EMPLOYMENT TRIBUNALS

Claimant: AB

Respondent: Birmingham City Council

Heard at: Midlands West (In public; Cloud Video Platform)

On: 4 July 2023

Before: Employment Judge C Knowles

Representation

Claimant: In person, not legally represented
Respondent: Miss W Miller (Counsel)

RESERVED JUDGMENT

1. The claims of constructive unfair dismissal and detriment on grounds of having brought a protected disclosure are dismissed because they were presented out of time and the tribunal does not have jurisdiction to hear them. It was reasonably practicable for the claimant to have presented her claim within the time limit.

2. The claims of direct race discrimination and victimisation are dismissed because they were presented out of time and the tribunal does not have jurisdiction to hear them. It is not just and equitable to extend time.

RESERVED REASONS

1. Within these reasons references to pages are to pages of the preliminary hearing bundle.

Purpose of the hearing

2. By a case management order dated 25 May 2023, Employment Judge Kelly directed that this preliminary hearing should determine (time permitting) (p33):

   (a) Whether the claimant's claims were brought in time, and

   (b) If not, whether time for presenting the claims should be extended.

   The tribunal may decide that the extension point should be determined at trial.

3. Employment Judge Kelly made directions to enable this hearing to take place, including a direction requiring the claimant to provide a witness statement. He set out what that information should be included within that statement (p32).

Preliminary matter

4. At the outset of the hearing, I informed both parties that there had been three occasions when, as a barrister, I had represented claimants who brought claims against the respondent. These dated back to 2010, 2011 and 2016. The cases did not involve any of the people involved in these claims before the tribunal. The parties were given an opportunity to consider during the morning break whether they wished to raise any objection to me being the Judge at this preliminary hearing. Following the break both parties confirmed that they did not have any objection.

The claims

5. At the preliminary hearing on 25 May 2023, Employment Judge Kelly had explored with the claimant the claims she wished to pursue, and these were identified at paragraph 37 of his Case Management Order (p37).

6. During the first part of the hearing before me, I also discussed with the claimant what her claims were. The claimant confirmed that she was bringing the following claims:

   (a) Constructive unfair dismissal (pursuant to Section 98 of the Employment Rights Act 1996 (**the ERA 1996**). The claimant says that the effective date of termination was 7 June 2022, because it was agreed that she would work beyond the original end of her fixed term contract on 31 May 2022.

(b) Detriment on grounds of having made a protected disclosure (pursuant to Section 48 of the ERA 1996). The claimant relies on various complaints that she made to Mr Scriven and others about the way in which colleagues of colour were treated as being protected disclosures. She says she was subjected to the following detriments:

(i) Craig Scriven made comments to the claimant in three meetings between February and March 2022 where he said that no one had handed a grievance in, and called claims about bullying and his lack of intervention anecdotal, said it was a shame that ethnic minority members of staff were leaving because they were on fixed term contracts, and said he had not read the exit interviews.

(ii) Mr Scriven did not call the claimant whilst she was absent through ill-health between February and March 2022 apart from to call her about whether she wished to accept a Grade 5 position.

(iii) Mr Scriven in a meeting at the end of May 2022 said he had been trying to call the claimant about whether she wanted to accept a grade 5 position, and when the claimant said she will not because she had racial concerns, replied “ok”.

(iv) In February 2022 Darren Hockaday, in response to racial concerns being raised with him, told the claimant’s manager to collate evidence and arrange a meeting.

(v) Darren Hockaday ignored emails from the claimant up to the end of her employment on 7 June 2022.

(c) Direct discrimination because of race (pursuant to Section 13 of the Equality Act 2010 (**the EA 2010**)). The less favourable treatment was: (a) being rejected for the Grade 6 post of People Performance Partner; (b) being rejected for the Grade 6 post of Rewards Partner. The claimant found out in February 2022 that she had not been successful in her application for these roles.

(d) Victimisation (pursuant to Section 27 of the EA 2010). The complaints that the claimant raised alleged that colleagues had been discriminated against, and the claimant says that she was subjected to a detriment because of those complaints. The detriments relied on are the same as for the claim of detriment on grounds of making a protected disclosure. Although this claim had not been identified within Employment Judge Kelly’s case management order, the information within the ET1 makes clear that the complaints that the

claimant says she made (which are also relied upon as being protected disclosures) alleged that managers of the respondent had discriminated against employees of the respondent.

7. In respect of the claims of direct race discrimination, during our discussion, the claimant did suggest that there were matters that had occurred as far back as 2021 where she believed she had been discriminated against. I explained to the claimant the difference between relying on matters as background to the claims being brought, and relying on particular acts as claims of discrimination in and of themselves. I gave the claimant time during the morning break to decide whether she was referring to incidents involving herself in 2021 as background to her claims that she had been discriminated against in February 2022 (when she had not been appointed to the roles of People Performance Partner or Rewards Partner), or whether she wished to make an application to amend her claim (i.e. to include claims that she herself had been discriminated against because of race in other respects going back to 2021). Following the break, the claimant confirmed that the claims identified at paragraph 6, above, were those that she wished to bring and that she did not wish to make any application to amend her claim.

Issues for the preliminary hearing

Assumption made for the purposes of the preliminary hearing

8. The hearing proceeded on the basis of an assumption that last act of detriment / discrimination was to be treated as being the effective date of termination. I could not make any findings about whether the claimant had in fact been subjected to any detriment, or whether she had been discriminated against, and so could not make any finding as to whether there was a series of detriments or any continuing act of discrimination or victimisation. Those would be matters to be determined at any final hearing if I decided that the claims about acts / omissions occurring on the effective date of termination had been brought in time, or that time should be extended in respect of claims about acts / omissions occurring on the effective date of termination.

9. There was a dispute about whether the effective date of termination was 31 May 2022 or 7 June 2022. As I could not determine that issue at the preliminary hearing, the preliminary hearing proceeded on the basis of an assumption that it was 7 June 2022. What the actual effective date of termination was would be a matter that would have to be determined at any final hearing if I concluded that any of the claims were in time, or that time should be extended.

Issues

10. Having identified the claims, the issues for the preliminary hearing were as follows:

10.1 Was the constructive unfair dismissal complaint made within the time limit in section 111 of the ERA 1996? The Tribunal will decide:

10.1.1 Was the claim made to the Tribunal within three months (plus any early conciliation extension) of the effective date of termination?

10.1.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

10.1.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

10.2 Assuming, for the purpose of the preliminary hearing only, that the claimant can establish that there was a detriment (or the last in a series of detriments) on 7 June 2022, was the complaint of being subjected to a detriment on grounds of a protected disclosure made within the time limit in section 48 of the ERA 1996? The Tribunal will decide:

10.2.1 Was the claim made to the Tribunal within three months (plus any early conciliation extension) of 7 June 2022?

10.2.2 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

10.2.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

10.3 Assuming, for the purpose of the preliminary hearing only, that the claimant can establish conduct extending over a period ending on 7 June 2022, were the discrimination and victimisation complaints made within the time limit in section 123 of the EA 2010? The Tribunal will decide:

10.3.1 Was the claim made to the Tribunal within three months (plus any early conciliation extension) of 7 June 2022?

10.3.2 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

10.3.2.1 Why were the complaints not made to the Tribunal in time?

10.3.2.2 In any event, is it just and equitable in all the circumstances to extend time?

Documents, evidence, and procedure

11. The hearing started at around 10.20. The short delay was due to technical issues experienced by the claimant in joining the hearing.

12. During the first hour of the hearing, I discussed with the claimant the claims that she wished to bring, and outlined to both parties the issues for determination by me. I identified the documents that each party wanted me to consider, and the procedure that the tribunal would follow. I summarised the law that I would need to apply in order to decide the issues.

13. I explained to the parties that I would pause at different points in the hearing to re-cap what we had done so far and what was going to happen next. I also explained that we would take a mid-morning break. I asked the parties whether there were any other adjustments that either party needed in order to be able to participate fairly in the hearing, and they confirmed that there were not.

14. In order to decide the issues, I was provided with:

    (a) A hearing bundle of 80 pages. Miss Miller confirmed that the bundle had been sent to the claimant, but at the start of her evidence the claimant realised that she was working from an earlier version of the bundle which only had 60 pages. A further copy was sent to the claimant. Before Miss Miller started to question the claimant, the claimant that she had received the full bundle and had seen all the documents in the bundle before.

    A further three documents (totalling six pages) were admitted into the bundle with the agreement of the parties, and although these documents did not reach me until around 3.15pm, both parties described to me what they said the documents contained and their position on the relevance of them to the issues that I had to address. I considered those documents and the submissions made about them before reaching my decision.

    (b) A skeleton argument on behalf of the respondent.

    (c) A bundle of authorities on behalf of the respondent.

15. The respondent's bundle of authorities included the 2014 decision of the Employment Appeal Tribunal in the case of Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13/LA. Prior to the hearing, and at my request, the tribunal clerk sent to the parties the Court of Appeal's decision in this case from 2018 ([2018] EWCA Civ 640). A further copy was sent to the claimant during the course of the morning as she explained to me that she had lost access to the attachment.

16. After the first hour of the hearing, we had a mid-morning break for around ten minutes to enable the parties to consider what we had already discussed and before starting to hear the evidence.

17. I was provided with a witness statement from the claimant (p67-71) and a witness statement from Mrs Barbara Giles on behalf of the respondent (p74-75). Both the claimant and Mrs Giles gave evidence to the tribunal, and were cross-examined. I also asked the claimant some questions. Where it was necessary, I assisted the claimant as a litigant in person in formulating her questions for Mrs Giles.

18. The evidence concluded by around 1pm, and we then took a break for lunch before returning at around 2pm for submissions. Submissions completed at around 2.40pm. Rather than ask the parties to stay available late in the afternoon, I decided to reserve my decision, and explained this to the parties.

19. There were a couple of occasions on which the claimant lost connection during the hearing, but these were only for a minute or two, and I waited for her to re-join before resuming with the hearing. There was also one occasion during submissions where Miss Miller experienced some issues affecting her sound, and I waited for her confirmation that she could hear sufficiently before proceeding further. These minor technical difficulties did not have any adverse impact on the hearing.

Findings of Fact

20. The claimant was employed by the respondent as a Culture Change Officer from 3 February 2020. There is a dispute between the parties about whether the claimant was dismissed or constructively dismissed, and whether the claimant's effective date of termination was 31 May 2022 (as the respondent says) or the 7 June 2022 (as the claimant says). For the purposes of this preliminary hearing only I have proceeded on the assumption that the correct date is 7 June 2022. The reference to a date of 8 August 2022 in the ET1 is an error and neither party suggests that the effective date of termination was 8 August 2022.

21. Early conciliation started on 13 September 2022 and ended on 25 October 2022. The claim form was presented on 7 November 2022. The claimant brings complaints of constructive unfair dismissal, detriment on grounds of having made a protected disclosure, direct race discrimination and victimisation.

22. Prior to commencing employment with the respondent, the claimant had worked as an HR advisor. She had been involved in matters such as

advising on sickness absence. She was aware that if someone suffered discrimination or bad practice in the workplace, they were able to bring a claim in the employment tribunal against their employer, but she had not been part of a tribunal claim before.

23. The claimant's role at the respondent was that of Culture Change Officer. This was a role within Organisational Design (**OD**), which was part of the respondent's HR function. It was a grade 5 role with a salary of £40,000 (gross) p.a.

24. The Culture Change Officer position was a fixed term appointment, and when it was coming to an end the claimant applied for three alternative posts. Two of those were grade 6 posts: (a) People Performance Partner; (b) Rewards Partner. The claimant's applications for those Grade 6 posts were unsuccessful and she says she found out on or around 21 February 2022. The third role that the claimant had applied for was a Grade 5 role in the Chief Executive's unit. The claimant was offered that role, but she turned it down in around May or early June 2022.

25. Between 28 February and 4 April 2022, the claimant was signed off sick. The claimant did not provide the relevant fit notes to the tribunal, but I accept that the reason for the claimant's absence related to her state of mental health at that particular time. The claimant told me that the reason had been anxiety or depression or "something like home stress". The claimant also made reference to having felt suicidal between March and June 2022. The claimant was however well enough to return to work on or around 5 April 2022.

26. On 8 June 2022, the claimant started a new role with the Financial Ombudsman Service. A friend had submitted the application form for this post on her behalf, but in May 2022 the claimant had been well enough to attend interview herself and been successful in securing the role. The claimant's new role was, as she accepted in cross examination, a responsible role. Her ET1 records that her new salary was £55,000 p.a. Between 8 June 2022 when she started that role, and 7 November 2022 when she presented the ET1, the claimant had not had any time off work due to ill-health.

27. Having started her new employment, the claimant described being "quite consumed" by what had happened to her at the respondent. She had "vented" to her new colleagues about the issues involving the respondent.

28. On or around 10 June 2022 the claimant spoke with Rebecca Hallard, Director of People Services, who asked whether the claimant's details could be passed to Barbara Giles (Interim HR). Mrs Giles was carrying out an investigation into the conduct of Mr Scriven. This followed concerns raised

by the claimant about the behaviour of Mr Scriven (and others), although she had not submitted a formal grievance about him or anyone else. The claimant agreed that her details could be passed on. Ms Hallard said she would be in contact to provide her with an update.

29. On 11 June 2022, the claimant emailed Ms Hallard. The claimant thanked Ms Hallard for her call on the previous Friday (which was 10 June), and she outlined what she said had been her experience working for the respondent in OD. The email included broad reference to matters which the claimant now relies upon as part of her claims. She concluded by saying that she was "*happy to go into detail with anything that I have mentioned above…..my recommendation is an independent investigation across People Services…"* (This was one of the documents added to the bundle by agreement).

30. On 11 August 2022, Mrs Giles emailed the claimant explaining her involvement and Mrs Giles and the claimant subsequently met on 17 August 2022.

31. Mrs Giles emailed the claimant on 19 August asking for consent for Ms Hallard to access statements that had been provided to the respondent's equalities unit by the claimant (p77). The claimant replied the same day. She asked for confirmation of how many statements were received by Mrs Giles, for a copy of the meeting notes, and said "*I'd really like to be kept informed in terms of how this progresses please as I had devoted so much time and energy to it before I left"* (p76). Mrs Giles responded to say "*I will, im in the process of just reviewing the notes for spelling errors etc so will get these to you asap"* (p76). On 26 August Mrs Giles emailed to the claimant a copy of the notes from the meeting, and provided her with an update on her investigation, saying that she had been meeting with a number of colleagues "*and hope to be able to conclude a report very quickly to be able to move the matters forward and I will keep you updated as they progress"* (p78-9). The claimant replied on 30 August confirming that the notes were accurate and saying that she looked forward to hearing from Mrs Giles soon (p78). Mrs Giles responded the same day "*Many thanks Sharan, ill be in touch again soon"* (p78).

32. On 13 September 2022, the claimant was discussing her issues with the respondent with a colleague, Rachel. Rachel told the claimant that what she should do was to look at the ACAS website. On 13 September the claimant notified ACAS for the purposes of early conciliation.

33. On 15 September 2022, Mrs Giles emailed the claimant, having received a missed call from her. She said "*I did try to call you this morning I wanted to let you know that I have completed my report and submitted this to Darren and Becky for the next steps, as soon as I have any more information that I*

can share with you ill give you a call" (p80). Mrs Giles left the respondent's employment at the end of September 2022, and she did not have any further involvement with the claimant, or the investigation.

34. The claimant suggested that a reason why she did not notify ACAS until 13 September or present her claim until 7 November was that she had been waiting for an outcome or at least update from Mrs Giles' investigation. I did not find that explanation to be credible. The fact that the claimant in fact notified ACAS on 13 September 2022, without having received any outcome from Mrs Giles, is not consistent with this being a case in which the claimant was awaiting the outcome of an internal process before taking any further steps. The claimant did not suggest in any of her communications with Mrs Giles at the time that she was awaiting the outcome of her investigation before presenting a claim to the tribunal.

35. The claimant also said in her statement that another reason that she had filed her claim late was that she had been unaware of the time frame for bringing a claim. I accept that the fact that the claimant had previously been an HR advisor did not mean that she was fully aware of the process of how to bring a tribunal claim. The claimant had access to the internet, and she did not "google" or carry out any internet research about tribunal procedures or time limits. The claimant did not seek any legal advice. She said this was because she thought that lawyers would cost thousands of pounds and she did not think she could afford it. She made no enquiries about whether it might be possible to obtain any free legal advice.

36. On 23 and 24 May 2023, the claimant had a video consultation with Dr Alessandro Bruno, Consultant Psychiatrist, who produced a letter dated 9 June 2023 addressed to the claimant's GP (p65-6). Dr. Bruno was of the opinion that the claimant's presentation was indicative of ADHD. He said that the claimant had reported to him that in adulthood she had developed compensatory and mitigating strategies that allowed her to succeed in her career despite pervasive symptomatology. He said that the claimant reported that she was bad at initiating activities, was a procrastinator and not efficient with time management and organisational skills. She reported "long-standing problems" of lack of concentration, inability to focus, inattention and distractibility. The claimant did not suggest that the reason that she had not notified ACAS until 13 September 2022 or submitted her claim until 7 November 2022 was related to ADHD, and Dr Bruno's letter did not suggest that either.

Law

<u>The "reasonably practicable" test</u>

37. The time limit for bringing a claim of constructive unfair dismissal is set out at Section 111 of the Employment Rights Act 1996 (**the ERA 1996**). In so far as relevant, that provides:

(2) …an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

(a) before the end of the period of three months beginning with the effective date of termination,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.

38. The time limit for bringing a claim to have been subjected to a detriment on grounds of having made a protected disclosure is set out at Section 48 of the ERA 1996. In so far as is relevant, it provides:

(3) An employment tribunal shall not consider a complaint under this section unless it is presented –

(a) before the end of the period of three months beginning with the date of he 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.

39. Section 207B provides for an extension of time to facilitate ACAS early conciliation, but where the notification to ACAS takes place after the time limit provided by Section 111 (2) (a) or Section 48 (3) (a), the conciliation process does not extend the time limit which has already passed.

40. "Reasonably practicable" means "reasonably feasible" (**Palmer and anor v Southend on Sea Borough Council** [1984] ICR 372).

41. In **Porter v Bandbridge Limited** [1978] ICR 943, Waller LJ held that the onus is on the claimant to prove that it was not reasonably practicable to present the claim within the time limit.

42. The tribunal has to determine as a matter of fact, the substantial cause of the claimant's failure to comply with the primary time limit and then decide whether, notwithstanding that reason(s), it was reasonably practicable for the claimant to submit the claim in time. If the claimant proves that it was not reasonably practicable to present the claim in time, the tribunal must

then decide whether the claim was submitted within such further period as was reasonable. That second question requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted, having regard to the strong public interest in claims being brought promptly (**Cullinane v Balfour Beatty Engineering Services Ltd** UKEAT/0537/10).

43. Ignorance of the right to claim may make it not reasonably practicable to present a claim in time, but only where the claimant's ignorance is itself reasonable. The tribunal must consider what the claimant's opportunities were for finding out her rights, whether she took them, and if not, why not? Was she misled or deceived? (**Dedman v British Building and Engineering Appliances Limited** [1974] ICR 53).

44. In **Schultz v Esso Petroleum Ltd** [1999] IRLR 488, the Court of Appeal identified that when asking whether it is reasonably practicable to present a claim in time, the overall limitation period is to be considered, but attention will in the ordinary way focus upon the closing part, rather than the early stages.

45. In **Cygnet Behavioural Health Ltd v Britton** [2022] IRLR 198, the EAT held that a person who is considering bringing a claim of unfair dismissal is expected to appraise themselves of the time limits that apply; it is their responsibility to do so. At paragraph 56, Cavanagh J commented that:

"*it would be the work of a moment to ask somebody about time limits or to ask a search engine."*

46. In **Bodha (Vishnudut) v Hampshire Area Health Authority** [1982] ICR 2022, Browne -Wilkinson J said (in a passage approved by the Court of Appeal in **Palmer**):

"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an [employment] tribunal, as a question of fact, that it was not reasonably practicable to complain to the….tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the….tribunal."

The "just and equitable test"

47. The time limit for bringing a complaint of direct discrimination pursuant to Section 13 of the Equality Act 2010 (**EA 2010**) or victimisation pursuant to Section 27 of the EA is set out in Section 123 of the EA. Section 120 of the EA gives the tribunal jurisdiction to hear complaints relating to

contraventions of Section 13 and 27 at work, and so far as relevant, Section 123 of the EA provides:

(1) Subject to Section 140B, proceedings on a complaint within section 120 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.

48. Section 140B of the EA provides for an extension of time to facilitate ACAS early conciliation, but where the notification to ACAS takes place after the time limit provided by Section 123 (1) (a), the conciliation process does not extend the time limit which has already passed.

49. The tribunal's power to extend time for a discrimination or victimisation claim is wider than the power to extend time in a claim for constructive unfair dismissal.

50. In **Abertawe Bro Morgannwg University Health Board v Morgan** [2018] EWCA Civ 640, Legatt LJ observed that (in relation to discrimination claims) Parliament has chosen to give the tribunal "*the widest possible discretion".* There is no requirement for a claimant to show that there was a good reason for delay before time can be extended. Factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

51. In some cases, it has been suggested that it may be useful for a tribunal exercising its discretion to consider the list of factors specified in Section 33 (3) of the Limitation Act 1980 (see **British Coal Corporation v Keeble** [1997] IRLR 336). Those factors include: the prejudice that each party would suffer if the time limit was extended (or not), the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the cause of action, and the steps taken by the claimant to obtain advice once she knew of the possibility of taking action. However, the Court of Appeal has held that the tribunal is not required to go through such a list, providing that it does not leave a significant factor out of account (**Southwark London Borough Council v Afolabi** [2003] EWCA Civ 15). Further in **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23, the Court of

Appeal warned (at paragraph 37) that rigid adherence to a checklist could lead to a mechanistic approach to what is meant to be a very broad general discretion. The best approach for a tribunal is to consider all the factors in the particular case which it considers is relevant to whether it is just and equitable to extend time, including in particular the length of, and reasons for, the delay.

52. In **A v Choice Support (Formerly Mcch Ltd)** [2022] EAT 145 His Honour Judge Beard said (at paragraph 30) that a disadvantage in being able to present a case is likely to be relevant as part of a general exercise of deciding justice and equity. The fact that a disadvantage existed prior to the expiry of the time limit does not mean that there is not a disadvantage.

53. The exercise of discretion is the exception rather than the rule, and there is no presumption that the tribunal should extend time unless they can justify failure to exercise the discretion (**Robertson v Bexley Community Centre** [2003] EWCA Civ 576, at [25]). The burden is on the claimant to persuade the tribunal to exercise its discretion in favour of extending time, but this does not mean that exceptional circumstances are required before the discretion can be exercised in favour of a claimant.

Submissions

The respondent

54. Miss Miller on behalf of the respondent provided a Skeleton Argument and authorities bundle, which I read. She also made oral submissions following the conclusion of the evidence. In summary:

Reasonable practicability

(a) The respondent submitted that the burden was on the claimant to persuade the tribunal that it was not reasonably practicable for her to have submitted a claim in time. It is reasonable to expect that which was possible to have been done.

(b) Prior to being employed by the respondent, the claimant had been employed in an HR role and had known about the prospect of bringing an employment tribunal claim. The claimant was capable of carrying out a Google search to find out the time limit for bringing a claim.

(c) Whilst the claimant relied upon her mental state, that had not hindered her to the extent that she could not research the point about bringing a tribunal claim or the time limits. She had been fit to start a new, responsible, job, one day after she finished her employment.

She could have searched online to find out the procedure for bringing a claim. It was reasonably practicable for her to have done so.

(d) The alleged discrimination that the claimant had suffered was at the forefront of her mind and remained so for some considerable period of time and she had admitted she had discussed this with many colleagues for a number of months. Although in cross-examination she had said that she had contacted ACAS as soon as she had been informed by a colleague about ACAS, she could have made enquiries much earlier than that. She could have made enquiries with legal firms or sought free legal advice and failed to do so.

(e) The suggestion made by the claimant that she was waiting for the outcome of an investigation by Mrs Giles into Mr Scriven before submitting a claim was unsatisfactory. The claimant had not submitted a grievance. Mrs Giles' investigation was an investigation into another member of staff, and so the claimant was not awaiting the outcome of a grievance that she had raised or an appeal. Mrs Giles had no authority to decide whether there should be any action taken against Mr Scriven. The claimant had no legitimate expectation that the contents of the report would be shared with her. The process did not preclude the claimant from submitting a claim in time.

(f) There was a significant delay in presenting the claim.

(g) The additional documents added to the bundle did not add anything to the issue that the tribunal had to consider at this preliminary hearing.

Just and equitable

(h) The respondent also relied on the points that I have set out in support of its argument that it would not be just and equitable to extend time in respect of the claims under the EA. The respondent recognised that the tribunal had a broad and unfettered discretion to extend time, but submitted that the tribunal must look at the reason and nature of the delay. The respondent submitted that whether parties other than the claimant and the respondent would be prejudiced by time not being extended was irrelevant.

(i) Initially, Miss Miller said that she was not able to say that there had been any particular forensic prejudice to the respondent in terms of a loss of evidence, only that she did not know if any of the witnesses were now available to be contacted and to provide evidence to the tribunal. However, having received further instructions Miss Miller

said that Melanie James (whose evidence would be potentially relevant to the rejection for the People Performance Partner role and who was one of the people the claimant reported had discriminated against colleagues) was no longer employed by the respondent, and nor was Rebecca Hellard (HR). Tracey Kirkton (whose evidence would be potentially relevant to the rejection for the People Performance Partner role and who was one of the people the claimant reported had discriminated against colleagues) was on long-term sick leave, and she believed "but was not certain" that Fiona Burton (one of the people the claimant reported had discriminated against colleagues) had also left the respondent's employment. Mr Scriven had been suspended. Generally, delay was a factor impacting the cogency of evidence.

The claimant

55. The claimant made oral submissions. In summary:

(a) Her role as a Culture Change Officer and past experience as a HR advisor was not relevant. Many Culture Change Officers had no HR experience at all and the role did not require HR / employment law experience. She had not been working in HR for over 3 years and when she did she managed very low level cases and did not have that much involvement in tribunals. She had heard about employment tribunals but did not know the process for lodging a complaint. It was unfair to expect that she would know the ins and outs of a tribunal and how to lodge a claim.

(b) In relation to her mental state, although she was able to get up in the morning, go to work and cook food, she described herself as being "*very much in [the] pits of gaslighting".* She felt that she had been ignored for so long at the council that she wondered if it was her making a fuss and that she was making a mole hill out of a mountain. She said that she felt that if this was how she was being treated by someone senior, what was the point of lodging a complaint, and that it did not cross her mind because she felt she was not going to be taken seriously.

(c) Having left the council she received a telephone call saying that there was an independent meeting with HR and OD to find out if others had been affected, and then shortly afterwards Mrs Giles contacted her. This gave her a glimmer of hope and the thought did not even cross her mind to lodge a complaint, which was going to take time and taxpayer's money.

(d) She understood that Mr Hockaday and Mr Scriven were still employed by the respondent, although Mr Scriven was suspended. To her knowledge Melanie James and Amarjit Sahota (the claimant's line manager) were not still employed by the respondent, but she understood that Ms Burton was. There was still plenty of paper evidence available. There is also a trade union representative who would give evidence for the claimant, and another witness who still works for the council.

(e) Before contacting ACAS, the claimant had held out hope that the respondent would take responsibility because the claimant felt that there were many people raising concerns.

(f) A colleague in her new employment had encouraged her to contact ACAS.

(g) If she could not proceed with her claims, the claimant felt that would leave her feeling like a second-class citizen. Since working for the respondent, she is more aware of her skin colour that she was before, she feels that she will not be taken seriously regardless of what she says, and in early January 2023 she started therapy. There would also be an impact on other employees.

Conclusions

Claims for constructive unfair dismissal and detriment on grounds of making a protected disclosure

Was the claim brought within the time limit provided for by Section 111 (2) (a), plus any extension provided by Section 140B of the ERA 1996?

56. Assuming (for the purposes of this preliminary hearing only) that the effective date of termination was 7 June 2022, the date by which a claim of constructive unfair dismissal had to be brought was 6 September 2022.

57. Early conciliation notification took place on 13 September 2022, after the expiry of the time limit, and so no extension of time was provided by the early conciliation process.

58. The claim form was presented on 7 November 2022, five months after the effective date of termination and two months after the date provided by Section 111 (2) (a). The claim was not brought within the time limit.

Was the claim brought within the time limit provided for by Section 48 (3) (a), assuming for the purposes of the preliminary hearing only that the detriment (or last in the series of detriments) was on 7 June 2022

59. In answering this question, I assumed (for the purposes of the preliminary hearing only) that the claimant would be able to show an alleged detriment on 7 June 2022. For the same reasons that I have already explained in relation to the claim for constructive unfair dismissal, the claim for detriment on grounds of making a protected disclosure was not brought within the time limit set down by Section 48 (3) (a).

Was it reasonably practicable for the claimant to have presented her claim on or before 6 September 2022?

60. The claimant did not persuade me that it was not reasonably practicable, in the sense of not reasonably feasible, for her to have submitted her claims of constructive unfair dismissal and detriment on grounds of having made a protected disclosure in time.

61. This is not a case in which the claimant only discovered the facts on which she relies as giving rise to a claim after the time limit had expired, or even close to the expiry of the time limit. The claimant's case is that she had raised her concerns to the respondent whilst she was employed by the respondent, and I note that when she emailed Ms Hallard on 11 June 2022 she mentioned matters which she now relies upon in support of her claims.

62. Although the claimant had not had prior involvement in employment tribunal proceedings, she did have some experience as a HR advisor and she was aware of the possibility of bringing an employment tribunal claim where an employee experienced bad practice.

63. If the claimant did not know more about the process for bringing a tribunal claim or the particular time limits for doing so, that ignorance was not reasonable. The claimant had access to the internet at all times up to the date by which the claim should have been presented (6 September) and beyond. It would have been feasible for her to carry out some research into the possibility of bringing a tribunal claim and the process if she did so, which would have included time limits. Had the claimant carried out some basic internet research she would have become aware of the time limits.

64. I concluded that the claimant was not prevented from being able to research tribunal processes or time limits, or from presenting a claim, because of ill-health, or because of ADHD:

    (a) As to the claimant's health, apart from the period between 28 February and 4 April 2022, the claimant was at all relevant times fit for work. She was well enough to attend an interview with her new employer in May 2022, and was successful in receiving an offer of employment. She was well enough to write to Ms Hallard on 11 June 2022 setting out her concerns about her experience working for the

respondent, including matters that now form the subject matter of these claims. She was well enough to start her new role on 8 June, and to carry out that responsible role without having any ill-health related absence between 8 June and 7 November 2022. She was well enough to discuss the issues she felt she had faced whilst working for the respondent with her new colleagues, and in August 2022 she was well enough to attend a meeting with Mrs Giles and communicate with her by email.

(b) Whilst the claimant was diagnosed with ADHD in or around May 2023, the claimant herself did not suggest that this had prevented her from presenting a claim in time. The letter from Dr Bruno does not suggest that either.

65. I was not persuaded by the claimant's suggestion that Mrs Giles' investigation was a reason why she did not notify ACAS until 13 September or present her claim until 7 November. The fact that the claimant in fact notified ACAS on 13 September 2022, before receiving any outcome from Mrs Giles, is not consistent with this being a case in which the claimant was awaiting the outcome of an internal process before taking any further steps. The claimant did not suggest in any of her communications with Mrs Giles at the time that she was awaiting the outcome of her investigation before presenting a claim to the tribunal. This is not a case in which the claimant suggests that anyone misled her as to the time limit.

66. Mrs Giles' investigation did not mean that it was not reasonably feasible for the claimant to present her claim in time, and even if the claimant had decided to await the outcome of the investigation, that would not have been reasonable. Whilst the claimant had sent an email to Ms Hallard on 11 June in which she recommended that an investigation take place, the claimant had not submitted a formal grievance, in respect of which she might reasonably expect to be notified of the outcome at some stage. Mrs Giles' emails could reasonably be read as agreeing to update the claimant as and when she could on the progress that she was making in her investigation, but she did not promise to notify the claimant of the contents of her report, or the outcome of any process that might subsequently be initiated against Mr Scriven. Further, only some of the claimant's claims relate to the conduct of Mr Scriven.

67. I find that it was reasonably feasible for the claimant to have presented her claim on or before 6 September 2022. In the circumstances, the tribunal has no jurisdiction to hear the claims for constructive unfair dismissal or detriment on grounds of having made a protected disclosure, and it is not necessary for me to consider whether the claimant presented the ET1 within a further "*reasonable period".*

Claims of direct race discrimination and victimisation

Were the claims of direct race discrimination and victimisation brought within the time limit provided for by Section 123 (1) (a) of the EA?

68. For the purposes of this preliminary hearing only, I approached this question on the assumption that the claimant could show that there was an act of discrimination / victimisation which continued to 7 June 2022. On that basis, the date by which a claim of discrimination or victimisation had to be presented was 6 September 2022.

69. Early conciliation notification took place on 13 September 2022, after the expiry of the time limit, and so no extension of time was provided by the early conciliation process.

70. The claim form was presented on 7 November 2022, five months after the 7 June 2022 and two months after the date by which the claimant should have presented her claim. The claim was not brought within the time limit provided for by Section 123 (1) (a).

Is it just and equitable to extend time from 6 September 2022 to 7 November 2022?

71. I have a broad discretion to extend time, if I conclude that it is "just and equitable" to do so. This requires me to take into consideration all relevant factors, applying the law set out above. It is relevant to consider in particular the reason for the delay, whether the delay has prejudiced the respondent (for example by preventing or inhibiting it from investigating the claim while matters were fresh), and what prejudice the claimant will suffer if time is not extended. I also take into account that, all other things being equal, time limits ought to be enforced.

72. In terms of the reasons for the delay, I have addressed those above when considering reasonable practicability, in particular at paragraphs 60 to 67. Whether or not the claimant had a good reason for the delay in presenting her claim is not determinative of the question of whether it is just and equitable to extend time. All relevant circumstances must be considered. However, in so far as the reason for the delay is concerned, and taking into account the matters discussed at paragraphs 60 to 67 (above) I conclude that the claimant did not have a good reason for delaying in presenting her claim. The claimant could, and should, have carried out some basic enquiries which would have informed her about the applicable time limits. The delay between the date by which she should have presented her claim (in the absence of any extension for early conciliation) and the date that she did present her claim was two months, i.e. two thirds of the short time-limit that Parliament has decided is appropriate in discrimination claims. The claimant knew the facts on which she now relies in support of her claim by 7 June 2022 at the very latest.

73. That is not however the end of the enquiry for the purposes of determining whether it is just and equitable to extend time. I have considered carefully the issue of prejudice to both parties.

74. In terms of the prejudice that there would be to the respondent if I decided to extend time:

    (a) The delay in presenting the claim itself was 2 months if the relevant date of victimisation / discrimination is assumed to be 7 June 2022. However, I also have to take into account the fact that the less favourable treatment relied upon in the direct race discrimination claim, namely the rejection of the claimant's applications for grade 6 posts, occurred in or around February 2022 (so 9 months before the presentation of the claim). At least some of the detriments that the claimant relies upon in respect of the victimisation claim also occurred in February and March. Further, for the purposes of the victimisation claim, the tribunal would have to consider whether verbal or written complaints raised by the claimant constituted protected acts, and some of these alleged protected acts are said to have occurred as far back as July 2021.

    (b) I do not find that the mere fact that if time is extended the respondent will now have to defend the proceedings amounts to relevant prejudice.

    (c) What is more relevant is the fact that, Miss Miller told me, and the claimant accepted, Melanie James is no longer employed by the respondent. Melanie James is someone who the claimant says was involved in rejecting her application for the post of "Rewards Partner". Tracey Kirkton is on long-term sick leave and she is someone who the claimant says was involved in the rejection of her application for the People Performance Partner role. Ms James and Ms Kirkton are at least potentially relevant witnesses in relation to the discrimination claims and there is prejudice to the respondent if they potentially cannot now be called to give evidence.

    (d) I have taken into account that the claimant's email of 11 June 2022 did raise, in broad terms, matters on which the claimant now relies as part of her employment tribunal claim. I was also told that an investigation took place into the conduct of Mr Scriven. However, there is a difference between putting the respondent on notice that a claim is being brought, so that the respondent clearly understands that it needs to investigate whilst matters are fresh for the purposes of defending a legal claim, and raising matters broadly in an email with no intimation that a claim is to be made.

(e) The fact that the claim was presented out of time led to jurisdiction being a matter that the tribunal had to consider, and in the circumstances of this case a preliminary hearing being listed to decide that. This means that no final hearing date has yet been set, some nine months after the date by which the claimant should have presented a claim relating to discrimination or victimisation occurring on 7 June 2022. If time were extended it is likely that the final hearing would take place later than it would have taken place if the claim had been presented in time, and this is relevant to the cogency of evidence and the ability of witnesses to recollect clearly conversations that took place. This also creates some prejudice to the respondent.

75. Balanced against that, I have considered the prejudice that the claimant would face if an extension of time were not granted. As to this:

(a) I do not regard the suggestion that if the claims could not proceed there would be prejudice to other people as being a matter which gives rise to prejudice to the claimant herself. Two of the additional documents added to the bundle (an email from unison and an account from "Amin") relate to complaints other than the claimant's specific claims. They do not establish that the claimant would suffer prejudice if her claims could not proceed.

(b) I do however accept that the claimant herself would suffer prejudice in that her claims of discrimination and victimisation (which may or may not be well-founded) would not be permitted to proceed at all. Claims of discrimination and victimisation can only be brought in the employment tribunal and there is no other remedy available to her.

(c) I accept that the claimant will also face disappointment if the claims are not permitted to proceed.

76. Weighing all of the factors above, I find that it would not be just and equitable to extend time in the circumstances of this case. Whilst the claimant will suffer prejudice in that her claims cannot now proceed and I also accept that she will be disappointed by that, I have also found that she could and should have found out about the tribunal process and time limits sooner than she did, and that she should have brought a claim earlier. The respondent would also suffer prejudice if I did extend time, and having weighed carefully the prejudice to the parties, I do not find that the prejudice to the claimant outweighs the prejudice that the respondent would face if I did extend time.

Employment Judge **C Knowles**
6 July 2023