EMPLOYMENT TRIBUNALS

Claimant: **Ms A Brown**

Respondent: **Bank of Ireland (UK) plc**

Heard at: **Bristol (via CVP video hearing)** **On: 26th March 2024**

Before: **Employment Judge P Cadney**

Representation:
Claimant: In Person
Respondent: Ms K Anderson (Counsel)

PRELIMINARY HEARING JUDGMENT

The judgment of the tribunal is that:-

i) The claimant's claims of disability and race discrimination are dismissed as having been presented out of time.

Reasons

1. By a claim form dated 14th June 2023 the claimant brings claims of disability and race discrimination.

2. The case came before EJ Gray on 7th November 2023 for a TCMPH. He listed the case for a Preliminary Hearing today to determine:

> i) To determine the time limit jurisdictional matters as set out in the list of issues below, if it remains the position that all claims are materially out of time. This though is subject to the Employment Judge who is allocated the preliminary hearing being able to decide that the time points are not suitable for determination and that it can be deferred to the full merits hearing, where for example, it can be decided in the light of all the evidence and/or the

best assessment can be made of whether it is just and equitable to extend time.

ii) To confirm the list of issues, consider consequential case management directions, including the listing of a final hearing and consideration as to whether this is a case suitable for an offer of judicial mediation.

Disability

3. The alleged disability is mental health / depressive illness generally, and specifically schizoaffective disorder. Whilst disability is not currently admitted the claimant has adduced medical evidence showing that she has been prescribed anti-depressive medication since 2008, and continuously from 2013/14; and confirming the diagnosis of schizoaffective disorder. Whilst the issue is not before me today, I will assume that here is a significant probability that the claimant will be held to be a disabled person within the meaning of s6 Equality Act 2010.

Race Discrimination

4. The claimant identifies as black and Jamaican born. She asserts that there were only three black members of the mortgage service department.

Age Discrimination

5. In her Particulars the claimant appears to suggest claims of age discrimination in generally favouring and recruiting younger people, and one incident when she was not invited out on a Friday night because she was too old. There has been no application to amend and I have only set out the claims apparently relating to the pleaded claims of race / disability discrimination below. Even, however, if there had been any successful application to amend it would not fundamentally affect or alter the exercise of the discretion.

Claims

6. The claimant has not in her claim form distinguished between allegations of race or disability discrimination and has not identified the type of discrimination relied on in each case. However the claimant's overall claim is that she was the only one of those in her team when she started, or who joined after her who did not achieve some form of promotion. She alleges that this was due either to her race or disability.

7. The events of which she complains in her claim form and which have been clarified in evidence today, are set out below. I have identified what the most likely form of discrimination appears to me to be.

8. The overarching claim is that:

i) The group she started with were all given additional responsibilities and/or were successful in applying to join other internal teams (Direct disability / race discrimination); and/or

ii) That new team members appointed after her also successfully advanced into other roles (Direct disability / race discrimination);

iii) That in general in four years she was not successful in any of her five job applications and contends that her managers deliberately kept her at the entry level (Direct disability / race discrimination).

9. The specific allegations are:

10. June 2019 –

i) The claimant applied for but was not appointed to the role of Mortgage Arrears Consultant (Direct Discrimination Race / Disability);

ii) On the day of the interview she called in sick but her manager Melanie Davies demanded that she attend work (Disability elated harassment);

iii) The following day Melanie Davies criticised her for not attending work; and asserted that it was misconduct not to follow her orders to attend (Disability related harassment).

11. 2019 (Post June) – The claimant applied for a Vulnerable Specialist role but was not interviewed or appointed (direct discrimination race/ disability). She understood the role had been removed.

12. June 2020 –

i) The claimant applied for a Mortgage Consultant role. She was interviewed by Marc Hodgson but not appointed (Direct discrimination race/ disability);

ii) The claimant was belittled by Marc Hodgson during the interview (Disability / race related harassment)

13. 2021 -The claimant applied for a Vulnerable Specialist role again. She was interviewed but not appointed. (direct discrimination race/ disability)

14. Early 2022- She applied again for the Mortgage Consultant role, but was informed in May that she was again unsuccessful. This is what prompted her resignation in July 2022.

15. The claimant was disciplined for being off work on four occasions (direct disability discrimination/ discrimination arising from disability)

16. As set out above the claimant has specifically identified the following people as responsible for particular acts of discrimination:

i) Melanie Davies;

ii) Marc Hodgson.

17. The claimant has specifically identified the following people as having been treated more favourably than her:

i) Janos Fabulya

ii) "Alex"

iii) Rebeca Gill

iv) Melanie Davies daughter;

v) Nicola Plessier;

vi) "Jess"

Time Limits

18. The claimant was employed from 30th April 2018 to 1st July 2022. All of her claims arise during that period. She submitted the ET1 claim form on 14th June 2023 having contacted ACAS on 13th June 2023. The ACAS Early Conciliation certificate gives 13th June 2023 and 14th June 2023 as dates A and B. The claimant does not, as a result, obtain the benefit of the extension of time provisions, and the primary limitation period ended at some point between August 2022 and 30th October 2022 (see below). The claim was, therefore presented at least some eight months out of time.

Continuing Act

19. As set out above, the last act of discrimination of which she complains, the failure to appoint to the Mortgage Consultant role in May 2022 occurred just over a year before the claim was submitted. Alternatively if time began to run from 1st July 2022, the last day of her employment, this was just under a year before the claim was submitted. I will assume for today's purposes that it is at least arguable that for many of the claimant's claims, particularly those relating to the lack of promotion, that the failure to promote her reflects an underlying continuing act even if the individuals involved and specific events were different.

Law

20. The burden of proving that it is just and equitable to extend time to enable a claim to proceed lies on the person seeking the extension. In Robertson v Bexley Community Centre t/a Leisure Link (2003) IRLR 434, the Court of Appeal stated that when employment tribunals consider exercising the discretion under s123 Equality Act 2010, '*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 claim*

*unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of dis*cretion *is the exception rather than the rule*.' (Although see the latest guidance from the EAT below as to the application of this principle)

21. Some relevant factors can be derived from s33 Limitation Act 1980 (as identified in British Coal Corporation v Keeble (1997) IRLR 336). S 33 Limitation Act 1980 requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, to:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had co-operated with any requests for information.

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action.

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

22. However, the ET has a broad discretion and those factors should not be applied mechanistically; as is set out in Adedeji v University Hospitals Birmingham NHS Trust (2021) EWCA Civ 23:- *"Keeble did no more than suggest that a comparison with the requirements of section 33 might help "illuminate" the task of the tribunal by setting out a checklist of potentially relevant factors. It certainly did not say that that list should be used as a framework for any decision. However, that is how it has too often been read, and "the Keeble factors" and "the Keeble principles" still regularly feature as the starting-point for tribunals' approach to decisions under section 123 (1) (b). I do not regard this as healthy...* " and "*Rigid adherence to a checklist can lead to a mechanistic approach to what is meant to be a very broad general discretion... 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 ….. "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*".

23. In addition at Paragraph 24 Underhill LJ stated that the self-direction that there was "*…a public interest in the enforcement of time limits and that they are applied strictly in employment tribunals"* is a correct statement of the law.

24. The most recent expression of appellate guidance as to the question of a just and equitable extension of time is the decision of the EAT (HHJ Tayler) in *Jones v Secretary of State for Health and Social Care* (paras 27-.38 (para 38 is included for completeness sake and is not specifically relevant in this case)):

27. Section 123 of the Equality Act 2010 ("EQA") provides that:

123 Time limits

(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.

28. Section 140B EQA permits an extension of time where ACAS early conciliation is undertaken in certain circumstances not relevant to this appeal.

29. Strictly speaking, section 123 EQA does not set out a primary time limit that may be extended but a time limit of three months **or** "such other period as the employment tribunal thinks just and equitable". Where the Employment Tribunal decides that a period other than three months is just and equitable that is the time limit. Nonetheless, the use of the term "primary time limit" for the three months period (with an extension for ACAS early conciliation where appropriate) is a useful shorthand.

30. It remains a common practice for those who assert that the primary time limit should not be extended to rely on the comments of Auld LJ at paragraph 25 of *Bexley Community Centre (t/a Leisure Link) v Robertson* [2003] EWCA Civ 576, [2003] IRLR 434, that time limits in the Employment Tribunal are "exercised strictly" in employment cases and that a decision to extend time is the "exception rather than the rule" as if they were principles of law. Where these comments are referred to out of context, this practice should cease. Paragraph 25 must be seen in the context of paragraphs 23 and 24:

> 23. I turn now to the second issue. The decision by the employment tribunal not to exercise its discretion to consider the claim on just and equitable grounds. There are a number of basic propositions of law to which Miss Outhwaite has referred us which govern the way in which this exercise has to be undertaken. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine, as it did here, having reconvened for the purpose of hearing argument on it.

> 24 The tribunal, when considering the exercise of its discretion, has a wide ambit within which to reach a decision. If authority is needed for that proposition, it is to be found in *Daniel v Homerton Hospital Trust* (unreported, 9 July 1999, CA) in the judgment of Gibson LJ at p.3, where he said:
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> 'The discretion of the tribunal under s.68(6) is a wide one. This court will not interfere with the exercise of discretion unless we can see that the tribunal erred in principle or was otherwise plainly wrong.'
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> 25 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. It is of a piece with those general propositions that an Appeal Tribunal may not allow an appeal against a tribunal's refusal to consider an application out of time in the exercise of its discretion merely because the Appeal Tribunal, if it were deciding the issue at first instance, would have formed a different view. As I have already indicated, such an appeal should only succeed where the Appeal Tribunal can identify an error of law or principle, making the decision of the tribunal below plainly wrong in this respect.

31. The propositions of law for which *Robertson i*s authority are that the Employment Tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere. The comments of Auld LJ relate to the employment law context in which time limits are relatively short and makes the uncontroversial point that time limits should be complied with. But that is in the context of the wide discretion permitting an extension of time on just and equitable grounds.

32. *In Chief Constable of Lincolnshire Police v Caston* [2009] EWCA Civ 1298, [2009] IRLR 327 Wall LJ stated:

> 24 Mr Rose placed much reliance on paragraph 25 of Auld LJ's judgment …
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> This paragraph has, in turn, been latched onto by commentators as offering 'guidance' as to how the judgment under the “just and equitable” provisions of the Race Relations Act and DDA fall to be exercised. In my judgment, however, it is, in essence, an elegant repetition of

> well established principles relating to the exercise of a judicial discretion. **What the case does, in my judgment, is to emphasise the wide discretion which the ET has** – see the dictum of Gibson LJ cited above – and articulate the **limited basis upon which the EAT and the court can interfere**. [emphasis added]

33. Sedley LJ stated:

> 30. I agree with Mr Justice Underhill and Lord Justice Wall that the EJ's decision, while it could have been (and, had it been reserved, no doubt would have been) a great deal better expressed, was not vitiated by any error of law.
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> 31 *In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well- known example), policy has led to a consistently sparing use of the power. That has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that limitation is not at large:* there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. [emphasis added]

34. Longmore LJ agreed, and added, pithily:

> I agree and would only reiterate the importance that should be attached to the EJ's discretion. Appeals to the EAT should be rare; appeals to this court from a refusal to set aside the decision of the EJ should be rarer. Allowing such appeals should be rarer still.

35. Without meaning any disrespect to Auld LJ, there might be much to be said for Employment Tribunals focusing rather less on the comments in *Robertson* that time limits in the Employment Tribunal are "exercised strictly" and an extension of time is the "exception rather than the rule"; and rather more on some of the other Court of Appeal authorities, such as the concise summary by Leggatt LJ in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640, [2018] ICR 1194 at paragraph 17-19:

> 17 The board's other grounds of appeal all seek to challenge the decisions of the employment tribunal that it was just and equitable to extend the time for bringing (a) the claim based on a failure to make adjustments and (b) the claim alleging harassment by Ms Keighan. Before turning to those grounds, the following points may be noted about the

power of a tribunal to allow proceedings to be brought within such period as it thinks just and equitable pursuant to section 123 of the Equality Act 2010.

> 18 First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act 2010 does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corpn v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] ICR 800, para 33. The position is analogous to that where a court or tribunal is exercising the similarly worded discretion to extend the time for bringing proceedings under section 7(5) of the Human Rights Act 1998: see Dunn v Parole Board [2009] 1 WLR 728, paras 30–32, 43, 48 and Rabone v Pennine Care NHS Trust (INQUEST intervening) [2012] 2 AC 72, para 75.
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> 19 That said, 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).

36. As noted recently by HHJ Auerbach in *Owen v Network Rail Infrastructure Limited* [2023] EAT 106 Leggatt LJ went on to state at paragraph 25:

> 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.

37. In our turn, judges of the EAT will be assisted by what Leggatt LJ said at paragraph 20:

> 20 The second point to note is that, because of the width of the discretion given to the employment tribunal to proceed in accordance with what it thinks just and equitable, there is very limited scope for challenging the tribunal's exercise of its discretion on an appeal. It is axiomatic that an appellate court or tribunal should not substitute its own view of what is just and equitable for that of the tribunal charged with the decision. It should only disturb the tribunal's decision if the tribunal has erred in principle—for example, by failing to have regard to a factor which is plainly relevant and significant or by giving significant weight to a factor which is plainly irrelevant—or if the tribunal's conclusion is outside the very wide ambit within which different views may reasonably be taken about what is just and equitable: see *Robertson v Bexley Community Centre (trading as Leisure Link)* [2003] IRLR 434, para 24.

38. A factor that may be of importance in considering an extension of time on just and equitable grounds where there is a potential comparator is when the claimant knew the race of the comparator. In **Barnes v Metropolitan Police Commissioner and another** UKEAT/0474/05 HHJ Richardson held:

> 18. In Mr Barnes' case, there was no doubt that the acts complained of were more than three months before proceedings had commenced. His case was concerned with the second stage: s 68(6). Knowledge of the existence of a comparator at that stage may be relevant to the discretion to extend time. In *Clarke v Hampshire Electroplating* [1991] UKEAT 605/89/2409, the Appeal Tribunal said:
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> "Under section 68(6) the approach of the tribunal should be to consider whether it was reasonable for the Applicant not to realise he had the cause of action or, although realising it, to think that it was unlikely that he would succeed in establishing a sufficient prima facie case without evidence of comparison."
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> 19. It follows that a tribunal will be entitled to ask questions about a Claimant's prior knowledge: when did he first know or suspect that he had a valid claim for race discrimination? Was it reasonable for him not to know or suspect it earlier? If he did know or suspect that he had a valid claim for race discrimination prior to the time he presented his complaint, why did he not present his complaint earlier and was he acting reasonably in delaying?

> These, of course, are far from being the only questions which the tribunal may ask in order to decide whether it was just and equitable to consider the complaint. The tribunal has to consider all the circumstances. We single out these questions because this appeal turns on the tribunal's finding about Mr Barnes' state of mind.

25. It appears to me that the basic principles to be derived from this guidance are:

i) The often quoted passage of Auld LJ is to been seen in context and not isolation, and not applied mechanistically (See EAT paras 31 and 35 above);

ii) The focus and starting point of the tribunal's consideration should be the comments of Leggatt LJ in Morgan, and specifically the two factors identified by him in para 19 Morgan (see EAT para 35 above).

Evidence

26. In accordance with EJ Gray's directions the claimant supplied a witness statement and has given oral evidence.

27. Her evidence is (as set out above) that she has a longstanding mental health condition, and been diagnosed with schizoaffective disorder. She commenced work with the respondent as part of the first telephony team for the mortgage services department team, consisting of seven people. She began to experience increased anxiety around the time of the first interview in June 2019. She worked from home during the Covid 19 lockdowns and re-started using drugs but stopped taking her medication. She resigned in July 2022 some months after her last unsuccessful job interview.

28. Specifically in relation to the reason for the delay her evidence is that she commenced new employment, in which she suffered harassment from colleagues, and in March 2023 she was informed by her GP that she could discuss employment issues with ACAS. Prior to that she was not aware of the existence of ACAS or the Employment Tribunal or any means by which she could pursue any claim.

29. In respect of the period between the end of March and 13th June 2023 when she consulted ACAS, she stated that she was still in work, but she was suffering from stress and depression, and she had childcare responsibilities as a single mother.

30. The respondent objects to the application to extend time for the reasons set out below. In support of its objection it has called evidence from Harpreet Singh Thiara, an Employment Relations Specialist with the respondent. His evidence is in summary:

i) None of the issues the claimant raises in her ET1/claim form were raised internally as grievances. Had they been it would have been obliged to retain the relevant documentation but for the reasons set out below it has not.

ii) As set out above the primary focus of the claimant's claim is the failure to secure promotion specifically through applications for five roles between June 2019 and early 2022.All records relating to unsuccessful job applications are only retained for twelve months. As a result all records for all of the job applications were deleted under the GDPR Data Retention and Deletion procedure before the claim was issued. This is also true of the respondents recruitment platform (Amris).

iii) In respect of the individuals involved Marc Hodgson is still employed by the respondent and he recalls interviewing and providing feedback to the claimant. However all his notes were uploaded to Amris and have now been deleted.

iv) Jade Redford, Nicki Plessier and Felicity Ball are also still employed but cannot recall any specific interaction with the claimant.

v) There are no records for "Jess" or Janos Fabulya.

vi) Melanie Davis, Rebekka Gill and Cerys Meadows are no longer employed by the respondent and he has had no response from the latter two.

31. He concludes by saying that combined effect of the lack of documentary evidence; the fact that key individuals do not recollect anything significant; and that some individuals have left the respondents employment as significantly impacting its ability to defend the claim.

Submissions

32. The claimant's submissions, are in summary: firstly she was genuinely not aware of any avenue for bringing claims, and specifically not that she had any right to bring claims before the employment tribunal until she was informed of the existence of ACAS by her GP. Secondly, she contends that that is the fault of the respondent and that her managers had a duty of care to draw this to her attention. Thirdly the delay between March and June for contacting ACAS is explicable for the reasons set out above, and is in any event not excessively lengthy. Fourthly, whilst the claim is out of time the period is not very lengthy or significant, and the delay cannot have significantly affected the cogency of the evidence; and the delay has not therefore, in fact significantly prejudiced the respondent. Finally, she firmly believes that she has been the victim of consistent discrimination over a period of years, particularly in relation to the lack of promotion, and that it would be unfair if she were not allowed to pursue her claims; and that any prejudice to her in not being allowed to pursue them outweighs any prejudice to the respondent if she is.

33. The respondent's submissions follow the recommendation of the EAT, and focus on Leggat LJ's two points.

34. Dealing first with the reason for delay they submit that there is no good reason either for the delay in principle, or the further delay between March and June 2023. They submit that the claimant's evidence that she was unaware that there was any recourse for discrimination in the workplace is scarcely credible, particularly for someone employed by a large financial institution; but even if true there was no impediment at any stage to her making the most basic enquires on line, simply by searching "discrimination", or "discrimination in employment" or a similar formulation. Had she done so she would easily have found information as to ACAS, the Employment Tribunal and time limits. During the primary limitation period she was working and there is no suggestion that there was any physical or medical impediment to her making basic online enquiries. Even after being aware of the existence of ACAS, she waited a further two and a half months, which is in and of itself almost the primary limitation period before making any enquiries. Whilst the absence of a good reason for the delay is not determinative in and of itself, it is a factor I can take into account.

35. In respect of the second they contend that the evidential prejudice for them if the claim is permitted to proceed outweighs any to the claimant if it is not. The basis of the claimant's primary claim will be that the tribunal can infer from the absence of promotion for her, and the fact of promotion for others that the reason was discriminatory. If the tribunal were to conclude that it could draw such an inference in the absence of an explanation from the respondent, the burden of proof would transfer to the it and it would be enormously difficult, if not impossible to discharge it. They have adduced cogent evidence as to the fact of, and the reason for their no longer having any records in relation to any of the applications, so as to demonstrate why the claimant was not interviewed or appointed, or by which to conduct, or allow the tribunal to conduct any comparative exercise. If the claim had been submitted in time some of the records would already have been deleted. However at least the records for the final application in early 2022 would still exist, and depending when it took place and when the claim was issued, the records of the penultimate application in 2021 also may still have been in existence. At least therefore there would have been a documentary evidential basis, which could also assist the recollection of those giving oral evidence, against which to judge one or more of the allegations of discrimination. If they are permitted to proceed now there will be none.

36. In addition they will be significantly prejudiced as some witnesses have little or no recollection of events which were up to four years before at the point the claim was submitted, and they may not be able to contact or call some at any future hearing.

37. It follows that the delay has caused very significant evidential prejudice

Conclusions

38. The task for me is to balance the factors set out above on behalf of both parties, and essentially to form a conclusion as to where the balance of prejudice lies.

39. Clearly there is prejudice to the claimant if she is not allowed to pursue what maybe a meritorious case, although that is always true when a case is presented out of time and time is not extended. That factor is necessarily not conclusive

40. Similarly I accept the respondent's submissions that there is no good reason for the delay in presenting the claim, although that is not determinative in and of itself.

41. If the claim had been submitted in time some of the records would already have been deleted. However this does not in and of itself, prevent me from taking into account the fact that a number of the allegations are historic, going back to 2019, even if the delay is not lengthy (see para 33 Adedeji above per Underhill LJ). In addition, had it been submitted on time, at least the records for the final application in early 2022 would still exist, and depending when it took place, the records of the penultimate application in 2021 also may still have been in existence. I accept the respondent's submission that there would therefore have been a documentary evidential basis, albeit partial, against which to judge one or more of the allegations of discrimination. It follows that the consequence of the delay has been to prevent the respondent retaining evidence in respect of at least one, and perhaps two of the of the allegations.

42. As the documentary evidence in respect of the earlier allegations had already been deleted, it in my judgment it makes the remaining evidence of even greater significance in allowing the respondent properly to defend the claims, and the prejudice to the respondent of not being able to adduce any documentary evidence in respect of any of the primary allegations at all is very significant indeed. It follows that the delay has caused very significant evidential prejudice to the respondent's capacity to defend the claims.

43. For the reasons given above, the prejudice to the respondent if the case is permitted to proceed is, in my judgment, very significant. In my view the most significant factor relates to the documentary evidence. Looked at overall the prejudice to the respondent if the case is permitted to proceed does, in my judgment outweigh that to the claimant if it is not. It follows that I am not persuaded that it is just and equitable to extend time in this case.

44. It follows that as I have concluded that it is not just and equitable to extend time, that the claimants claims must be dismissed as having been presented out of time.

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Employment Judge Cadney
Dated: 27th March 2024

Amended Judgment sent to the Parties on 21 June 2024

For the Tribunal Office