EMPLOYMENT TRIBUNALS

Claimant: **Miss S Darr**

Respondent: **CORE Education Trust**

Heard at: **Birmingham** (in public, by CVP)

On: **5 April 2023**

Before: **Employment Judge Kenward (sitting alone)**

Representation

Claimant: **Mr R Anderson, Counsel**
Respondent: **Mr R Powell, Counsel**

PRELIMINARY HEARING
RESERVED JUDGMENT

1. The Claimant's application to revoke previous Case Management Orders is dismissed.
2. The Claimant is not permitted to amend her Claim to include the amendments proposed in the Further and Better Grounds of Claim served on 23 December 2022.
3. The Claimant's complaints of victimisation contrary to Employment Rights Act 1996 section 47B (as set out in her original Grounds of Claim dated 1 April 2022 and in the Further and Better Grounds of Claim dated 27 June 2022 are dismissed as out of time.
4. The Claimant's complaints of direct discrimination contrary to Equality Act 2010 section 13 and harassment contrary to Equality Act 2010 section 26 (as set out in her original Grounds of Claim dated 1 April 2022 and in the Further and Better Grounds of Claim dated 27 June 2022 are dismissed as out of time.

REASONS

1. This was an open / public Preliminary Hearing to determine the Respondent's application to strike out the Claim as out of time whilst the Claimant had made an application seeking to vary an Order that the issue should be determined at the Preliminary Hearing listed for that purpose and that the requirement to serve a Statement of Evidence as to the time issues should be revoked, as well as an application that permission should be granted to amend the Claim to add further complaints including a new complaint of constructive dismissal and further complaints of discrimination and victimisation.

The Claim and subsequent proceedings

2. The Claimant was the Head Teacher of the Rockwood Academy. The Respondent is the Trust responsible for the Academy.

3. The Claimant provided notification to ACAS on 24 January 2022. The ACAS certificate was issued on 4 March 2022. Tribunal proceedings were commenced by way of an ET1 Form of Claim on 1 April 2022. As at that date, the Claimant's employment was still continuing.

4. At the outset of the Preliminary Hearing, it was agreed that proceedings had been commenced out of time. The Respondent calculated that the proceedings were 97 days out of time. No issue was taken with this calculation by the Claimant.

5. The ET1 Form of Claim made complaints of race discrimination and religion / belief discrimination. The Grounds of Claim attached to the ET1 Form of Claim describe the Claimant as a Muslim of Pakistani heritage.

6. Paragraph 4 of the original Grounds of Claim can be broken down into 33 separate sub-paragraphs making allegations of detriment or mistreatment.

7. Paragraph 5 of the original Grounds of Claim makes it plain that these allegations are relied upon individually or cumulatively as amounting to less favourable treatment on the grounds of race and / or religion.

8. The matters complained of in paragraphs 4.1.3 and 4.1.14 of the original Grounds of Claim are also alleged, in the alternative, to amount to harassment contrary to Equality Act 2010 section 26.

9. Paragraph 7 makes it plain that the allegations between paragraphs 4.1.9 and 4.1.25 are also relied upon individually or cumulatively as amounting to whistleblowing victimisation.

10. The whistleblowing victimisation complaint is on the basis that safeguarding concerns referred to as being raised at paragraph 4.1.8 amounted to a protected disclosure.

11. Not all of the allegations were dated. Most pre-dated 6 June 2021 as that was the date that the Claimant was involved in a serious road traffic accident which

subsequently caused her to be absent from the School. Paragraphs 4.1.21 to 4.1.25 deal with allegations after that date, the latest of which is dated as being in or around October 2021 (see paragraph 4.1.21). Paragraph 4.1.22 is describing treatment during the Claimant's sickness absence, namely her e-mail accounts being disabled, staff being told to have nothing to do with her and staff being given her name as a reason for changing staff terms and conditions, although no dates are provided in relation to these various issues. Paragraph 4.1.25 was alleging that, since 24 August 2021, "*R has sought to engage C in protected conversations despite C not being medically fit to engage*", although no further dates were given for this.

12. However, it was not suggested at the Preliminary Hearing that the way in which the original Claim was pleaded was such as to plead that there was any continuing course of conduct which continued to a point in time that was in time.

13. Furthermore, it was not suggested at the Preliminary Hearing that there were any causes of action pleaded in the original Grounds of Claim that post-dated the cause of action from October 2021 which was referred to at paragraph 4.1.21 of the Grounds of Claim. Indeed, as stated above, it was accepted that the original Grounds of Claim, as originally pleaded, were out of time.

14. Following receipt of the Claim, on 5 April 2022, the case was listed for a case management hearing to take place on 11 October 2022 with an estimate of 90 minutes.

15. On 3 May 2022, the Respondent filed its Response with a covering e-mail which made a striking out application as set out in paragraph 1 of the Respondent's Grounds of Resistance.

16. The e-mail was copied to the Claimant's Solicitors on the basis that they should send any objections to the Tribunal.

17. It was suggested that the case management hearing be converted to an open (public) Preliminary Hearing with an estimate of one day so as to consider the striking out application.

18. The basis of the striking out application was that all of the complaints were out of time and that the date of the most recent act or omission complained of was that alleged in paragraph 4.1.21 which was complaining about the contents of an occupational health referral in or around October 2021 which the Respondent stated had actually been made on 1 October 2021.

19. There were documents which appeared at the end of the bundle which showed that the issue of the occupational health referral in October 2021 in fact involved the Respondent seeking clarification on 1 October 2021 as to a report sent the previous day, and in particular as to whether, notwithstanding not being able to attend meetings, the Claimant could deal with issues in respect of a disciplinary investigation in writing or through her union, with the Claimant subsequently objecting to the content of this request, in particular the fact that it was referring, in alleged breach of her data protection rights, to those disciplinary processes.

20. If this was the last alleged act, then ACAS early conciliation should have been commenced on or before 31 December 2021, when, in fact, it was commenced on 24 January 2022, 24 days later.

21. Put another way, any alleged acts of discrimination or victimisation which took place before 25 October 2021 would be out of time.

22. However, the consequence of the fact that any time limit running from 1 October 2021 had already expired at the point in time when ACAS was notified of the prospective Claim, was that there was no extension to the time limit for the purposes of early conciliation. Thus, the date of the eventual commencement of proceedings on 1 April 2022 was 91 days after the expiry of the primary three-month time limit running from the date of any cause of action which arose on 1 October 2022.

23. The Respondent sought to contend that there would be no basis for extending time, whether on the basis of the Tribunal's discretion to extend time in respect of a complaint under the Equality Act 2010 where just and equitable or on the basis that it had not been reasonably practicable to submit the whistleblowing victimisation complaint in time.

24. The Grounds of Resistance set out a chronological narrative effectively dealing with various of the complaints at paragraph 4 in the Grounds of Claim.

25. It is to be noted that, in relation to paragraph 4.1.22 of the Grounds of Claim, paragraph 2.26 seems to suggest that the Claimant's IT account was suspended within the first couple of weeks of her sickness absence in June 2021. Paragraph 2.27 also deals with paragraph 4.1.22, but this is simply to deny that the Respondent had changed any terms and conditions of employment.

26. Paragraphs 3 and 5 of the Grounds of Resistance effectively made various requests for further and better particulars.

27. On 31 May 2022, following receipt of the response, the Tribunal directed that the Claimant provide comments on the Respondent's application to strike out the Claim and also provide the further particulars requested in paragraph 5.1.2. Technically, the direction to provide further particulars only related to the further particulars requested in respect of any protected disclosure.

28. On 27 June 2022, the Claimant commented on the striking out application. The e-mail does not specifically take issue with the contention that the last act alleged occurred more than three months before ACAS was notified. However, it does suggest that the Claimant's position was that it would be just and equitable to extend time and it was not reasonably practicable to present the whistleblowing victimisation complaints in time. The grounds relied upon for it being just and equitable or not having been reasonably practicable are not set out in the e-mail. However, it was stated that these were matters to be dealt with "*by way of hearing evidence*", with the one area where there seems to have been agreement being that the issue should be dealt with at a one day open Preliminary Hearing.

29. The same e-mail referred to attaching "*further and better particulars of claim*" (headed "*Further and Better Grounds of Claim*") which essentially either added (in red) to the existing sub-paragraphs of paragraph 4 of the Grounds of Claim or added new sub-paragraphs. Given that some of the sub-paragraphs are broken down into further sub-paragraphs. there were now well over 50 separately numbered sub-paragraphs or allegations.

30. Although the further and better particulars were being provided in late June 2022, no more recent acts of alleged detriment or mistreatment were pleaded than those which had been set out in the original Grounds of Claim. In other words, the same analysis to the effect that the last act or omission was on 1 October 2021 was still capable of applying.

31. On 15 July 2022, the Tribunal directed that the striking out application and any other jurisdictional applications would be "*addressed at the preliminary hearing on 11th October 2022*". Any amended Grounds of Resistance were to be filed by 12 August 2022.

32. On 12 August 2022, the Respondent indicated that it was not filing amended Grounds of Resistance on the basis that the further and better particulars did not involve seeking to bring any "*new heads of claim*" and did not affect the submissions as to time limits already made. It was again suggested that the case management Preliminary Hearing be converted to a one-day open Preliminary Hearing, pointing out that it seemed that both parties had agreed to this.

33. On 3 October 2022, Employment Judge Battisby dealt with this application and postponed the hearing on 11 October 2022 on the basis that the case should be listed for an open Preliminary Hearing. The Claimant was ordered, by 31 October 2022, to serve a witness statement "*dealing with the time limit issue only and explaining the grounds on which you will be relying for an extension of time*".

34. No statement was forthcoming by that date, and the very next day (1 November 2022) the Respondent made an application for an unless order on the basis that the Respondent "*cannot take its preparation for this case and the open preliminary hearing any further until it knows the reason(s) that the Claimant is seeking to rely upon for the timing of the submission of her claim*".

35. 29 minutes after this application had been made, the Claimant's Solicitors made their own application which was seeking to revoke the Order dated 3 October 2022 (which had been to the effect that a statement should be served and that the matter would be listed for an open Preliminary Hearing). The grounds were that the Claimant had now resigned by giving notice, albeit her employment would not terminate until 31 December 2022, and she was intending to bring a complaint of constructive dismissal relying upon, as breaches of contract, the very same alleged detriments and alleged acts or omissions set out at paragraph 4 of the Grounds of Claim and Further and Better Grounds of Claim. Given that her employment had not yet terminated, it was contended that she would be in time for the purposes of any constructive dismissal complaints, so any Final Hearing would need to examine the factual issues raised in the complaints already before the Tribunal, whether or not they were out of time as alleged acts of discrimination or victimisation.

36. It is to be noted that this e-mail does not state that there had been any subsequent alleged detriments or alleged acts or omissions which were being relied upon as further acts of discrimination or victimisation. That said, it would be unlikely that the Claimant would have resigned and claimed constructive dismissal in August 2022 if nothing further had happened since October 2021.

37. On 26 November 2022, an open Preliminary Hearing was listed for 5 April 2023 to consider the striking out application originally made by the Respondent.

38. It seems that, on or about 28 November 2022 (the document is not in the bundle), the Respondent had been directed to comment on the Claimant's application and did so on 5 December 2022, at a point in time when the Claimant's application to amend the Claim had not yet been made, so it would not have been appreciated that the application would seek to include further or more recent allegations of discrimination and victimisation.

39. Thus, at this point, the Respondent's grounds of objection were pointing out the differences between the case proceeding as a constructive dismissal case and the case proceeding as a discrimination / victimisation case.

40. On 23 December 2022 the Claimant submitted an application to amend her Claim. The application made it clear that the Claimant was also wanting to amend her Claim to add more recent alleged acts of discrimination or victimisation with the last such act dating from 17 November 2022 and the Claimant's case being that the acts of discrimination / victimisation were pursued either individually, or, in the alternative, as continuing courses of conduct.

41. The application referred to relevant case law in relation to amendments, notwithstanding the fact that the written application seemed to be made under rule 34 of the Tribunals Rules of Procedure 2013 which deals with adding parties.

42. Accordingly, the Claimant's Solicitors put forward the Claimant's proposed amended Grounds of Claim in the form of the Further and Better Grounds of Claim which had been served on 27 June 2022 with the proposed new amendments shown in green text. The proposed amendments add a further 16 sub-paragraphs making further allegations of detriment or mistreatment by way of acts or omissions. Four of the new sub-paragraphs make allegations as to matters which pre-date the original Grounds of Claim although the only one of these allegations which post-dated 1 October 2021 is that set out in paragraphs 4.1.29 which relates to 24 February 2022 (it should also be noted that the allegation in paragraph 4.1.31 refers to an undated refusal to change the grievance investigating officer). With the exception of paragraph 4.1.39 (which contains two sub-paragraphs) and paragraph 4.1.40, most of the other individual complaints relate to the period between May and September 2022, so would have been outside the primary time limit as at the date of the application to amend.

43. The complaints at 4.1.39 and 4.1.40 relate to the grievance outcome received on 17 November 2022 and the adequacy of the grievance investigation in respect of which, on 14 November 2022, the Claimant had received the notes of the investigatory interviews conducted.

44. The new allegations are put forward as complaints of both direct discrimination and / or whistleblowing victimisation, but none of them has been labelled as harassment.

45. The Claimant's resignation is alleged to amount to an unfair dismissal, a discriminatory dismissal and an automatically unfair dismissal for the purposes of Employment Rights Act 1996 section 103A.

46. The Tribunal only dealt with the application to amend through a letter dated 6 February 2023 acknowledging the correspondence. This was a letter written by the Tribunal in response to various letters from the parties with the Tribunal's letter stating that Legal Officer Metcalf had directed that the parties be advised "*that the Open Preliminary Hearing will remain as listed*". There was some discussion at the Preliminary Hearing as to whether this letter should be treated as having disposed of the Claimant's application to vary the earlier Order. It is to be noted that the letter is silent as to the Claimant's application itself, does not say that the application has been refused and does not mention the issue in respect of the Claimant having been ordered to serve a Statement.

47. On this basis, I was satisfied that the following applications still remained live applications:
(1) the Respondent's striking out application on the grounds of the Claim being out of time;
(2) the Claimant's application to vary the Order which had listed the open Preliminary Hearing to consider the striking out application and required a Statement of Evidence to be filed as to the time issues;
(3) the Claimant's application to amend her Claim.

48. However, in the circumstances, it was a little surprising that the Claimant had not provided a Statement of Evidence for the Preliminary Hearing given that the application to strike out the Claim as out of time remained listed and there were clearly two different outcomes possible in relation to the application to vary the Order listing the Preliminary Hearing and requiring a Statement (so that not serving a Statement amounted to putting all of one's eggs in one basket).

49. It made sense to deal first with the Claimant's application to vary the previous Order listing the case for a Preliminary Hearing to consider time limits, as, if successful, any consideration given to the Respondent's application at the Preliminary Hearing would potentially be otiose.

50. In Serco Limited v Wells [2016] ICR 768, it was made clear any interference with a previous interlocutory order by a Judge of equivalent jurisdiction had to be "*necessary in the interests of justice*", in accordance with rule 29 of the Employment Tribunals Rules of Procedure 2013, which was to be interpreted as requiring either (1) a material change of circumstances since the Order was made; or (2) the Order has been based on a mistake (of fact or, possibly, in very rare cases, of law, although that sounds much more like the information for appeal); or (3) there had been an omission to state relevant facts (although this list was not necessarily exhaustive). These principles were summarised and applied, in the context of a Preliminary Hearing having been listed to consider time issues, in L v

X [2020] UKEAT/0079/20/RN. It appeared that the Claimant was seeking to argue that there was a change of circumstances based on having intimated seeking to amend her Claim to add a complaint of constructive dismissal (and then having later applied to amend her Claim both in relation to adding a complaint of constructive dismissal and adding new complaints of discrimination and whistleblowing victimisation in the period up to and beyond having given her notice of resignation).

51. I rejected the Claimant's application to vary the previous Order in this way with reasons given orally at the time and now provided in writing here. Those reasons summarised the history described above. Effectively, I was dealing with representations made by the Claimant that the hearing should not proceed to consider the application which was based on the original Claim being contended to be out of time when it was commenced on 1 April 2022 where it was not disputed that the Claim as pleaded had been out of time at that point. As such, viewed in relation to the original Claim, this was not a case where the argument for dealing with the time issue at a Final Hearing was that there would need to be a determination as to whether the various acts which would otherwise be out of time were linked in such a way with the last pleaded act, which act was in time, so as themselves to be in time. In this context, the time issue seemed to boil down to whether time should be extended.

52. It may well be the case that the new proposed constructive dismissal complaint relied upon the same factual matrix as giving rise to a repudiatory breach of contract but that was a significantly different sort of enquiry. Moreover, these were reasons for possibly arguing that the evidence may have to be heard anyway or that there may not be a significant saving in time, but they were not conclusive arguments for not determining the time issue at the Preliminary Hearing when it was already taking place. The Claimant had previously indicated that there was no reason for that issue not to be capable of being dealt with in an open Preliminary Hearing. The fact that further complaints had been put forward might mean that the saving of time which might be achieved through a certain outcome would be less, but was not, in itself, a reason for not dealing with the issue which was listed and remained listed. The discrimination and victimisation complaints in the original Claim would involve substantial Tribunal time, which might be reduced; so that it made sense, if it was possible, to seek to narrow the issues; and the Respondent was ordinarily entitled to know the case that it would need to meet and whether that case was within the jurisdiction of the Tribunal. On the face of it, if the complaints in the original Claim were not within the jurisdiction of the Tribunal, it made sense to determine the jurisdictional issue at an early stage. I was not satisfied that the application to amend amounted to a change in circumstances which warranted varying any previous Order. Alternatively, in so far as it did amount to a change in circumstances, I was not satisfied that it caused the position to be such that the Respondent's application could not be considered at a point in time when it had been listed. Accordingly, I was not satisfied that interference with a previous interlocutory order by a Judge of equivalent jurisdiction was necessary in the interests of justice. In so far as the application to amend the Claim was relevant to the issue of whether the original Claim should be treated as being within the jurisdiction of the Tribunal, I invited the parties to address the issue of whether the application to amend should be allowed, in their submissions on the time points.

The application that the time issue should not be considered at the Preliminary Hearing was accordingly dismissed.

53. The Claimant's application to revoke the previous Order was also made in relation to providing a Statement of Evidence. Once I had confirmed that the Preliminary Hearing would deal with the time issue, the application being pursued by the Claimant changed so that the Claimant's application now became that she should be allowed to give evidence, notwithstanding having failed to file and serve the Statement of Evidence ordered.

54. In relation to this revised application, Mr Powell argued that, because the Claimant had failed to comply with the Order in respect of providing a Statement of Evidence, she should not be given permission to give evidence. He was suggesting that prejudice would arise from the Claimant being able to adduce evidence of which the Respondent should have had notice. He also pointed out that until I had made my decision on the first part of the Claimant's application it was still unclear as to what the position would be in relation to the application that the Claimant had made in November to the effect that the Preliminary Hearing should not go ahead and that she should not be required serve witness evidence. He further pointed out that the application effectively to revoke the previous Case Management Order had been made the morning after the deadline for making or providing the Statement. Mr Powell made some obviously pertinent points, namely that no person coming to a hearing where there are two possible paths which might ultimately be followed, should come to the hearing only, in effect, prepared for one of the two possible paths to be followed. Thus, he submitted that any prejudice was of the Claimant's own making. She had had the option to prepare a Statement of Evidence in case it was needed and did not take that option. In referring to possible prejudice to the Respondent, he sought to suggest that the Claimant had not previously intimated that she would wish to call evidence. This was not entirely accurate because, of course, when the Claimant originally commented upon the striking out application, the point that was being made by the Claimant was that the striking out application should be dealt with at an open Preliminary Hearing at which there would be evidence. Moreover, it was also clear from those comments that the points which would be pursued or would need to be dealt with by way of evidence were the issues as to whether or not it was just and equitable to extend time, or whether or not it had been reasonably practicable to issue the victimisation proceedings in time. However, Mr Powell was right that there had not been outlined the factual basis or the factual matters that the Claimant would be relying upon in support of those two submissions that time should be extended. He made the point that the Order for a Statement to be served was so that the Respondent would not be taken unawares and so that the Respondent would know the nature of the Claimant's assertions. Thus, he identified possible prejudice to the Respondent in not at this late stage knowing what the Claimant might say in evidence and the concern that evidence might be given at the Preliminary Hearing, upon which further instructions would then be needed.

55. In the circumstances, consideration was given as to the practicalities regarding the Claimant giving evidence. The Tribunal agreed to the Claimant's proposal of providing a Statement at the start of the afternoon session at 14.00 pm with the Respondent then able to consider its position in the light of the content of the

Statement. Thus, rather than have the Claimant deal with any evidence-in-chief by way of oral evidence, it was directed that a draft Statement of Evidence should be provided and considered at which point Mr Powell could address the Tribunal, once the Respondent was aware of what evidence the Claimant was intending to give, as to any prejudice which might flow from that and any consequences which he might seek to assert should follow if there was any prejudice. In the event, following provision of the Claimant's Statement of Evidence, Mr Powell did not seek to assert that the Respondent was not in a position to deal with that evidence at the Preliminary Hearing.

Findings

56. The Claimant's employment as Headteacher commenced in July 2017. Her various complaints in the original Claim cover the period between July 2020 and the beginning of October 2021. She remained at work, notwithstanding alleged ongoing bullying / detrimental behaviour, until 6 June 2021 when she had a road traffic accident. She then commenced a period of sickness absence and did not return to work at any point.

57. An occupational health report had been completed on 22 September 2021 which diagnosed the Claimant with mild trauma brain injury, PTSD, and a shoulder impairment. It was stated that her neurological symptoms would improve but it would take some time and it was difficult to give a specific timeframe for that. It was further suggested that the Claimant should avoid triggers and stresses which could exacerbate the symptoms further, including avoiding stressful situations, prolonged conversations and screen work. At this stage, she was signed off work until November 2021 and would likely be signed off further dependent on the symptoms. She was not fit to attend a meeting at that time.

58. The Claimant's fit notes in the period between September 2021 and April 2022 refer to PTSD and work-related stress as the cause of her sickness absence. There was no reference to depression and anxiety on the fit notes.

59. The Claimant relies upon having raised concerns about bullying on several occasions both verbally and in an e-mail prior to raising a grievance (which seems to refer to her grievance dated 4 February 2022).

60. At all material times the Claimant was being assisted by her trade union and / or had available to her the assistance of her union.

61. The Claimant had instructed a firm of Solicitors (Wildings) in around late October / early November 2021.

62. It was common ground, as referred to by both parties at the Preliminary Hearing, that the Claimant engaged in 'without prejudice' communications with the Respondent in December 2021. She states that occupational health had stated that the Respondent could contact her via her trade union but needed to give her sufficient time to reflect on any such contact and give instructions. It was accepted that there had been correspondence from the Claimant's then Solicitors on 13 December 2021 and within that correspondence reference was made to potential causes of action and the factual issues involved.

63. The Claimant states that she sought to reach an agreement with the Respondent, but because no resolution was found she saw that it was necessary to file a grievance which it took her a long time to prepare. The grievance letter dated 4 February 2022 was a detailed document (running to six pages) which provided much of the same narrative (spread over 24 numbered paragraphs) as set out in the original Grounds of Claim at paragraphs 4.1.1 to 4.1.25.

64. Wildings remained involved on behalf of the Claimant until late February 2021 as that was the period when the last piece of correspondence from Wildings was received. The Claimant had instructed different Solicitors, Atkinson Rose, towards the end of ACAS early conciliation period (the ACAS certificate was issued on 4 March 2022) as to taking further steps when early conciliation was not successful.

65. The Claimant states that, around the end of March 2022, it became clear that discussions with the Respondent to try and resolve matters were not going anywhere and therefore she instructed her current legal representatives, Atkinson Rose, to proceed with the Claim to the Tribunal.

66. The history of the proceedings following the submission of the ET1 Form of Claim on 1 April 2022 has already been set out above.

A summary of the relevant law

67. As far as the whistleblowing victimisation complaints of detriment are concerned, section 48(3) of the Employment Rights Act 1996 ("ERA 1996") provides that an Employment Tribunal shall not consider such a complaint unless it is presented "*(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months*". For these purposes, where an act extends over a period, the "*date of the act*" means the last day of that period.

68. The above provisions as to the time limit of three months and the limited basis upon which it may be extended are in similar terms to the provisions in respect of unfair dismissal complaints at ERA 1996 section 111, to which most of the guidance in the case law relates. The burden of proof rests on the Claimant (see Porter v Bandridge Limited [1978] IRLR 271).

69. If the Claimant succeeds in proving that it was not reasonably practicable to present her claim in time, the Tribunal must then consider whether it was presented within a reasonable time thereafter. The Claimant is expected to make his or her application as quickly as possible once it has become reasonably practicable to do so (see Westward Circuits Ltd v Read [1973] 2 All ER 1013).

70. In relation to discrimination complaints, section 123(1)(a) of the Equality Act 2010 ("EA 2010") provides that "*a complaint … may not be brought after the end*" of … "*the period of 3 months starting with the date of the act to which the complaint relates*" or "*such other period as the employment tribunal thinks just and equitable*". EA 2010 section 123(3)(a) provides that "*conduct extending over a period is to be*

treated as done at the end of the period" and section 123(3)(b) provides that "*failure to do something is to be treated as occurring when the person in question decided on it*".

71. In relation to the issue of considering whether it would be just and equitable to grant an extension of time, the Tribunal was referred to and considered the guidance provided in Hutchison v Westward Television Limited [1977] ICR 279, British Coal Corporation v Keeble [1997] IRLR 336, and Mills v Crown Prosecution Service v Marshall [1998] IRLR 494.

72. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, [2021] ICR D5, CA, Underhill LJ noted that Tribunals had tended to use the factors relevant to dealing with any discretion to extend time in personal injury cases, as set out in Limitation Act 1980 section 33, as a checklist and advised that they should not do so. He went on to give the guidance set out below.

"*The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking.*

The following is a non-exhaustive list of factors which may prove helpful in assessing individual cases:

— the presence or absence of any prejudice to the respondent if the claim is allowed to proceed (other than the prejudice involved in having to defend proceedings);

— the presence or absence of any other remedy for the claimant if the claim is not allowed to proceed;

— the conduct of the respondent subsequent to the act of which complaint is made, up to the date of the application;

— the conduct of the claimant over the same period;

— the length of time by which the application is out of time;

— the medical condition of the claimant, taking into account, in particular, any reason why this should have prevented or inhibited the making of a claim;

— the extent to which professional advice on making a claim was sought and, if it was sought, the content of any advice given".

73. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194, CA, the Court of Appeal dealt with the argument that, in the absence of an explanation from the Claimant as to the reasons for not bringing a Claim in time and an evidential basis for that explanation, the Employment Tribunal could not

properly conclude that it was just and equitable to extend time. The argument was rejected, as set out below.

"*I cannot accept that argument. As discussed above, the discretion given by section 123(1) of the Equality Act 2010 to the employment tribunal to decide what it 'thinks just and equitable' is clearly intended to be broad and unfettered. There is no justification for reading into the statutory language any requirement that the tribunal must be satisfied that there was a good reason for the delay, let alone that time cannot be extended in the absence of an explanation of the delay from the claimant. 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*" (paragraph 25).

74. The Tribunal notes that the above reasoning was relied upon by the Employment Appeal Tribunal in Concentrix CVG Intelligent Contact Limited v Obi [2023] ICR 1, EAT.

75. The fact that a Claimant has awaited the outcome of his or her employer's internal procedures before making a Claim is just one matter to be taken into account by an Employment Tribunal in considering whether to extend the time limit for making a Claim (see Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713, CA).

76. In Bexley Community Centre v Robertson [2003] IRLR 434, CA, the Court of Appeal provided the guidance set out below.

"*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*" (Auld LJ at paragraph 25).

77. Thus, the burden of proof is on a Claimant to satisfy the Tribunal that any complaint was either made within the applicable time limit for doing so, or that it would be just and equitable to extend time.

78. The key test for considering amendments is identified in Cocking v Sandhurst (Stationers) Limited [1974] ICR 650, as below.

"*In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused*".

79. That key test was effectively refined and repeated in Selkent Bus Company Limited v Moore [1996] ICR 836, which set out some of the factors which may be taken into account in considering whether to exercise the discretion were set out. They

are: the nature of the amendment, the applicability of time limits and the timing and manner of the application. Those factors were given as examples as to what may be taken into account when conducting the fundamental balancing exercise which was described in Cocking. They are not therefore the only factors that may be relevant. The exercise of balancing injustice or hardship remains the paramount consideration.

80. In Abercrombie and Others v Aga Rangemaster Limited [2014] ICR 209, CA, Underhill LJ made the observations set out below.

"*Consistently with that way of putting it, the approach of both the Employment Appeal Tribunal and this court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted*".

81. Underhill LJ advised the Tribunal to focus on the practical consequences of allowing an amendment and this practical approach should underlie the entire balancing exercise. This means that the considerations for the Tribunal may include those of: if the application is refused how severe the consequences will be in terms of the prospects of success of the Claim or defence, and if permitted what would be the practical problems in responding.

82. In Vaughan v Modality Partnership [2021] ICR 535, EAT, HHJ Tayler similarly identified that the main focus should be on the practical consequences of allowing an amendment. This requires a focus on reality rather than assumptions. The real question when considering the injustice of refusing an amendment is whether the Claimant will be prevented from getting what they need. An amendment may be of practical importance because, for example, it is necessary to advance an important part of a Claim or defence.

83. The decision in Galilee v Commissioner of Police of the Metropolis [2018] ICR 634, EAT, considered the issue as to whether the original Claim had to be a valid Claim to be capable of being amended. Relying on Abercrombie v Aga Rangemaster Limited [2014] ICR 209, CA, it summarised the position as being as set out below.

"*In my view, therefore, the reasoning in paragraph 54 (set out above in the preceding paragraph) must be "one of principle" and I think it applies also to a challenge to the jurisdiction of the employment tribunal on the grounds that the claim has not been brought within the time limit for doing so. Such a claim is not a nullity ab initio; it is a valid claim unless and until the employment tribunal decides that it is out of time either because of a mathematical computation as to the period between the act complained of and the date when the proceedings were commenced or between the last act in a series of acts and the date of the commencement of the proceedings or, in discrimination cases, because the tribunal concludes that it is not just and equitable to extend that period. Accordingly, if want of jurisdiction was what Mummery J had in mind when he used the word*

"essential" I do not think that the reasoning in para 54 of the judgment in Abercrombie supports it being "essential", in the sense of it being mandatory, to dispose of limitation issues before granting permission to amend" (paragraph 79).

84. The case of Transport and General Workers Union v Safeway Stores Limited [2007] UKEAT/0092/07, is authority for the proposition that the fact that an amendment would introduce a claim that was out of time was not decisive against allowing the amendment, but was a factor to be taken into account in the balancing exercise. Thus, the extent to which any new allegations are out of time is a factor to be weighed by the Tribunal in the balancing exercise, and the weight to be attached to it varies according to the circumstances of each case.

85. In Galilee (see above), it was held that, where new complaints were added by way of amendment to an existing Claim, there was no doctrine of "relation back" by which the new complaints were treated as having been made at the time when proceedings were started. Thus, in relation to the issue of "relation back", the conclusion at paragraph 109(a) of Galilee, was as set out below.

"*Amendments to pleadings in the employment tribunal, which introduce new claims or causes of action take effect for the purposes of limitation at the time permission is given to amend and there is no doctrine of "relation back" in the procedure of the employment tribunal*".

Submissions

86. The Claimant did not seek to dispute that the entirety of the original Grounds of Claim could be dismissed as out of time. The position of the Claimant was originally set out in the e-mail of 27 June 2022 which stated that with "*regard to the question of time limits, the Claimant will say that it would be just and equitable to extend time and that it was not reasonably practicable for the Claimant to present her detriments claim in time*". This was the same e-mail which attached the document seeking to provide further particulars of the Claim.

87. As of 23 December 2022, the Claimant's position became that she should be allowed to amend her Claim to include further complaints, which were still in time at that point, namely a complaint of an unfair constructive dismissal with the dismissal also alleged to be discriminatory and automatically unfair under ERA 1996 section 103A plus additional complaints of discriminatory treatment and / or whistleblowing detriments for which the most recent cause of action pleaded was 17 December 2022 and with the matters pleaded being relied upon both separately and as part of a course of conduct.

88. The Claimant's legal submissions in support of the application to amend the Claim had been set out as part of the written application and included an analysis of the relevant case law. Since the victimisation and discrimination complaints were pleaded as a course of conduct, it was asserted that there were no time limits issues (as at the date of the written application to amend); any delay in making the application to amend was partly explained by waiting for the outcome of the Claimant's February 2022 grievance (which was provided in November 2022), and there was no prejudice to the Respondent as any complaints which (if viewed

individually) were outside the primary time limits would have to be considered anyway due to the way in which the Claimant was relying upon a course of conduct and cumulative breach of the implied trust and confidence. Reference was made to Sefton MBC v Hincks [2011] ICR 1357, EAT, where Underhill J (as he then was) stated (in the context of equal pay litigation by local authority employees) that "*it is particularly important in this kind of mass litigation to observe what is in truth a general principle, namely that amendments should not be denied purely punitively and where no real prejudice would be done by their being granted*".

89. At the Preliminary Hearing it was accepted that, when proceedings were originally issued at the beginning of April 2022, they were out of time as the last pleaded act in time had occurred in October 2021. Two main arguments were put forward. First, it was contended that the delay had now been explained by the Claimant and arose from the circumstances which she described. It was then contended that, in any event, the delay had not prejudiced the Respondent, and the reality was that, because the Claimant was able to pursue proceedings arising out of the same factual circumstances, whether through her application to amend her Claim being accepted, or through issuing a new Claim, the Tribunal was going to have to hear evidence on these matters anyway.

90. Reliance was placed upon the decision of the EAT in De Lacey v Wechseln Limited [2021] IRLR 547, to the effect that a discrimination complaint arising out of a constructive dismissal might be timeous even if the discriminatory events were out of time. Thus, the fact that the incidents in issue may be out of time for a free-standing discrimination complaint did not mean that they should be disregarded for a discriminatory constructive dismissal claim. Moreover, even though they were out of time in this way, the Tribunal would need to reach a concluded view on whether the incidents were discrimination for the purposes of the discriminatory constructive dismissal complaint, and, if so, whether that meant that the constructive dismissal itself was unlawful discrimination.

91. It was specifically asserted (in a Case Management Agenda which had been used to set out the Claimant's position) that "*C has an ACAS EC certificate and could still issue those claims separately, but sees no merit to doing so for the reasons aforesaid*" (the reasons essentially being that she believed that the new complaints could be added by amending her original Claim). It was further clarified that the Claimant had obtained a further ACAS certificate in respect of the new complaints and would issue new proceedings in the event that she was not given permission to amend the original Claim or in the event that it was necessary to protect her position.

92. It was further submitted that the circumstances described by the Claimant meant that it had not been reasonably practicable to issue proceedings in respect of the original victimisation complaints in time, and these complaints had then been brought within a reasonable period of time thereafter.

93. The Respondent's Submissions originally sought to highlight the absence of any explanation put forward by the Claimant for the delay in issuing proceedings and, at the end of the Preliminary Hearing, in the light of the evidence subsequently given by the Claimant, then sought to challenge the adequacy of that explanation.

94. For the purposes of considering whether it would have been reasonably practicable to have issued proceedings in respect of the original victimisation complaint in time, it was contended that the explanation put forward did not provide a basis for finding that it was not reasonably practicable or that any extension should be granted.

95. The Tribunal was further invited to view the explanation as inadequate on the basis that the explanation for any delay was a relevant factor for the purposes of the discretion under the Equality Act 2010. The evidence suggested that any delay was a matter of choice informed by legal advice.

96. The other main focus of the Respondent's Submissions was on the issue of prejudice. It was suggested that the Respondent would be prejudiced in having to adduce evidence in relation to incidents going back to 2020 and, in particular, in relation to verbal communications going back to 2021 where the focus would be on recalling the motivations of those involved and what happened, with this being especially difficult where it was not documented.

97. In terms of prejudice, the Respondent sought to place specific reliance upon the assertion made by the Claimant (as set out above) that a further ACAS certificate had recently been obtained, so that it was being said on behalf of the Claimant that she could simply file a new Claim which would be in time. On the basis of this being the Claimant's position, it was asserted that the Tribunal should treat the position as being one in which there was no prejudice to the Claimant, both for the purposes of the exercise of the just and equitable discretion and for the purposes of deciding whether to permit the original Claim to be amended. The Claimant would not be prejudiced by the original Claim being dismissed as out of time or by permission to add new complaints to original Claim being refused, as she was saying that she could simply issue a new Claim.

Discussion and Decision

(1) Application to amend Claim

98. In arriving at the decision of the Tribunal, I considered the application to amend first.

99. For the sake of completeness, it should be noted that the Claimant had originally served further and better Grounds of Claim on 27 June 2022. Essentially, this provided more detail in relation to existing causes of action, partly as result of a request for further and better particulars. The Respondent indicated that it was not filing amended Grounds of Resistance on the basis that the further and better particulars did not involve seeking to bring any "*new heads of claim*". In any event, no more recent acts of alleged detriment or mistreatment were pleaded than those which had been set out in the original Grounds of Claim. As such, the parties and the Tribunal had effectively proceeded on the basis that permission to amend was not required in relation to the further and better particulars which had been provided on 27 June 2022.

100. On 23 December 2022, the Claimant's Solicitors had then put forward the Claimant's further proposed amended Grounds of Claim in the form of the Further and Better Grounds of Claim. In relation to these proposed new amendments, I

considered the application to amend by seeking to identify and have regard to the relevant considerations in accordance with the guidance provided by the relevant case law, as set out above.

101. What is the nature of the proposed amendments? The proposed amendments were effectively being made to introduce new causes of action arising out of alleged acts or omissions which were either not raised in the original Claim or post-dated the original Claim. Effectively the Claimant seeks to rely upon further acts of alleged bullying and / or detrimental treatment over the course of her further employment up to 23 December 2022 as having amounted to direct discrimination and / or whistleblowing victimisation. She alleges that these further acts or omissions, viewed separately, give rise to new individual causes of action in their own right, but she also alleges that they are effectively an extension of the same history of direct discrimination or harassment and / or whistleblowing victimisation set out in the original Claim (albeit those original allegations were at risk of being dismissed as being out of time) and that this course of conduct amounted to an act extending over a period or a series of similar acts which had effectively continued up to a point in time shortly before the termination of her employment. Since her resignation was by reason of this treatment, any constructive dismissal effectively amounted to a discriminatory dismissal and / or an automatically unfair dismissal on the basis of the principal reason for dismissal being that of having made a protected disclosure.

102. It can be seen that the proposed amendment involves various new complaints giving rise to new causes of action leading up to her alleged constructive dismissal together with the addition of further causes of action which are claimed to flow from that alleged dismissal. The proposed amended case makes it clear that, based on subsequent alleged treatment (both that which post-dated the last pleaded act in the original Claim and that which post-dated the original Claim itself) the Claimant now wishes to allege that any discrimination or harassment and / or victimisation did not end in October 2021 (which was the effect of her original pleaded case), but continued beyond that date and, in doing so, gave rise to a constructive dismissal.

103. In terms of time limits, as at the date of the written application to amend, the new causes of action in the proposed amended Clam were potentially in time, either individually (although only in relation to the more recent causes of action which it had been proposed to add to the Claim) or on the basis of the Claimant's pleaded case that the matters amounted to an act extending over a period or a series of similar acts (whether the end of the period and / or the last of the series of similar acts was to be treated as giving rise to a cause of action which dated from the termination of employment in December 2022 or which dated from the last alleged detriment prior to the termination of employment (which was in November 2022)). However, the effect of the conclusion at paragraph 109(a) of Galilee (see above), is that applying to amend, on its own, does not stop the limitation clock running. In the absence of permission to amend being considered before the Preliminary Hearing, the Claimant was always going to be in a position at the Preliminary Hearing where more than three months had passed since the date of the last cause of action.

104. The Claimant's Solicitors had clearly appreciated this, and so had taken steps so as to be in a position to issue separate proceedings should it be necessary (in other words, if permission to amend was not granted). On the basis of the Claimant's Solicitors having obtained an ACAS certificate in respect of a fresh Claim, it was asserted on her behalf that the Claimant was in a position to issue separate proceedings which would be in time in respect of the proposed amended Claim (and the Respondent equally relied upon this position having been asserted). Indeed, at the conclusion of the Preliminary Hearing, when the decision was reserved, it was made plain that proceedings would be issued, if necessary, to protect the Claimant's position, pending any decision.

105. In terms of the timing and manner of the written application to amend, it was made at a point in time when the Claimant was effectively subject to notice with that notice being about to expire. However, it was made nearly four months after the Claimant had given notice (at which point, on her case, there had been a repudiatory breach of the contract of employment) and approximately five weeks after she had received the grievance outcome which was effectively the last pleaded act prior to the alleged constructive dismissal taking effect.

106. In terms of the exercise of balancing injustice or hardship, the Claimant sought to contend that any new matters were matters which the Respondent would potentially have to meet, whether in any amended Claim or in a new Claim. However, the proposed amended Clam would potentially be adding a 14-month period of further alleged discrimination and / or victimisation. This was in relation to a case where the individual causes of action had effectively been itemised in over fifty separate sub-paragraphs (including the further numbered sub-paragraphs within some of sub-paragraphs), with most of these sub-paragraphs setting out more than one cause of action (as the same pleaded facts were being alleged to have amounted to both direct discrimination, with this being both on the grounds of race and on the grounds of religion or belief, and whistleblowing victimisation). The proposed further proliferation of causes of action within a single set of proceedings certainly ran the risk of the point been reached where defending the proceedings would be a particularly burdensome logistical exercise.

107. By contrast, the point could be made, and was made, that there was no injustice or hardship to the Claimant if permission to amend her Claim was withheld if these were matters which she was asserting she was able to pursue, if necessary, by way of a new Claim, in any event, effectively having already taken steps to be able to do so. The Claimant had asserted within the Preliminary Hearing that she was still in a position to issue a new Claim which would be in time.

108. As stated above, in Vaughan, the Employment Appeal Tribunal identified that the real question when considering the injustice of refusing an amendment is whether the Claimant will be prevented from getting what they need. The Claimant's position was that she would not be so prevented, as she had taken steps to ensure that she was in a position, if necessary, to issue a new Claim. The stance being adopted by both parties was that the Claimant was in a position to do this. As such, on the basis of this effectively being the agreed position and there being no representations to the contrary, it was difficult for the Tribunal to see that there was any injustice or hardship to the Claimant, on her own analysis. There was some reference to issues of convenience and cost, but the reality was that the

proposed amended Grounds of Claim were effectively good to go as the Grounds of Claim for any new Claim. The new Claim substantially expanded the scope of the original Claim. Insofar as the new Claim was relying upon a continuation of the treatment originally alleged in the original Claim there would clearly be an argument for hearing the two Claims together, although that argument would effectively be otiose if the original Claim had been struck out as out of time.

109. Ultimately, in the absence of any real prejudice or hardship or injustice having been identified, the Tribunal was not satisfied that it was appropriate to give permission to amend the Claim or that the balance of prejudice was in favour of doing so. The proposed amended Claim would involve substantially new and different areas of inquiry than the original Claim, including complaints of a constructive dismissal and automatically unfair dismissal. Given the timing of the Preliminary Hearing, so that there was always going to be a delay in permission been considered for any proposed amendment. It was difficult to understand the basis upon which the Claimant had not simply issued a fresh Claim already, in which case the issue to be determined would simply have been that of whether the two Claims should be heard together (if the original Claim was found to be within the Tribunal's jurisdiction). A tactical decision appeared to have been made to avoid addressing the time issues in the original Claim by raising new complaints and seeking to link these with the previous complaints, even though the previous complaints had not been pleaded in such a way as to allege that there were continuing causes of action which were still continuing at the point in time when the original Claim was filed. As a tactic, this effectively depended upon permission being granted within the primary time limit in respect of the new causes of action. Leaving aside the merits of any application, if permission was only going to be considered at the date listed for the Preliminary Hearing, then, in terms of protecting the Claimant's position, steps needed to have been taken for the purposes of issuing a separate Claim. The Tribunal was being told that these steps had been taken so that the Claimant was in a position to issue any separate Claim in time. As such, it was difficult to see any prejudice or hardship to the Claimant in not permitting the Claim to be amended. If a new Claim was issued, and if the original Claim survived the application that it should be struck out as being out of time, then separate consideration could be given to the issue of whether the two separate Claims should be consolidated.

110. On the basis of the reasoning set out above, permission to amend the Claim is refused in relation to the amendments proposed in the written application made on 23 December 2022.

111. On the basis of this decision, I turn now to consider the time issues in respect of the complaints raised in the original Claim.

(2) Time limit under Employment Rights Act 1996

112. It was not disputed that the original Claim was out of time when it was issued. No issue was taken with the analysis of Mr Powell to the effect that the last pleaded act occurred on or about 1 October 2021 on which basis the primary time limit had already expired when early conciliation was commenced on 24 January 2022 (so 24 days after the expiry of the time limit) through notifying ACAS of the prospective Claim. It was not until 1 April 2022 that the proceedings were issued,

approximately 90 days after the expiry of the time limit (as commencing a period of early conciliation in respect of a complaint which was already out of time neither stopped the limitation clock nor extended the time limit for bringing proceedings).

113. The explanation put forward by the Claimant for the delay in commencing proceedings did not begin to establish that it was not reasonably practicable to have brought the complaints of detriment amounting to whistleblowing victimisation within three months of the last pleaded act.

114. For significant parts of the relevant period, the Claimant had access to advice and assistance from both her trade union and Solicitors. She was able to provide instructions to enable her Solicitors to send correspondence on 13 December 2021 which it was accepted made reference to the potential complaints and factual issues. I have concluded that it was clearly reasonably practicable for instructions to be given for the purposes of that correspondence at that point in time, so that it ought also to have been reasonably practicable for instructions to have been given which would have enabled proceedings to be commenced at that point in time. Similarly, a detailed formal grievance was submitted by the Claimant on 4 February 2022. It contains a similar level of detail to that set out in the Grounds of Claim. Had the Claimant notified ACAS so as to commence early conciliation by 31 December 2021, her Claim would potentially have been in time (in the sense of being within the time limit of three months running from the last pleaded act) and there would have been a period of early conciliation, of up to six weeks even, following which she would have had a month to issue proceedings.

115. In passing, it is to be noted that, on this scenario, had the Claimant commenced early conciliation on 31 December 2021, she might potentially have had up to 10 March 2023 to issue proceedings with those proceedings potentially being in time on the basis of the last pleaded act being 1 October 2021 (subject to establishing any necessary link between the last pleaded act and the earlier complaints).

116. The evidence given by the Claimant regarding her difficulties dealing with matters did not begin to suggest that she could not have contacted ACAS by the end of December 2021, or given instructions for this to happen. She was able to give instructions for the letter dated 13 December 2021 to be dispatched. Giving instructions for ACAS to be notified of a prospective Claim would not have been significantly more difficult.

117. If, for the sake of argument, it had not been reasonably practicable to take any necessary steps for the purposes of issuing proceedings in time, the Tribunal concludes that the Claimant clearly was able to do so by 4 February 2022 when a grievance was submitted by her setting out much the same complaints as those in the ET1 Form of Claim. As such, the further delay between 4 February 2022 and 1 April 2022 is inconsistent with the requirement on the Claimant to act promptly once it became reasonably practicable to commence proceedings.

118. It follows that there is no basis for exercising any discretion to extend time in relation to the complaints of detriment amounting to whistleblowing victimisation contrary to ERA 1996 which were brought in the original Grounds of Claim.

(3) Time limit under Equality Act 2010

119. I turn to consider the issue as to whether or not it would be just and equitable to extend time in respect of the complaints under EA 2010.

120. The Claimant's originally pleaded case clearly contends that the acts of alleged discrimination and harassment set out at paragraph 4 amounted to an "*ongoing course of bullying/detrimental behaviour*". Effectively, as at the point in time of the original Grounds of Claim, it was being contended that this ongoing course of bullying / detrimental behaviour extended between July 2020 and 1 October 2021.

121. In deciding whether or not it would be just and equitable to extend time for the purposes of the discrimination and harassment complaints, I turn to give specific consideration to the factors identified as relevant in Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021].

122. The first potentially relevant factor is the presence or absence of any prejudice to the Respondent if the Claim is allowed to proceed (other than the prejudice involved in having to defend proceedings).

123. The Respondent's Submissions suggested that there was prejudice in that it faces "*unwieldy and ill particularised claims*" (with paragraph 4.1.5(i) as an example), dating back to 2020, "*lacking clarity as to the alleged discriminator and wholly failing to plead a causal link between the alleged detriment and the claimant's protected characteristics*". It is stated that the volume of allegations will require a large amount of investigation; more requests for further and better particulars; all at great cost to the Respondent and the time of its staff. It is further stated that it is evident from the Respondent's requests for further and better particulars that the Respondent did not understand a number of the allegations. Asking its staff to give evidence on matters which are now of some age puts it at a substantial disadvantage, especially in relation to giving evidence as to verbal conversations going back to 2021, and where it would be necessary to recall motivations, especially when it was not documented. The point is made that the Tribunal "*imposes a three month time limit for good reason*".

124. I accept that the Respondent does not have to establish prejudice, in that the absence of prejudice does not necessarily make it just and equitable to extend time. However, it is a relevant factor which I am required to consider. The focus is on various issues and incidents which arose over a period of more than a year and are alleged to amount to an ongoing course of bullying / detrimental behaviour up to October 2021. Some of the issues raised amount to general criticisms which are short on specifics.

125. Ultimately, the direct discrimination complaints will depend upon whether there is material from which the Tribunal can conclude that there was a difference in treatment and that difference in treatment was on the grounds of race or religion. I accept that, for the most part, the pleaded case does not offer particulars of the causal link between the alleged less favourable treatment and the protected characteristics. There are effectively over 50 issues or incidents being complained about by the Claimant as amounting to discrimination.

126. In terms of any need for further investigation and getting staff members to give evidence regarding the matters alleged, Mr Powell himself pointed out that much the same set of complaints had been put forward in the Claimant's grievance dated 4 February 2022, but even at this point in time the complaints were out of time, with some of them stretching back more than a year. It is not simply a case of relying on the evidence generated by the grievance investigation for the purposes of meeting the Claimant's complaints. The Claimant herself takes issue with the adequacy and thoroughness of the investigation and makes the point that the investigation did not involve interviewing a number of witnesses referred to in her grievance.

127. Thus, the Tribunal ended up concluding that there was likely to be prejudice to the Respondent in having to deal with significantly out of time complaints. The Tribunal was prepared to accept that the delay in commencing proceedings was likely to have caused prejudice to the Respondent through the cogency and availability of the evidence being adversely impacted.

128. In terms of prejudice to the Claimant, the Respondent's written submissions placed significant emphasis upon the Claimant having asserted that she "*has an ACAS EC certificate and could still issue those claims separately*" and it being the "*claimant's case that, if her claim is struck out she is still in time to present a claim for constructive dismissal*" (the effective date of termination being 31 December 2022) and she would "*still be able to plead that her dismissal was an act of discrimination/victimisation and/or assert that the principal reason for her dismissal was her protected disclosures*". The Claimant's argument against proceeding to hear the striking out application, namely that striking out would make no difference as she could issue a new Claim, was inconsistent with any argument at this next stage of the hearing in terms of any prejudice caused to the Claimant by not extending time.

129. In terms of the conduct of the Respondent up to the date of the issue of proceedings, some reference has been made to communications involving the Respondent and the Claimant's union and / or Solicitors, and some criticisms had been made of the Respondent, such as in the grievance letter and in the Claimant's proposed Amended Claim. For example, it was alleged that there was a failure to make an occupational health referral in or around February 2022 and there was a delay in commissioning someone suitable to investigate the Claimant's grievance. However, the Tribunal has heard very limited evidence at this stage for the purpose of making any findings as to the conduct of the Respondent so this was not a factor to which any significant weight could be attached in relation to the exercise of any discretion. Additionally, whilst the Claimant has been critical of the Respondent's actions or omissions (as her employer), the history of the matter shows that this did not stop her complaining about her employer, whether through issues raised in correspondence or by way of the grievance in February 2022, and she had union and / or legal advice at her disposal for these purposes.

130. Findings have been made above in relation to the conduct of the Claimant over the same period, based on the evidence heard by the Tribunal and the evidence to which the Tribunal was referred. Findings were also made in relation to the medical condition of the Claimant (albeit based on very limited medical evidence) and the extent to which professional advice was sought (although the

Tribunal has not heard evidence as to any specific advice given, which would potentially have involved the Claimant having to waive any privilege). However, as Mr Powell pointed out, the Claimant did not seek to blame any delay on her Solicitors or trade union, although it is clear that she had access to a trade union and Solicitors for advice and assistance over the relevant period.

131. The Respondent did not particularly seek to challenge the description of the medical situation as put forward by the Claimant, but concentrated rather on suggesting that she would still have been capable of issuing proceedings, particularly given her access to legal and union advice and assistance, and ultimately must have made a conscious choice not to issue proceedings until she did.

132. The Tribunal has already concluded that it would have been reasonably practicable to issue proceedings in the period from 1 October 2021 for the purposes of the time issues in relation to the victimisation complaints. The Claimant's own Statement refers to having raised concerns about bullying on several occasions both verbally and in an e-mail prior to raising a grievance. The Claimant did have access to advice and assistance. The Claimant was being assisted by her union. The bundle provided the example of the union's Regional Officer, at the request of the Claimant, raising concerns promptly and in detail on 8 October 2021 in relation to the last pleaded act (the Respondent's communication with occupational health on or about 1 October 2021). She had also instructed Solicitors by early November 2021. This resulted in without prejudice communication(s) in December 2021. Early conciliation was commenced on 24 January 2022. Effectively this was 24 days later than the Claimant should have done if she was to protect her position in respect of a cause of action which had arisen on 1 October 2021. Having sought and apparently failed (as of 4 February 2022) to reach an agreement with the Respondent, the Claimant then decided to file a grievance. In fact, it seems that the grievance document was a work in progress through much of this time in that the Claimant's Statement of Evidence says that it took her around 2½ months to prepare the grievance document. In evidence, she explained that her medical situation meant that it took a long time to do things and longer was needed for communications. Her case is that, around the end of March, it became clear that discussions with the Respondent to try and resolve matters were not going anywhere and therefore she instructed her new Solicitors to proceed with a Tribunal Claim.

133. However, the ACAS certificate had actually been issued on 4 March 2022, so there had clearly been an extended period of conciliation. Moreover, it is probably more than a coincidence that the time taken from the issue of the certificate to the issue of proceedings was more or less a month, which would have been the period of time allowed had the original notification to ACAS been in time.

134. The Tribunal did not find it easy weighing up the evidence regarding the steps taken by the Claimant prior to the issue of proceedings. There was a lack of documentary medical evidence but the evidence as to the occupational health advice which had been given, which was unchallenged, was consistent with the Claimant's medical situation having had a significant impact upon her ability to deal with her workplace issues and potential complaints. However, the Tribunal ultimately did not accept that it amounted to a satisfactory explanation for the delay,

given the assistance that the Claimant had available to her, and the fact that she was able to submit a detailed grievance in February 2022, and Solicitors had been setting out her position n correspondence in December 2021.

135. The length of the delay is significant. By the Tribunal's calculation it amounted to about 90 days from the date of the last pleaded act (and obviously substantially longer from the date of earlier pleaded acts, which were being pursued both individually and as part of an act extending over a period). The evidence of the Claimant mostly concentrated on the period from the date of last pleaded act, so there was very little explanation as to any earlier delay or reasons for not having taken proceedings in respect of the earlier complaints. The Tribunal recognises that the Claimant had suffered a road traffic accident on 6 June 2021 and was essentially off work due to sickness from that point in time. However, a substantial part of the case concerns events while she was still in work. Effectively, the Claimant's explanation hinged on the earlier acts being part of an act extending over a period which continued until the last pleaded act. However, she was also inviting the Tribunal to deal with these acts as discrete complaints, in which case the delay was substantial, with little explanation for the earlier delay. Even as part of an act extending over a period, there was significant delay from the pleaded end of that period. Extending time would have involved the Respondent being put in the position of having to deal not just with an issue which dated from October 2021 and was out of time, but a plethora of issues which had arisen in a period of a year or more prior to that.

136. The burden is on the Claimant to satisfy the Tribunal that it is just and equitable to extend time. In all of these circumstances, and having weighed the various relevant factors in the balance, the Tribunal was not satisfied as to this and concluded that it would not be just and equitable to extend time in relation to the complaints of direct discrimination and harassment made in the original Grounds of Claim.

137. It follows that the decision of the Tribunal is that the Claimant's complaints as made in Case Number 1301903/2022 are out of time and should be struck out on that basis.

Conclusion

138. In conclusion, the decision of the Tribunal is as set out below.

(1) The Claimant's application to revoke previous Case Management Orders is dismissed.

(2) The Claimant is not permitted to amend her Claim to include the amendments proposed in the Further and Better Grounds of Claim served on 23 December 2022.

(3) The Claimant's complaints of victimisation contrary to Employment Rights Act 1996 section 47B (as set out in her original Grounds of Claim dated 1 April 2022 and in the Further and Better Grounds of Claim dated 27 June 2022) are dismissed as out of time.

(4) The Claimant's complaints of direct discrimination contrary to Equality Act 2010 section 13 and harassment contrary to Equality Act 2010 section 26 (as set out in her original Grounds of Claim dated 1 April 2022 and in the Further and Better Grounds of Claim dated 27 June 2022) are dismissed as out of time.

139. I apologise for the time taken in providing this Judgment to the parties.

Employment Judge Kenward
9 January 2024