GI on 19 October 2014. His role was initially assembly operator and later production operative.

31. Mr Din had back and hand/wrist conditions which led to difficulties working on the production line.

32. An occupational health report provided to GI on 16 March 2020 said that Mr Din required a non-manual role, with the ability to pace his work. It suggested that consideration be given to an 'offline' role (that is, a role which is not on the production line) so that he could be seated as required (page 98).

33. The occupational health recommendations were not discussed immediately: BMW shut down shortly afterwards because of the pandemic. After the workplace reopened, GI emailed Mr Murphy, Mr Din's manager, on 19 May 2020 to explain the adjustments that had been recommended for Mr Din (page 101).

34. Mr Din was told to go home and not to come to work while this was being considered. He did not work at BMW after 19 May 2020 (page 101).

35. Mr Murphy told GI on 20 May 2020 that due to the processes and line speed of the area, 'we would not be able to accommodate the adjustments required' (page 103). Mr Murphy's email was focused on roles in his area. He was not saying on 20 May 2020 that the adjustments could not be accommodated anywhere in BMW.

36. Enquiries were made with other managers. Mr Syrett, TU-O-432 group leader, said on 21 May 2020,

> "Unfortunately we do not have any positions available and the ones we do have are already filled with BMW associates. There is also no option in TU-O-45" (page 105).

37. I find that in this email Mr Syrett was saying that there were no positions available on his area or on the area called TU-O-45, not that there were no positions available anywhere in BMW.

38. Mr Din's union representative contacted two other managers (of areas TU-O-43 and TU-O-44) to ask them to look at finding a role (page 108). The request was sent on to three managers (in TU-O-440, TU-O-441 and TU-O-442) (page 107). On 4 June 2020, a manager in TU-O-441 confirmed that they were unable to find a role in TU-O-44 that would suit Mr Din (page 107). On 9 June 2020, a manager in TU-O-43 confirmed that there were no roles available to offer Mr Din (page 109). I find that these emails were about the lack of roles in particular areas. None of them was saying that there was no possible role for Mr Din anywhere in BMW.

39. After the last of these emails on 9 June 2020, Mr Din's manager Mr Murphy did not hear anything further about possible roles.

40. I accept Mr Din's evidence that between June and September 2020, he understood that:

    40.1. there were discussions going on between BMW, GI and his union to explore what could be done to find a role for him at BMW;
    40.2. GI were waiting for BMW to come back to them to see if they had a suitable role;
    40.3. GI would sit down with him to discuss things in person once they heard from BMW.

41. I accept Mr Din's evidence on this because his recollection is consistent with the account he gave in March 2021 (page 16) and with the witness statement of GI's people partner (page SB6). Although Mr Murphy was not aware of any further discussions after June, he accepted that he would not have been involved in discussions with senior managers about roles in parts of the factory that would not come under his area of responsibility.

42. Mr Din remained on full pay during May to September 2020 and did not work for any other client of GI. He was waiting for the outcome of the investigation and discussions about alternative roles.

43. On 15 September 2020 Mr Din attended a meeting with GI. It was held at the BMW plant in Oxford (page 112). At the meeting Mr Din was told by GI there were no options on site at BMW. He was told that he would be referred back to GI as there were no suitable roles available at BMW. Mr Din was paid a week's pay after the meeting on 15 September 2020 as a goodwill gesture by GI. The meeting on 15 September was the first time that Mr Din knew that BMW had said it had not been able to find a suitable role for him in any part of the business.

44. I find that it is likely that there were discussions going on between BMW (most likely BMW HR), GI and the union after 9 June 2020, and that BMW

made a decision between 9 June 2020 and 15 September 2020 that it had no alternative role for Mr Din anywhere on its site (page 128). There was no evidence of the exact date on which BMW made this decision or communicated it to GI.

45. Mr Murphy told me that, to the best of his knowledge, BMW does not have a way of tracking which roles were vacant or available at a specific point in time. He said offline roles are not advertised and there tend to be people waiting to go into those roles, sometimes steered through the medical department. He was unsure whether BMW's HR department would keep a record of those roles or not.

46. After the meeting, between 6 and 29 October 2020, GI tried to find a role for Mr Din with their other clients.

47. Mr Din raised a grievance with GI on 6 October 2020 (page 116). His grievance hearing took place on 19 October 2020 at BMW in Oxford. He said he had been told there was no suitable job, but he had seen jobs that were offline that he could do and which could be included in a rotational situation.

48. On 7 October 2020 Mr Din notified Acas for early conciliation in respect of his claim against BMW (page 4). The early conciliation certificate was issued on 26 October 2020.

49. GI spoke to a BMW manager about Mr Din's grievance (page 128). The outcome of the grievance was sent to Mr Din on 12 November 2020 (page 127). The grievance was not upheld. GI told Mr Din that BMW were unable to identify a suitable role for him.

50. Mr Din then had discussions with his union about whether legal assistance could be provided for an employment tribunal claim. In late December 2020 Mr Din's union representative told him that he would not be provided with legal assistance, and he should submit the claim by 25 December 2020 otherwise it would be out of time.

51. On 23 December 2020 Mr Din submitted his employment tribunal claim. In section 8.1 he ticked boxes to say he claimed unfair dismissal and disability discrimination. In section 8.2 of the form (details of the claim) he wrote, 'union rep has claim document however he is now on annual leave till 4th jan 2021' (page 11).

52. On 29 March 2021 Mr Din sent a one page email explaining what his claim is about. It included the following: 'In the meeting I was told that BMW and GI had been trying to find me a suitable offline role but could not find anything for [me] therefore I was being unassigned… I feel … there are many roles [in] BMW mini plant Oxford which are offline roles.'

53. It appears that the tribunal did not initially require BMW to present a response to the claim while further information was sought from Mr Din.

For reasons which are unclear to me but which may have been related to pressures on the tribunal administration during the pandemic, Mr Din's email of 29 March 2021 was not sent to BMW until 28 June 2022. BMW's response to the claim was submitted to the tribunal on 27 July 2022.

**The legal principles relevant to the time point**

54. Section 123 of the Equality Act 2010 explains the time limit for complaints of discrimination (including discrimination arising from disability and failure to make reasonable adjustments). The starting point is that the claim should be started ('presented') within a three month period.

55. The three month period starts on 'the date of the act to which the complaint relates'. Sometimes the date on which an act takes place is obvious. Section 123 explains how to identify 'the date of the act to which the complaint relates' in less obvious cases, including where the complaint is about a failure to do something. Sub-sections 3 and 4 say:

> *"(3) For the purposes of this section—*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."*

56. The time to bring the claim ends three months less a day from that start date. However, when working out the end of the three month period, the rules relating to Acas early conciliation need to be taken into account. These rules are contained in section 140B of the Equality Act. This says at sub-section (3) that:

> *"In working out when a time limit … expires the period beginning with the day after Day A and ending with Day B is not to be counted".*

57. Day A is the day on which Acas is notified for early conciliation, and Day B is the date of the early conciliation certificate. This means that time spent in the Acas early conciliation process is discounted when working out the date on which the three month time period ends.

58. A claim which is started after the expiry of the three month period may still go ahead if the tribunal thinks it has been started within a period which is 'just and equitable'. This is often called 'extending the time limit'. This is

explained in sub-section 123(1)(b) which says that in the employment context, a complaint:

> *"may not be brought after the end of—*
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
> *(b) such other period as the employment tribunal thinks just and equitable."*

59. There is no presumption that the time limit should be extended, rather it is for the claimant to convince the tribunal that it is just and equitable to do so. Extending time is the exception rather than the rule (Bexley Community Centre v Francis Robertson [2013] EWCA Civ 576 at paragraph 25).

60. There is no general principle that a claimant should always wait for the outcome of internal grievance procedures before embarking on litigation, rather, a decision to hold off commencing proceedings in the tribunal while waiting for the outcome of domestic proceedings is only one factor to be taken into account (Apelogun-Gabriels v Lambeth LBC [2002] ICR 713 at paragraph 16).

61. These rules about time limits concern the date by which a claimant has to start or 'present' their claim to the employment tribunal. In Mr Din's case, I also have to consider the question of how much information must be provided to start a claim.

62. Rule 12 of the Employment Tribunal Rules of Procedure says that a claim, or part of it, shall be rejected if a judge considers that the claim, or part of it, is,

> "in a form which cannot sensibly be responded to or is otherwise an abuse of the process."

63. One type of claim form which cannot be sensibly responded to is a claim form with insufficient information to enable the respondent to understand the claim. In a case called Chandhok v Tirkey [2015] ICR 527, EAT, the judge said that:

> *"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so."*

64. In, Secretary of State for Business, Energy and Industrial Strategy v Parry and anor [2018] EWCA Civ 672, CA, the Court of Appeal considered a case in which the wrong particulars of claim document was attached to the claim form. In that case, the court said (emphasis added):

> *"30. The judge, as already noted, held that an EJ looking at this ET1 could only have concluded that the Respondent school "would*

*have had no idea of the basis on which the Claimant was making either of her claims". With respect, I entirely disagree. The school knew perfectly well that, as the ET1 states, she had been employed by them as Director of Dance from 1 September 1996 onwards. They also knew, although the ET1 did not state this, that her employment in that capacity had been terminated on 31 August 2015 and that she had been re-engaged as Head of Dance the next day. Their case was that the dismissal was a genuine redundancy. Her case was that it was not. (No separate argument was advanced before us relating to the claim for arrears of wages.)*

*31. The school could and in my view should have filed an ET3 stating something on these lines: "The Claimant was dismissed on 31 August 2015 on the grounds of redundancy, which in the circumstances the Respondent acted reasonably in treating as a sufficient reason for dismissal." Either side could then have been directed to give further details of their case. But at least proceedings would have been properly launched. Employment tribunals should do their best not to place artificial barriers in the way of genuine claims.*

*32. I should add that in holding that a sensible response could have been given to this claim I am not laying down a general rule that the respondent to a claim in an employment tribunal must always be treated, for the purposes of rule 12(1)(b) , as having detailed knowledge of everything that has occurred between the parties. If, for example, a claimant brings a claim for sex or race or disability discrimination without giving any particulars at all, or attaching the particulars from someone else's case, that ET1 might well be held to be in a form to which the employer could not sensibly respond and thus properly rejected under rule 12(1)(b). But in many unfair dismissal cases there will be a single determinative issue well known to both parties, so that even if particulars are omitted from the ET1 the employer can sensibly respond, for example: (a) "the Claimant was not dismissed; she resigned on [date X]"; or (b) "the Claimant was dismissed on [date X] on the grounds of gross misconduct, which in the circumstances the Respondent acted reasonably in treating as a sufficient reason for dismissal".”*

**Conclusions on the time point**

65. I have applied the legal principles to the facts as I have found them, to reach the following conclusions on the question of whether Mr Din’s claim was brought in time.

Was the claim properly started on 23 December 2020?

66. First, I considered whether Mr Din’s claim was properly made on 23 December 2020. Ms Gyane said that the claim form was not in a form that

could sensibly be responded to until Mr Din sent the tribunal more information in an email on 29 March 2021. She says that the claim should be treated as not having been presented until 29 March 2021.

67. Ms Gyane relied on the case of Secretary of State for Business, Energy and Industrial Strategy v Parry and the fact that Mr Din's claim is for discrimination, not unfair dismissal. She said there was a myriad of possible discrimination complaints which would need to be known to be sensibly responded to.

68. In Parry, the Court of Appeal said that a discrimination case in which no particulars are provided 'might well be held' to be one which cannot be sensibly responded to. It was using an example of a discrimination claim to illustrate that there would be some cases where more information is required. The court was not saying that the principle it was outlining could only apply in complaints of unfair dismissal, or that discrimination complaints will always fall on the other side of the line. It is a matter for the tribunal to consider in the circumstances of each case whether a sensible response could be given to the claim. The type of complaint being brought (for example unfair dismissal or discrimination) is not conclusive of that.

69. I have decided that although the claim against BMW is a discrimination complaint, Mr Din's is a case in which there was a single determinative issue well known to both parties before the claim form was presented. His claim is about whether he should have been found an alternative role once he became unfit to work on the production line. Mr Din ticked the boxes for unfair dismissal and disability discrimination. BMW had been aware since May 2020 of Mr Din's health condition and his request for an alternative role to be identified. It was aware that no such role had been identified, and that as a result Mr Din could no longer work at its site in Oxford. Mr Din did not make a grievance complaint directly to BMW, but he did make a grievance complaint to GI. GI raised Mr Din's concerns with BMW again in October 2020 at the time of his grievance to them, in similar terms.

70. The claim form in this case did not need to include detailed information of the specific legal labels Mr Din was attaching to his complaint. The thrust of what Mr Din was complaining about would have been clear to BMW from the allegation of disability discrimination and their knowledge of the circumstances of his departure from BMW. BMW could, if required, have sensibly responded to the claim form presented by Mr Din. It could have explained that Mr Din had left when it had not identified a suitable alternative role for him, and it could have explained why it said that the failure to identify a suitable alternative role did not amount to any form of unlawful disability discrimination. BMW could have explained in response to the complaint of unfair dismissal that Mr Din was engaged on its site via GI, and was not their employee and was not therefore entitled to complain of unfair dismissal by BMW.

71. In fact, the tribunal told BMW it did not need to respond until further information was provided, but that does not affect my conclusion that the

claim as first presented was in this case in a form that could have been sensibly responded to.

72. For these reasons, I have concluded that in the circumstances of this case there was sufficient information in the claim form to enable it to be sensibly responded to by BMW. That means that Mr Din's ET1 claim form was properly presented on 23 December 2020.

When does the three month period start?

73. Next, I have to decide whether that claim was started within three months of the act Mr Din complained of. I start by considering the date on which the acts took place. The two complaints are:

    73.1. the complaint of discrimination arising from disability, which relates to the ending of his assignment with BMW, and
    73.2. the failure by BMW to make adjustments to the requirement to work on a production line.

74. I have decided that Mr Din's assignment with BMW ended when BMW confirmed that there was no suitable role for him anywhere on its site. Prior to that, discussions to find another role were continuing, and Mr Din remained assigned to BMW. That is supported by the facts. Mr Din did not work for any other client of GI. He could have returned to his assignment with BMW if a suitable role had been found. The meeting on 15 September 2020 took place on BMW's site.

75. The failure to make reasonable adjustments took place on the same day that BMW confirmed that it had no suitable role for him. The time limit for both complaints started to run on the same date.

76. Ms Guyane suggested that the assignment ended on 20 May 2020. She said that a decision was made on that day that there was no suitable role for Mr Din and that this was a final decision which was repeated in emails on 4 and 9 June 2020. I have not found this to be the case. I have found that the emails of 20 May, 4 June and 9 June were separate decisions about the lack of roles in particular areas of BMW. None of them were emails recording a decision that there was no alternative role anywhere in BMW. There is no evidence from which I can identify the date on which BMW confirmed to GI that it had not suitable role. Mr Din only learned of it when informed of it by GI on 15 September 2020.

77. I have found that BMW confirmed to GI that it had no alternative role anywhere in BMW on a date between 9 June 2020 and 15 September 2020, and that it this was communicated to Mr Din by GI on 15 September 2020.

When does the three month period end?

78. Normally, the three month period ends 'three months less a day' from the date of the act. However, the calculation of the three month time period is adjusted for any period of Acas early conciliation. Time during early conciliation is not counted when calculating the end of the three month period.

79. Mr Din notified Acas for early conciliation on 7 October 2020 and received his early conciliation certificate on 26 October 2020. He started his claim on 23 December 2021. The 18 day period between 8 October 2020 and 26 October 2020 is not counted when calculating the end of the three month period.

80. This means that any act which occurred on or after 6 September 2020 would be in time, because the three month time limit for an act on that day would be 5 December + 18 days, ie 23 December 2020, the date on which the claim was presented.

Is it just and equitable to extend time?

81. I have found that BMW's confirmation that there was no suitable alternative role for Mr Din was between 9 June 2020 and 15 September 2020, although it not communicated to him until 15 September. I have considered whether, in respect of that act, the claim has been presented within such other period as I think just and equitable.

82. It was reasonable for Mr Din, having learned of BMW's decision on 15 September 2020, to make a grievance complaint to GI, to explore options for legal assistance via his union and to rely on his union representative's advice about the likely time limit (which it appears took the time spent in the early conciliation process into account). The period taken by Mr Din to take these steps after he found out there was no role for him at BMW was a reasonable one.

83. I have weighed up the prejudice to the respondent if the claim is allowed to proceed in respect of an act which took place between 9 June 2020 and 5 September 2020 (anything on or after 6 September is in time, as explained above). I take into account the prejudice inherent with any delay, and the importance of parties to potential litigation having finality and certainty. I heard evidence from Mr Murphy about difficulties with tracking vacant roles at a specific point in time. However, that would have given rise to evidential difficulty for BMW irrespective of when the claim was started, as it is caused by the way in which BMW records vacancies and allocates roles, rather than the passage of time. There was no evidence of any other prejudice, such as witnesses no longer being available because of the passage of time.

84. Against the prejudice to the respondent, I consider the prejudice to Mr Din if the complaint is not allowed to proceed. The key factor here is that Mr Din only became aware of BMW's overall decision on alternative roles on 15 September 2020. Further, his concerns about the failure to identify a

role were known to BMW in May 2020 and raised again with a manager in BMW in October 2020 at the time of the grievance to GI, so BMW would have been aware of the basis of Mr Din's complaint at those times. Overall, I have decided that these factors, together with the reasonable period of time Mr Din took to present his claim after the meeting on 15 September 2020, and the absence of specific prejudice to the respondent arising from the delay, mean that the balance falls in Mr Din's favour in respect of acts between 9 June 2020 and 5 September 2020. Acts on or after 6 September are in time, as explained above.

85. Mr Din's complaint against BMW presented on 23 December 2020 can therefore proceed to a final hearing. The issues are as identified at the hearing and summarised above.

86. The tribunal at the final hearing will not need to consider whether the claim has been brought in time, that decision has been made by me on a 'once and for all' basis.

**BMW's costs application**

87. The other issue for me to decide is BMW's costs application. BMW says the tribunal should order Mr Din to pay part of BMW's legal fees because of his conduct leading up to and at the second preliminary hearing on 12 May 2023. BMW sent a written application to the tribunal and Mr Din on 25 May 2023.

88. The written application says that Mr Din failed to comply in full with preparations for the second preliminary hearing (the hearing on 12 May). BMW says he failed to comply with a requirement to provide further details of his claim, failed to disclose documents, failed to engage regarding the hearing bundle and failed to provide a witness statement. BMW says that this was disruptive and unreasonable conduct. BMW also says the tribunal should order Mr Din to pay legal fees because Mr Din made a late request for a postponement of the second preliminary hearing (on the day itself).

89. BMW seeks £1,000 plus VAT, the brief fee for counsel at the second preliminary hearing.

90. At the hearing before me, Ms Gyane emphasised that Mr Din came to the second preliminary hearing without a copy of the bundle or the witness statements, even though they had been emailed to him on 28 March 2023 and again on the morning of the hearing (page SB19). She said that although he is a litigant in person, Mr Din should have been able to come to the tribunal on time and with a copy of the papers.

91. Ms Gyane accepted that the time on 12 May 2023 was not wasted, as it was used to consider GI's application for the claim against it to be dismissed (referred to as 'the Acas point'). Ms Gyane agreed that time would have been required for this application in any event. The hearing on

12 May 2023 was listed for 3 hours. There was not enough time on that day to decide the time point as well as the Acas point.

92. Mr Din said BMW sent him an electronic copy of the bundle. He was unable to open the electronic copy of the bundle on his mobile phone, and he does not have another device. This made his preparations difficult. It was difficult to use his phone to see the bundle at the video hearing because he was already using his phone to attend the video hearing.

93. Mr Din said he has never been in this situation before and he was trying his best to comply. He said he has now had some informal help from a friend who is a solicitor (although not an employment solicitor).

94. In line with the orders made on 12 May 2023, fort the hearing before me, BMW's legal team provided Mr Din with a paper copy of the bundle, and he found this easier to use. He produced a witness statement on 16 May 2023. Everyone was at the tribunal venue for the hearing before me. Mr Din brought his copy of the bundle to the hearing and found this much easier.

**The rules and legal principles relevant to the costs application**

95. The power to award costs is set out in the Employment Tribunal Rules of Procedure 2013. Under rule 76(1) a tribunal may make a costs order, and shall consider whether to do so, where it considers that:

*"(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of proceedings (or part) or the way that the proceedings (or part) have been conducted; or*

*…*

*(c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins ."*

96. Rules 74 to 78 provide for a two-stage test to be applied by a tribunal considering costs applications under Rule 76. The first stage is for the tribunal to consider whether the ground or grounds for costs put forward by the party making the application are made out. If they are, the second stage is for the tribunal to consider whether to exercise its discretion to make an award of costs, and if so, for how much.

97. In determining whether unreasonable conduct under rule 76(1)(a) is made out, a tribunal should take into account the 'nature, gravity and effect' of a party's unreasonable conduct (McPherson v BNP Paribas (London Branch) 2004 ICR 1398, CA). However, it is not necessary to analyse each of these aspects separately, and the tribunal should not lose sight of the totality of the circumstances (Yerrakalva v Barnsley Metropolitan Borough

Council 2012 ICR 420, CA). At paragraph 41 of Yerrakalva, Mummery LJ emphasised that:

> *"The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it has."*

**Conclusions on the costs application**

Are there grounds for a costs order?

98. I first need to consider whether there are grounds for a costs order. BMW's written application says that it is seeking costs under rule 76(1)(a) and/or (c), because Mr Din acted disruptively and unreasonably in his conduct of proceedings and because he applied for a postponement of the hearing on 12 May 2023 (page SB13, paragraph 10).

99. In relation to the postponement, it is not correct to say that Mr Din's application was granted (page SB13, paragraph 13). Rather, the judge decided to deal with the Acas point concerning the claim against GI first, and there was then insufficient time to deal with the time point. Although the judge said that she would have been minded to postpone the point, she did not in fact do so (page SB20). As no postponement was made as a result of Mr Din's application, there is no power to award costs under rule 76(1)(c).

100. As to rule 76(1)(a), I do not consider Mr Din's conduct to have been disruptive or unreasonable. He is a litigant in person and, as BMW says, he did comply with some of the orders, such as providing a schedule of loss and list of suitable roles (page SB12, paragraph 6). I have decided that in failing to comply with the other orders, Mr Din was not acting unreasonably or showing a disregard for the tribunal's orders. Rather, he found it difficult to know what he had to do and to manage the electronic documents. One of the orders was for him to identify the 'PCP' in his reasonable adjustments complaint and the 'something arising' in his complaint of discrimination arising from disability. These are technical questions and as a litigant in person Mr Din found it difficult to understand what was required. The lack of a paper copy bundle and difficulties with the electronic bundle made compliance and preparation for the hearing very difficult for him.

101. I have concluded that Mr Din's conduct in the lead up to the hearing on 12 May 2023 was not such that it gives rise to grounds for a costs order.

Exercise of discretion

102. As I have not found that there are grounds to make a costs order against Mr Din, I do not need to go on to consider whether to exercise my discretion to make an order.

103. However, for the sake of completeness, I add that if I had found Mr Din's conduct to have been grounds to make an order, I would not have exercised my discretion to award costs. The main reasons for this are:

    103.1. The hearing on 12 May 2023 was not wasted, as it was used to determine the Acas issue. If the time point had been considered on 12 May 2023 instead of the Acas point, another hearing would have been required in any event, as there would have been insufficient time to deal with both the time point and the Acas point in a three hour hearing;

    103.2. Mr Din is a litigant in person and I have accepted that he tried to comply with the tribunal orders, but found this difficult and experienced particular difficulties as a result of the electronic bundle. The final hearing will be in person and the respondent must provide Mr Din with paper copies of all documents which will be required for the hearing.

104. For these reasons, BMW's application for costs is refused.

**The costs application by GI**

105. After the hearing on 12 May 2023, Judge Reindorf decided that Mr Din's claim against GI should be struck out. GI made a costs application against Mr Din in writing on 9 June 2023. GI did not attend the hearing on 29 June 2023. It appears that GI may have decided not to pursue its costs application, perhaps to save further costs and time in light of the decision to strike out the claim against them.

106. If I am wrong about this and GI are seeking a hearing to decide their costs application, or asking for their application to be decided without a hearing, they should confirm this to the tribunal and the other parties.

**Employment Judge Hawksworth**

Date: 18 September 2023

Sent to the parties on:
19 September 2023 .....

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For the Tribunal Office

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