EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 8000034/2024

Hearing Heard at Aberdeen by means of CVP on 8th April 2024

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Employment Judge J Young

15 **Sharon Mellis** **Claimant**
In Person

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The Highland Council **Respondent**
Represented by:
Mr M Whillans -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

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(1) although the complaint of unfair dismissal was presented outwith the three month period provided for in section 111 of the Employment Rights Act 1996 the Tribunal is satisfied that it does have jurisdiction to hear the complaint of unfair dismissal;

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(2) the Tribunal is satisfied that it has jurisdiction to hear the claimant's complaints of discrimination under the Equality Act 2010.

REASONS

1. !n this case the claimant presented a claim to the Employment Tribunal complaining that she had been unfairly dismissed and discriminated against by the respondent. That claim was presented on 9 January 2024.

2. The claimant asserted discrimination arising from disability under section 15 of the Equality Act 2010 (EqA); failure to make reasonable adjustments for the claimant under sections 20/21 of EqA; and of victimisation under section 27 of EqA. The respondent denies unfair dismissal and discrimination and also asserted that the Tribunal had no jurisdiction to hear the complaints by virtue of time bar. This Preliminary Hearing was arranged to determine:-

    (a) Were the complaints of discrimination and/or victimisation presented within 3 months of the date of the acts to which the complaint relates or such other period as the Tribunal thinks just and equitable in accordance with section 123 of EqA; and

    (b) Was the complaint of unfair dismissal presented within 3 months of the effective date of termination, or such further period as the Tribunal considers reasonable, if it is satisfied that it was not reasonably practicable for the complaint to be presented within the initial 3 month period in accordance with section 111(2) of the Employment Rights Act 1996 (ERA).

The Hearing

3. The parties had helpfully liaised in providing a joint file of documents paginated 1-95. Two documents were added at the Hearing being paginated 96-97 (J1-97).

4. I heard evidence from the claimant.

5. From the evidence led, documents produced and admissions made I was able to make findings in fact on the issues.

Findings in Fact

6. The claimant was employed by the respondent as a Revenues Assistant in the period between 13 November 2017 and 13 November 2022. She was based in the respondent's offices and her duties involved processing applications for benefit and advising on benefit entitlements and claims. Those duties were conducted by computer or by telephone with no in person contact.

7. The claimant felt pain in her hands around Christmas 2020 which gradually increased.

8. in March 2020 as a consequence of the Covid pandemic she commenced home working using a computer provided by the respondent.

9. At this time her doctor had diagnosed osteoarthritis with a query as to whether or not the claimant had rheumatoid arthritis.

10. In April 2021 the claimant's mother's health declined and she spent non work time travelling to care for her in Edinburgh.

11. By June 2021 the pain which was now in her fingers, hands, spine and feet had increased to the extent that she was no longer able to continue working. She has not worked since June 2021.

12. She approached her Manager at that time and requested an Occupational Health (OH) referral for assistance to return to work and advised that she made a specific request as to whether voice activated software might be provided.

13. The referral to OH resulted in a telephone conference with the claimant (at which time the claimant advised she had repeated the request for voice activated equipment) and a Report being issued on 30 July 2021 (J1/2). That Report essentially advised that test results were awaited to confirm the *"type of arthritis she has"* with no treatment plan in place and it was appropriate to await the outcome of the results with a treatment plan in place before considering *"what reasonable adjustments can be afforded to facilitate a return to work".* The Report also provided that in the opinion of the OH provider the claimant remained *"unfit due to ongoing joint pain and discomfort* ..." and that the respondent may wish to refer the claimant *"back to OH following the outcome of her results"* in order that any adjustments might be considered.

14. On 7th September 2021 the claimant reported to her Manager that a diagnosis had been obtained from her consultant of *"osteoarthritis and (probably/possibly) psoriatic arthritis".* The letter (J3) advised that there would be a follow up. She advised that she still suffered from painful fingers and joints and that she had an appointment with a doctor later in the week and indicated *"any suggestions to help me get back are very welcome".* She advised she received no response to that letter.

15. The claimant's mother died on 18 September 2021.The claimant had hoped that the joint pain would ease given that the stress of watching her mother die had ended but it in fact got worse with her doctor advising that possibly adrenaline had masked the pain. Around this time she became depressed and was prescribed Sertraline.

16. In February 2022 she was advised that her sick pay period would end in April 2022 and the claimant decided that she would require to apply for ill health retirement. That decision was essentially driven by financial need as she was shortly to be on zero income with two children in further education and one still residing at home.

17. In March 2022 the claimant's consultant advised that the complaint was *"only osteoarthritis"*. She advised her Manager of the diagnosis. A further referral was made to OH with a meeting being held remotely on 23 March 2022. The subsequent report (J7) advised that, the claimant was *"unlikely to return to work in the long term at any time"* and that she *"wishes to retire on grounds of ill health"* and that the OH provider had sought consent to approach her doctor to obtain a medical report on her condition. Subsequently an Independent Registered Health Practitioner (IRHP) would review reports and make a decision on *"IHR suitability"*. There was no discussion at that time of any adjustments which might be made for the claimant to make a return to work.

18. On 26th April 2022 the respondent received a letter from the instructed IRHP (J8) who had reviewed available clinical reports and noted the specialist report of 8 March 2022 suggesting that physiotherapy was planned and that her most recent GP Report indicated the *"possibility of localised injections to alleviate her pain"*. It was stated that in light of that information there still remained a *"reasonable prospect of symptomatic improvement"* which may be sufficient for *"a return to her employed duties, which may or may not require adjustments, for which further Occupational Health input would be required"*. Accordingly it was stated that the claimant could not be considered to have *"incapacity of a permanent nature"* and the IHR application could not be supported.

19. The claimant did not receive this letter and no copy was provided to her by the respondent. She learned of it at a meeting on *"Teams"* of 13 May 2022 with her Manager. She was told at that time what the letter had said regarding the IHR application. She had no knowledge of any *"localised injections to alleviate her pain"* suggested by her GP.

20. The claimant contacted her GP who advised that there was no suggestion that painkilling injections may assist and advised she would send a further letter to the IRHP. She did so but there was no change of heart on the IHR application.

21. Shortly after the meeting of 13 May 2022 the claimant's manager sought return of her computer from home. The claimant did not consider she could refuse this request as it was Council property but described herself as *"devastated"* that she would no longer be able to keep contact with her work colleagues or have access to any of the internal support systems or intranet. She considered the message was that she was no longer *"part of the team".* She was aware that others who had been on maternity leave or other long term absence had not had any requests for return of computer equipment.

22. On 25 August 2022 the claimant received an email from her Manager (J12) which advised that she had been awaiting information from HR regarding next steps and asked if voice activated technology might be used to assist her back to work in some capacity *"as there may be scope for redeployment if this were"* suitable. The claimant replied that day (J11) to say that she would be happy to try voice activated software. It was something that she had suggested *"to Occupational Health last April but they didn't seem to think it was appropriate".* She also indicated that any redeployment would need to involve homeworking as she did not feel safe to drive any distance. Her Manager advised she would return to HR to advise the claimant would *"consider trying voice activated software with the provision for homeworking* etc."(J11).

23. Further email took place on this matter with the claimant on 8th September 2022 raising some queries on redeployment and also made the point that she had been on *"zero pay for a while"* and it was only now that *"possible adaptations had been mentioned"* and it would have been more helpful had this been offered earlier and that if the respondent was unable to place her in a role then what would be the next step. She also asked for a copy of any redeployment policy or policy regarding reasonable adjustments on disability. At that time she was claiming ESA. Her Manager responded to say that she still awaited a response from HR on the issue (J13/14) but it was likely a further referral to OH would be required on the possibility of voice activated

technology as the claimant had previously indicated that she *"didn't feel that you could return".*

24. Around this time the claimant had a discussion with her Manager regarding possible redeployment and the process which was involved. Her Manager had gone through a list of jobs which were available but had indicated for each one that the claimant would be unable to take up any redeployment offer due to her disability. The process would involve the claimant going on a redeployment list, for 12 weeks with an assigned HR person to assist finding a position. If at the end of that time no redeployment had been possible then it would be necessary to consider a capability hearing given the long term absence. The claimant was concerned that given the information on lack of any possible redeployment she would simply be on a waiting list for 12 weeks with zero pay and then be dismissed and that being on such a list would affect her entitlement to ESA. These matters were summarised in a letter to the claimant of 16th September 2022 (J15/16).

25. The claimant responded saying that she had thought the suggestion of voice activated software had come from Occupational Health in an attempt to provide reasonable adjustments. She considered that she would wish to appeal against the refusal of IHR as there would not appear to be any suitable posts. The claimant was very depressed at this point. Her condition was painful and she felt there was *"nothing I could do".*

26. She attended a capability meeting on 11 November 2022 and at that time was dismissed as a result of her ill health with effect from 13 November 2022. She was sent a letter confirming that dismissal on 11 November 2022 (J19). The claimant advised that she did not read the letter at that time such was her distress.

27. The letter to her reviewed the information available and stated:-

> *"You advised that there has been no improvement in your health and situation and that you consider that you would not be fit to return to*

work in any capacity and that no reasonable adjustments or supports could allow you to do so".

28. The claimant explained that she considered the duty to consider reasonable adjustments was on the respondent and that she had trusted them to make the appropriate assessment. She believed that her employer would have conducted all processes correctly in coming to a view on dismissal. Accordingly she did not consider that her dismissal was unfair at that time and took no action.

29. The claimant acknowledged that she was aware of unfair dismissal claims but having no reason to consider that her dismissal was unfair at the time did not make any enquiry or application to the Tribunal.

30. The claimant had appealed the decision of refusal of suitability for IHR in September 2022 and awaited the outcome.

31. Over a lengthy period the claimant sought resolution of that appeal. Email correspondence (J25/56) showed continued requests for progress by the claimant and no response from the respondent. The *"Stage 1* Appear should have been resolved within 3 months of 23 September 2022 but had not been progressed by that point (J55/56). The claimant made contact with various of the respondent' officers to ascertain progress but had not been given any satisfactory response. She contacted her local Councillor for assistance in February 2023 stating that she was *"emailing you in the desperate hope that you can help me"* (J225) and was aware that the Scottish Public Pension Agency (SPPA) had also become involved in an attempt to make progress with her appeal.

32. On 7 August 2023 (J57) the claimant advised the respondent that as all previous attempts at communication on the appeal had been ignored she had no option but to lodge a *"Stage 2 Appeal"* with SPPA again (having done so previously) and that she had now lodged a formal complaint. Thereafter she

was notified that a new OH provider had instructed a fresh IRHP to review the various Reports on the ciaimant's health along with the previous refusal.

33. The Report from that IRHP dated 20 November 2023 (J58/59) advised that there was insufficient evidence to consider *"on the balance of probability"* that the claimant was likely to be *"permanently incapable of discharging the duties of her contracted role"* given that there were some treatment options which could be put in place to help stating?

"Furthermore the available evidence does not show that the appropriate workplace adjustments have been robustly explored in this case. Before ill health retirement can be considered all reasonable workplace adjustments should have been investigated, medical treatments have been fully explored and the possibility of other work for the employee should have been looked into. The OH Report from 2021 suggested a need for adjustments in this case and it is unclear why it was unavailable for Mrs Meilis. I anticipate that Mrs Meilis would benefit from assistive technology such as speech to text software, ergonomic equipment such as a soft touch keyboard, a sit-stand desk etc and ergonomic workstation settings to limit the need for typing. Access to Work can help in workplace assessment and the provision of funding, appropriate equipment and training. Changes in work organisation should also be considered".

34. The claimant received this Report on 1 December 2023 having had sight of a draft Report which she was invited to correct for her part (which she did) and considered the Council may correct other areas if they took exception to the Report.

35. The claimant received a letter of 29 November 2023 (J60) from the respondent in which it was noted that the Report from the independent practitioner had been forwarded to the claimant and while that *"mentions reasonable adjustments"* understood that *"this was discussed in meetings"* and the claimant felt she *"would be unable to return to work in any capacity and no reasonable adjustments or supports would enable her to do so".*

36. Essentially the claimant considered this to be new information, namely that there were workplace adjustments which could have been put in place by her employer. She considered this a neglect of their duty to explore the possibility of reasonable adjustments and that failure rendered her dismissal unfair and that there had been discriminatory treatment. She considered that she had never been offered the form of adjustments being outlined in the Report and so could not have refused them.

37. The claimant made enquiry of ACAS regarding her claim and received some advice on time limits. She was told that it may be appropriate to take legal advice. She contacted her home insurers as legal advice was included and was able to speak to one of the legal advisors. She was a little confused as to the advice being received and approached ACAS for early conciliation from 5 December 2023 with a Certificate being issued on 4 January 2024. In the meantime she had purchased a laptop to enable her to make her claim which she presented to the Tribunal on 9 January 2024.

38. In respect of the claims made it is conceded by the respondent that at the relevant time the claimant was a disabled person as that is defined in EqA. The claimant asserts discriminatory treatment of her by being isolated in the removal of equipment in May 2022 from her home; that there had been a failure on the part of the respondent to put in place reasonable adjustments by way of auxiliary aids as identified in the Report of 20 November 2023 along with adjustments such as more frequent breaks and/or a reduction in working hours; that failure was discriminatory and also led to unfair dismissal: and that she had been victimised in that the respondent had failed to progress her Stage 1 pension appeal within the 3 month statutory time limit and in any event interact with her on that appeal and deliberately delayed its determination until 20 November 2023 to prevent a discrimination claim being made in time. She asserts the continuing delay was victimisation on the basis that she may make such a claim.

39. The claimant made a Freedom of Information request subsequent to lodging her ciaim and the response showing the length of time it took- for the respondent to conclude IHR appeals (J64) and noted her appeal took considerably longer for resolution but that it appeared the respondent regularly exceeded the 3 month period within the appropriate Regulations for concluding such appeals.

Submissions

40. I was grateful for the submissions made by the parties. No discourtesy is intended in making a summary.

For the Claimant

41. On the issue of unfair dismissal the claimant submitted that crucial information had been withheld from her by the respondent. They had not followed their procedure in the dismissal in exploring all reasonable adjustments before taking the dismissal step. She had sought information on what could be done to get her back to work and that information had not been properly explored by the respondent. Only when she received the outcome of the appeal and the Report from the IRHP was it made dear that reasonable adjustments had not been properly explored before any decision to dismiss was taken.

42. It was acknowledged that she was aware of the possibility of making a Tribunal claim but had no particular knowledge of that procedure or timescales involved. In any event, at the relevant time she had trusted that the Council were following procedures and had no reason to consider a failure. Her mental health at that time was not great given the medication being taken, pain being experienced and continuing distress on the death of her mother.

43. Once she became aware of her claim she had contacted ACAS and proceeded swiftly with early conciliation and the lodging of her ET1 claim form.

5 44. On the discrimination claims she advised that her claim of victimisation continued through to 1 December 2023 when she received the outcome of the appeal which noted the failure of the respondent to explore and implement reasonable adjustments. Her position was that the Council had deliberately delayed the appeal process on the basis that once the appeal
10 outcome was known she would make a claim under EqA. Her claim of discrimination was within time having been presented on 9 January 2024 with early conciliation occurring between 5 December 2023 and 4 January 2024. On that basis her claim of discrimination should proceed.

15 45. In any event the submission made in respect of the claim of unfair dismissal was relevant also for the discrimination claim.

46. She had not been aware of the reasonable adjustments which could be offered until the outcome Report on the appeal had been issued. As soon as
20 she was aware of these matters she made her claim promptly. There would be no prejudice caused to the respondent as the vast majority of evidence would be contained within emails and other documents. She did not have evidence of failed calls but she had a chain of emails including emails with SPPA and her local Councillor which would evidence long periods of non
25 communication with her on the appeal process and lack of information of reasonable adjustments prior to her appeal.

47. The joint file included Tribunal cases to which the claimant made reference being **Brereton v Jane Ward and Mairi Campbell-Block t/a Stems Florist**
30 3301341/2021; **B Nagy v Sodexo Limited** 4103927/2022; **Polly Reymond v Greystoke Manor** 1403217/2022; and **T McInerney v Sword Construction UK Limited** 4103759/2023.

For the Respondent

48. It was submitted for the respondent that the claimant had not been able to show that the claim of unfair dismissal should proceed. The claimant had made it dear that she did not consider reasonable adjustments were appropriate and the Council relied on that.

49. The claimant had been asked on 16 September 2022 if she wished to proceed with the redeployment process and on 22nd September 2022 (J15/18) the claimant responded to say that she had decided not to continue with the redeployment process but appeal against the decision to refuse access to her LGPS pension.

50. Again no appeal was submitted against the dismissal. The claimant was able to take advice. She was well aware of the availability of advice agencies such as CAB. She knew that claims of unfair dismissal could be taken to Tribunal. She was aware of the opportunity to discuss matters with ACAS. She failed to take those steps. Had she done so she could have lodged her claim in time. It was reasonably practicable for her to have done so.

51. The timescale in this case was over 12 months from the date of dismissal before the claimant lodged her claim of unfair dismissal. Albeit authority suggested that section 111(2) of ERA should be given a liberal interpretation in favour of an employee, allowing a claim to proceed more than 12 months after dismissal could not be considered a reasonable time period.

52. Reference was made to **Marks and Spencer Pic v Williams** [2005] ECWA Civ 470; **Palmer and Saunders v Southend on Sea Borough Council** [1984] IRLR 119: **Walls Meat Company Limited v Khan** [1978] IRLR 499; **Dedman v British Building and Engineering Appliances Limited** [1973] IRLR 379; **London International College Limited v Sen** [1993] IRLR 333; **Remploy Limited v Brain** UKEAT0465/10; **Becksley Community Centre t/a Leisure Link v Robertson** [2003] IRLR 434 **Marley (UK) Limited and other v Anderson** [1993]; **University Hospitals Bristol NHS Foundation**

Trust v Williams UKEAT/0291/12; **Nolan v Balfour Beatty Engineering Services** EAT0109/11.

53. On the issue of the claims under the EqA it was stated that the allegations of discrimination and victimisation were denied in their entirety. At no time did the respondent intend to cause undue delay in the outcome of the pension appeal in order to prevent the claimant issuing a claim to the Tribunal. In any event the potentially *"protected act"* of issuing Tribunal proceedings could have been pursued by the claimant prior to the pension appeal decision in November 2023.

54. It was submitted that the delayed appeal decision could not be considered a continuing act of discriminatory conduct and so the claims under EqA were also out of time under reference to section 123 of EA.

55. In the Report of the OH physician of 23 March 2022 (J7) the claimant advised that she wished to retire on the grounds of ill health thus indicating she did not wish to return to work with or without reasonable adjustments.

56. The respondent had contacted the claimant suggesting use of voice activated equipment on 25 August 2022 and those issues were further explained in relation to redeployment in September 2022. However the claimant did not wish to go through the redeployment process (J18).

57. The medical reports from the IRHP indicated that ill health retirement was not a possibility and the claimant was advised of this matter at least by May 2022. She had ample time to submit her claim to the Tribunal if she felt she was being discriminated against.

58. It was also submitted that the delay in providing an appeal decision was not due to the claimant's disability status and that once the outcome report was received the claimant was advised promptly of details of how to lodge a Stage 2 appeal. In any event given the outcome of the November 2023 Report supporting the original decision in 2022 it was submitted that even if

the process had been undertaken differently or within a shorter period of time that would not have changed the outcome.

59. Reference was made to **Bodha v Hampshire Area Health Authority** [1982] ICR 200 and **Polkey v A E Dayton Services Limited** [1987] UKHL 8.

Discussion and Conclusions

Claim of Unfair Dismissal

60. Section 111(2) of ERA states that a Tribunal shall not consider a complaint of unfair dismissal unless it is presented to the Tribunal before the end of 3 months beginning with the effective date of termination, or 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 3 months.

61. It is clear that in this case the complaint was not presented within the primary limitation period of 3 months. The dismissal of the claimant took effect from 30 November 2022 with the claim being presented 9 January 2024. The issue then becomes whether it was reasonably practicable for the complaint to be presented within that primary limitation period.

62. The question of what is reasonably practicable is a question of fact for a Tribunal, The burden of proof falls on the claimant. Lord Underhill in **Lowri Beck Services Limited v Brophy** [2019] EWCA Civ 2490 advised in respect of the test that:-

- The section should be given a liberal interpretation in favour of an employee
- The test was not just one of physical impracticability
- If a claimant misses time because he/she is ignorant of or mistaken about time limits or of a crucial fact then the issue is

whether that ignorance or mistake was reasonable. If not then it was reasonably practicable to bring the complaint in time. There was a need to assess any enquiry which an employee or advisor should have made

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- If there was a skilled advisor involved then the mistake would be attributed to the advisor and it would still be reasonably practicable to make the claim

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- The test was one of fact and not of law

63. In this case it is not asserted by the claimant that she was ignorant of the ability to make a claim of unfair dismissal to an Employment Tribunal. While she indicated she had no knowledge of the process involved or conditions which might attach to making a claim the ignorance of a time limit would rarely be acceptable for delay where an employee was aware of the right to claim unfair dismissal. In those circumstances an employee would have been put on enquiry or should enquire as to any conditions which might attach to the process of making an application to the Employment Tribunal.

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64. In this case it was not ignorance of the right to claim that was being asserted by the claimant but the discovery of new relevant facts which was at the root of her submission. That can be a ground for an extension of time (**Machine Tool industry v Simpson** [1988] ICR 558). The principles which would require to be assessed in relation to such a claim were helpfully set out in **Cambridge v Peterborough NHS Foundation Trust and Crouchman** [2009] ICR 1306. Those principles could be summarised as:-

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- Ignorance of a fact that is crucial or fundamental to a claim will in principle be a circumstance rendering it impracticable for a claimant to present that claim

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- ♦ A fact will be crucial or fundamental if it is such that when the employee learns of it his or her state of mind genuinely and

reasonably changes from one where it is not believed he/she has grounds for a claim to one where he/she believes a claim is viable

- The ignorance of a fact has to be reasonable and the change of belief in light of the new fact is reasonable

® It is not relevant to decide that the belatedly learned crucial fact is true. What matters is whether the information has genuinely and reasonably produced the change of belief

65. In this case I accepted from the claimant that it was only on receipt of the IRHP Report of 20 November 2023 that the issue of adjustments that could have been put in place was clearly identified. Those had not been identified previously in the OH referrals which had been made to the point of dismissal. The position of the respondent appeared to be that as the claimant could not identify reasonable adjustments (apart from the possibility of voice activated software) and had made application for IHR then no further enquiry need be made.

66. However the Report of 20 November 2023 does say that all reasonable *"work place adjustments should have been investigated …."* and identifies that the claimant may benefit from *"assistive technology such as speech software, ergonomic equipment such as a soft touch keyboard, a sit stand desk etc and ergonomic work station settings to limit the need for typing".* It also advises where help might be obtained in that assessment and in the provision of funding. Also it was advised that *"changes in work organisation should be also considered".* Those relevant and critical factors had not been considered.

67. The claimant's position was that when she got sight of this final Report she considered that there has been a failure by the respondent to *"robustly investigate"* these issues and contrary to her belief that the respondent would have acted properly and appropriately in the dismissal that was not the case.

68. The credibility issue which arises is whether the claimant was relying on her claim of IHR succeeding and it was only when that appeal was rejected that she then sought to search for an alternative cause of action and the unfair dismissal claim now made was not brought about by any new facts. However the claim for IHR had been rejected well before dismissal and while an appeal was pending if rejection of IHR was the reason for the claimant to make a claim that ground existed at the point of dismissal.

69. I accepted then from the evidence that it was the content of the report of 20 November 2023 on adjustments which might have been made and not explored that changed the claimant's state of mind genuinely and reasonably from a position where she did not believe there were grounds for a claim to one where she believed a claim was viable.

70. I also accept the ignorance of these matters which could have been explored was reasonable. The claimant had sought views of the respondent on what steps might be taken to assist a return to work. She had sought a referral to Occupational Health in March 2021 but the OH assessments had not revealed any adjustments. She had written following diagnosis to the respondent in September 2021 asking for assistance in what might be put in place but had received no response. She had not herself identified these adjustments which were now stated as ones which should be considered and so was not of the view that the respondent had failed in a duty when they came to make the decision to dismiss.

71. In those circumstances, therefore, I consider that she has made out a claim of reasonable impracticability in the lodging of her claim within the 3 month time limit and that the Report of 20 November 2023 on the appeal did contain significant and crucial facts which caused her to change her belief that she did not have a claim.

72. Thereafter I do not think there can be any dispute that she acted promptly in taking advice from ACAS and a legal advisor through the home insurance policy; instigating early conciliation; and then lodging her claim.

5 73. In those circumstances therefore I 'would not have considered it reasonably practicable to have presented her claim in the 3 month time limit and that once she became aware of the claim took steps to present that promptly. Accordingly I would allow the claim of unfair dismissal to proceed.

io **Discrimination claims**

74. Section 123 of EqA requires that any complaint of discrimination within the Act must be brought, within 3 months of the date of the act to which the complaint relates or such other period as the Tribunal thinks just and

15 equitable.

75. Section 123(3) of EA states:-

"For the purposes of this section -

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(a) conduct extending over a period is to be treated as being done at the end of the period

(b) failure to do something is to be treated as occurring when

25 *the person in question decided on it".*

76. Where there is a series of distinct acts the time limit begins to run when each act is completed whereas if there is continuing discrimination time only begins to run when the last act is completed. A Tribunal should consider whether

30 the substance of a claimant's allegations is an ongoing situation or a continuing state of affairs as distinct from a succession of unconnected or isolated specific acts. This can sometimes be a difficult distinction to make in practice.

77. In **Robinson v Royal Surrey County Hospital NHS Foundation Trust** (UKEAT/0311/14/MC) it was stated that continuing conduct can comprise acts which fall under the different headings of discrimination (such as victimisation and direct discrimination in that case and discrimination arising from disability, failure to make reasonable adjustments and victimisation in this case) and that it would be an error to consider those different types of discrimination separately. Of course it is necessary that the facts of the matters relied on do indeed form a continuing state of affairs. Robinson is only authority for the principle that the mere fact the legal label for discrimination changes during the period is not itself sufficient to break what would otherwise be a continuing act.

78. On that basis it would be appropriate to consider whether there was a continuing course of conduct up to the last act of alleged discrimination being the victimisation claim concluding with the intimation of the outcome report dated 20 November 2023 and which the claimant states she received 1st December 2023.

79. She alleges that the continuing delay eventually resolved with the intimation of that report was an act of victimisation because the Council were aware that once that report was issued she would be making a claim under the EqA (that being the *"protected act").*

80. A continuing act of discrimination can begin during the employment relationship and continue into post termination conduct. In this case the application for review of the refusal of ill health retirement was made in September 2022 and the position of the claimant is that the delay in dealing with that matter continued through to post employment and eventually concluded by intimation of the outcome report to her on 1 December 2023.

81. It was maintained that the victimisation claim could have been made earlier but the position of the claimant is that the claim crystallised on receipt of the Report of 20 November 2023.

82. I do not consider that at this stage it is for me to decide whether that ciaim is good or bad. The fact is that the claim of discrimination was presented to the Tribunal within 3 months of the date of that outcome report or in it becoming available and so was in time. This hearing was not an exercise in assessing whether it was reasonable to consider there had been discrimination by reason of victimisation to the point of release of the outcome report. The assertion of victimisation is made and while it is denied that there is any victimisation it would appear that is a matter for further determination by way of further hearing under the Tribunal Rules of Procedure.

83. The Court of Appeal authorities of **Aziz v FDA** [2010] EWCA Civ 304 and **Hendricks v Commissioner of Police of the Metropolis** [2003] IRLR 96 (as followed in **Lyfar v Brighton and Sussex University Hospitals Trust** [2006] EWCA Civ 1548) makes clear that where the question of time limits arises at a preliminary hearing and there is a question as to whether or not there is *"conduct extending over a period'* the Tribunal must be satisfied that the claimant has a *prime facie* case that the various complaints are so linked as to amount to a continuing act or ongoing state of affairs, In **South West Ambulance Services NHS Foundation Trust v King** [2020] IRLR 168 it was observed that an act that is found at a final hearing not to be an act of discrimination cannot form part of a continuing act for the purposes of the provision of time limits. For that reason it is not normally possible at a preliminary hearing to make any final determination on whether or not something is a continuing act because in order to make any final determination the Tribunal would have to make a final determination on the merits of the claims. So the test at preliminary hearing is not conclusive but whether an act is capable of being part of an act extending over a period.

84. In that assessment **Hendricks** makes it clear that it is not appropriate for Employment Tribunals to take too literal an approach to the question of what amounts to *"continuing acts".* The focus should be on the substance of allegations made and whether the respondent was responsible for an ongoing situation or continuing state of affairs in which the claimant was treated less favourably. Thus the Tribunal should look at the substance of

the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

85. In this case the claimant claims isolation by the removal of her equipment in May 2022 and then failure to make reasonable adjustments for her to continue her employment and then victimisation. She assets these all arise out of her conceded disability. Whether these are claims that will be successful is not the question at this stage. The issue is whether the claimant has a *prima facie* or arguable case that there was conduct over a period culminating in receipt of the outcome report of 20 November 2023. I take the view that the claimant does have an arguable basis for the contention that the various complaints are so linked as to be a continuing act or to constitute an ongoing state of affairs arising out of the treatment of the claimant over a period of time connected with her absence from work on account of her disability. They are separate claims of discrimination but at this stage I do not consider that any of them could be separated as individual acts without connection. In any event there was no submission made that the acts of discrimination should be treated as a series of distinct acts and that time limit began to run when each act was completed.

86. In those circumstances therefore while in due course the Tribunal might consider that there was no victimisation through to 1st December 2023 and so require to consider whether time bar operated in respect of either of the other claims (failure to make reasonable adjustments or discrimination arising from disability) it would not be a matter to be decided at this stage.

87. In those circumstances I consider that it would be appropriate for there to be reserved to any final hearing the issue of time bar on the basis that if the Tribunal did not consider that victimisation was well founded as a discriminatory complaint then it would be necessary to consider whether either the complaint under section 15 of EqA or section 20/21 of EqA were well founded; and if so should time be extended on a just and equitable basis.

88. However i do not think any particular Order need be made in that respect as that would depend on a determination of matters at the final hearing and submissions made. It would suffice at this stage to indicate that the discrimination claims should proceed.

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Employment Judge: J Young
Date of Judgment: 2 May 2024
Entered in register: 2 May 2024
and copied to parties