Case Number: 3313229/2023

EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mrs Jane Cameron Bentley **v** **1. Sodexo Ltd**
2. Buckinghamshire Healthcare NHS Trust

RECORD OF A PRELIMINARY HEARING

Heard at: Watford
On: 18 and 19 December 2024
Before: Employment Judge Bedeau (by CVP)

Appearances
For the Claimant: In person
For the First Respondent: Mr M Mensah, counsel
For the Second Respondent: Mr J Boyd, counsel

RESERVED JUDGMENT

1. The constructive unfair dismissal claim was not presented within a reasonable time, therefore, this claim is struck out.

2. It is just and equitable to extend time in relation the direct disability discrimination claim, and it shall proceed to a final hearing.

3. The claimant's application to amend by adding direct sex discrimination, is granted.

REASONS

1. In a claim form presented to the tribunal on 6 November 2023, the claimant made claims against Sodexo Ltd, hereinafter referred to as, Sodexo, of disability discrimination and constructive unfair dismissal.

2. In the response presented to the tribunal on 21 December 2023, Sodexo avers that the claims were presented out of time; that the claimant was never its employee but an employee of Buckinghamshire Healthcare NHS Trust, hereinafter referred to as the Trust, and as the claims are unparticularised, it requested further information.

3. Following an order issued by Employment Judge Quill on 5 July 2024, the Trust was added as Second Respondent, and the Judge waived the obligation upon it to present a response. (pages 94-95 of the joint bundle)

4. In an email dated 17 July 2024, the Trust's legal representatives wrote to the tribunal agreeing with Sodexo's representatives that the case be listed for a public preliminary hearing to consider the out of time point and the correct respondent. (97-98)

The issues

5. On 1 October 2024, Employment Judge Quill listed the case for a public preliminary hearing. The issues for the Employment Judge to hear and determine were as follows:-

    5.1 Whether Sodexo or the Trust employed the claimant?

    5.2 Whether the claims were brought in time and, if not, whether time should be extended?

    5.3 Whether the Judge should issue case management orders? (100-102)

    5.4 In an earlier direction dated 5 July 2024, the same Judge listed any amendment applications to be heard and determined. (94-95)

The evidence

6. In relation to the out of time issue, I heard evidence from the claimant and from Mr Paul Tovey, Accredited Union Representative, on behalf of the claimant. He was not the claimant's representative during this hearing as she represented herself. On the issue of the correct employer, Sodexo intended to call Ms Kiley MacDermott, Human Resources Business Partner-Care Division, and the Trust, Mr David Spencer Hawkins, Human Resources Business Partner-Corporate Services, but due to the limited amount of time left their evidence was not given as the issue was not heard and determined by me. No other witnesses were called on behalf of the respondents.

7. In addition to the oral evidence, the parties initially produced a joint bundle of documents comprising of 307 pages. Further documents were added during the hearing taking the bundle up to 410 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

8. Sodexo is a facilities management company, delivering a range of services under various trading agreements throughout the United Kingdom and Northern Ireland. It employs over 30,000 people.

9. The Trust is part of the National Health Service.

10. The claimant worked as a Night Switchboard Operator, seconded to Sodexo by the Trust and worked at Stoke Mandeville Hospital. She had been continuously employed by either Sodexo or the Trust from 17 May 2014 to the effective date of her resignation on 22 December 2022. At all material times she was a member of the union, Unison. Following her resignation, and since January 2023, she has been working for the Trust.

11. As referred to above, one of the issues I did not have time to hear and determine, is whether the claimant was legally employed either by Sodexo or the Trust. It is the claimant's case that she was employed by Sodexo. This is disputed by Sodexo as it contends that she was employed by the Trust. The Trust acknowledges that it employed the claimant but disputes that the events in support of the disability discrimination claim applies to its employees or agents, only to Sodexo. (pages 28-50, and 106)

12. On 24 November 2022, the claimant resigned from her employment giving one month's notice, as she felt that she should not have been the subject of an investigation into alleged theft of food when one of her male colleagues at work admitted to the theft and at the time when she was first invited to an investigation meeting, he was not given a similar invitation but sometime later. (287)

13. Mr Tovey accompanied the claimant to the investigation meeting as her representative. He was not aware that the claimant had resigned until after she collected her belongings from work. He and the claimant were aware of the three months primary time limit within which to present a claim to an Employment Tribunal. ACAS was notified of a potential claim on 24 January 2023 and an early conciliation certificate was issued on 7 March 2023. (4)

14. Mr Tovey said that in his conversation with a named ACAS Conciliation Officer, he was told that he needed to "Send it in", that being the claim form. He said that he took that statement to mean that he should send in the claim form to ACAS but acknowledged further into his evidence that the Conciliation Officer neither instructed nor advised him to do so. He then went on to repeat that he was advised to send the form to ACAS, but this did not accord with the rest of his evidence, and he was not able to say who gave him that advice. I do not accept that either the ACAS officer or anyone acting on behalf of ACAS, specifically advised Mr Tovey to submit the claim form to it. Claim forms and responses cannot be legally presented to ACAS.

15. I acknowledge that this was Mr Tovey's first experience in presenting a claim form to a tribunal. It was completed by the claimant, but he sent it off by post to ACAS. He did not, contrary to what the claimant had asserted, complete the section stating that he was her representative. In fact, he acted as her representative up to but not including this public preliminary hearing. (13)

16. He said that he was unaware of Employment Tribunal procedures but was only aware of the time limits.

17. The claim form was sent to ACAS on 6 April 2023 and later supporting documents were also sent on 12 April 2023. Had the claim form been sent on that date to Watford Employment Tribunal, with the ACAS "stop the clock" extension, there would have been no issue in relation to time limits. (301)

18. There was no response either from ACAS or from the tribunal as Mr Tovey had erroneously expected. He rang the tribunal, but no one answered. He again contacted ACAS and spoke to the same Conciliation Officer who informed him that the form should be sent directly to Watford Employment Tribunal. He followed that advice by sending the claim form, which was a copy of the form he had earlier sent to ACAS, on or around 13 July 2023. It was not acknowledged by the tribunal as is the process because, it would appear, the wrong email address was used. He sent the documents to Watford@justice.gov.uk. (301)

19. Mr Tovey also said he checked the email address on the website to confirm that it was correct. A printout of that information was not produced in the bundle nor in evidence. I do not accept that the correct email address was used by him.

20. On 18 August 2023, he emailed the claimant inviting her to call Watford Employment Tribunal because he had a problem getting a response. At the time he was questioning whether he had the correct Watford Tribunal email address and whether he had followed the correct procedure.

21. On 9 October 2023, the claimant emailed him stating that he had used the wrong email address and gave him the correct one. He said in answer to questions put to him by Mr Mensah, counsel for Sodexo, that none of the emails to Watford had bounced back to his email account. (351)

22. From 16 August to 9 October 2023, nothing happened to progress this case to an Employment Tribunal. Mr Tovey said that he again called the tribunal but received no response. The Watford Employment Tribunal email address sent to him by the claimant, which was, "WatfordET@justice.gov.uk.", unfortunately, as the address was at the end of the sentence, she put a full stop after "uk". What Mr Tovey then did was to use the email address given by the claimant with the full stop after "uk". That meant that all of his email correspondence were not received by the tribunal. He wrote to the tribunal on 2 November 2023, at 13:29, stating that he had submitted the claim form several times but had received no response and asked whether it would be possible to acknowledge receipt. (381-382)

23. On 3 November 2023, after speaking to the ACAS Officer he had previously spoken to, stating that he had not heard from the tribunal, he was informed that he would need to send the documents to the Central Administration Centre in Leicestershire and to use the central portal. This being the new set up following the implementation of the Tribunals' Reform programme. He called at a Post Office in Aylesbury on that day and posted, by recorded delivery, a copy of the same claim form that he had sent originally to ACAS, to the Administration Centre in Leicestershire. (409-410)

24. On 6 November 2023, the Administration Centre acknowledged receipt of the claim form as having been presented on that day.

25. Mr Tovey did not do any research on the internet regarding tribunal procedure, nor did he seek legal advice from Unison. He said that requesting legal advice is a drawn-out process.

26. With regard the claimant's application to amend by adding direct sex discrimination, such a claim was not referred to during the investigation meeting on 23 September 2022 and was not part of her grievance dated 2 January 2023. There is no reference to sex discrimination in the reply she sent on 19 April 2024, in response to the order for further information dated 21 March 2024. She confirmed at the time that her claims were constructive unfair dismissal and disability discrimination. Counsel were only made aware of her application to amend at the commencement of the hearing. (63)

27. The claimant was diagnosed with General Anxiety and Disorder in or around 2019, and Social Anxiety was diagnosed three weeks ago. She has accepted that her Social Anxiety diagnosis was not within the knowledge of the respondents while working at Sodexo.

28. Mr Tovey did not help in the preparation of the Agenda for the preliminary hearing listed to take place on 8 July 2024, which was subsequently vacated, and no reference is made in that document to direct sex discrimination. (67 to 72)

<u>The amendment</u>

29. From the claimant's grievance email and from her evidence, it would appear that the basis of the direct sex discrimination claim is the same as for direct disability discrimination, in that, as the only female and someone living with General Anxiety Disorder, working on the Helpdesk Switchboard at night, she was the first to be invited to an investigation meeting when Ms Lesley-Anne Cook, Communications and Compliance Manager, for Sodexo, knew that one of the claimant's work colleagues, Mr Irfan Hussain, Communications Operative, had confessed to ordering food via Patients Dining; Mr Hussain and Mr William Morris, Communications Operative, who are male and do not suffer from the claimant's disability, were not invited at the same time to an investigation meeting until after the date of the claimant's invitation; Sodexo knew about the claimant's anxiety and innocence, yet prolonged the investigation process raising her anxiety level; additional shifts were offered to Mr Hussain but not to the claimant; the claimant felt that she was being pushed out of a job she loved and wanted to continue working in until her retirement; she resigned because of her alleged discriminatory treatment; management insisted on a welfare check on 1 December 2022, while she was on sick leave from 27 October 2022; and she was escorted from the premises when she called to collect her belongings. Her comparators are Mr Hussain and Mr Morris.

30. Sodexo in its response has denied the claims of constructive unfair dismissal, disability and age discrimination, as well as victimisation. In its draft List of Issues for case management, there is no reference to sex discrimination. (74-75)

31. No direct evidence was given by Sodexo on how the cogency of the evidence is likely to be affected if the direct sex discrimination claim is allowed to proceed to a final hearing, and in relation to the out of time issue.

32. I accepted the claimant's evidence when she said that this was her first experience in completing a claim form and that she did not know the boxes to tick and what to write. She ticked only the disability discrimination box. She was, however, as I have found earlier, aware of the time limits.

Submissions

33. I heard oral submissions from the claimant and from Mr Boyd, Counsel on behalf of the Trust. Mr Mensah prepared detailed written submissions and spoke to those. I do not propose to repeat their submissions herein having regard to Rule 62(5) Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013, now rule 60(7) Employment Tribunal Procedure Rules 2024, which came into effect on 6 January 2025. I have also taken into account the authorities they have referred me to.

The law

34. Section 111(1) Employment Rights Act 1996 provides that an unfair dismissal claim may be presented to an Employment Tribunal.

35. Section 111(2) states that an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal -

> "(a) before the end 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."

36. The claimant bears the burden of proving both that it was not reasonably practicable for her to have presented the claim in time and that she presented it within a reasonable time.

37. In the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, the claimant was summarily dismissed. He knew he had some rights under the relevant statute at the time but did not know about the time limits. He sought advice from a firm of solicitors, but they did not advise him of the time limit. He presented his claim form out of time. He failed in his application that he be allowed to pursue his unfair dismissal claim as it was not "practicable" for the claim to have been presented in time

as he was unaware of the time limit and had sought legal advice but was not told about the time limit. The case was considered by the Court of Appeal.

38. Lord Denning MR, held that, "If a man engages skilled advisers to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them.", page 61, paragraph F.

39. A claimant may know of his or her rights but prevented from exercising them through either "illness, absence, some physical obstacle, or by some untoward an unexpected turn of events" which would make it not practicable to have presented the claim in time. Where the claimant is pleading ignorance of the law, questions had to be asked as to what were his or her opportunities for finding out their rights? Did they take them? If not, why not? Were they misled or deceived? Were there acceptable explanations for a continuing ignorance of the existence of their rights? Ignorance of his or her rights does not mean that it was impracticable for him to present a complaint in time, Scarman LJ, page 64, paragraphs D to F.

40. In the case of Walls Meat Company Limited v Khan [1978] IRLR499, it was held that it would not be reasonably practicable if there was "some impediment which reasonably prevents, or interferes with, or inhibits, such performance" namely the presentation of a complaint. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable, Brandon LJ, page 502 paragraph 44.

41. In the case of Riley v Tesco Stores Limited [1980] IRLR103, the claimant was dismissed for either alleged theft from or receiving property belonging to the respondent. On the day of her dismissal she visited a Citizens Advice Bureau, "CAB", where a claim form was completed claiming unfair dismissal. Six days later she was charged by the police. She alleged that, subsequently, she was told by the CAB that she could not present her claim until the criminal proceedings were completed. Ten months later she was acquitted of the charge against her. Within eight days of her acquittal she presented her claim to an Employment Tribunal, "ET". She argued before the ET that her failure to make a complaint in time was because of incorrect advice by given by the CAB. The ET rejected that argument and relied on the fact that she engaged the services of the CAB as "skilled advisers" and acted on their advice. This was upheld by the Employment Appeal Tribunal. On appeal to the Court of Appeal, Waller LJ held that:

> "What is the position if, knowing of your right, you ask another to take the necessary action? In my opinion, you cannot then be in a better position than if you had retained the power to act yourself. If you have retained a skilled adviser and he does not take steps in time, you cannot hide behind his failure. There may be circumstances, of course, where there are special reasons why his failure can be explained as reasonable."

42. In London International College Limited v Sen [1993] IRLR333, the Court of Appeal held, on the facts, that a claimant had been entitled to rely on incorrect advice from a tribunal employee when presenting a late claim, with the effect that it had not been reasonably practicable to have presented it within time. What was important was to establish the substantial cause of the delay. The tribunal found that the advice from a member of the tribunal staff had followed very shortly after the advice from the solicitor that the substantial cause of the lateness was what was said by the member of staff, rather than by the solicitor. The tribunal had jurisdiction to hear the claim although it was one day out of time.

43. In the case of Adams v British Telecommunications Plc [2017] ICR382, Mrs Justice Simler, President, held:

> "19 The question for the tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the claim form on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error, since she had been aware of it no doubt she would not have made it or it would have been corrected".

44. In the case of Jean Sorelle Ltd v Rybak [1991] IRLR 153, the EAT held, Knox J, that an ET had not erred in holding that wrong advice from an ET employee as to when the three-months' time limit expired for presenting an unfair dismissal complaint, rendered it not reasonably practicable for the claimant to have presented the claim in time.

45. A similar view was taken by the EAT in the case of DHL Supply Chain Ltd v Fazackerley UKEAT/0019/18, where an ACAS helpline officer erroneously advised the claimant to exhaust the internal appeal process before presenting his claim, HH Judge Barklem.

46. In the case of Palmer v Southend-on-Sea Borough Council [1984] ICR 372, it was held that the test of "reasonably practicable" means, "Was it reasonably feasible" to present the complaint within three months?

47. A party can apply to amend the claim or response at any time in proceedings, Selkent Bus Co Ltd v Moore 1996 ICR 836 and rule 29, schedule 1, Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

48. Whether an amendment is required will depend on whether the claim form or response provides, in sufficient detail, the complaint or defence the party seeks to make. The mere fact that a box is ticked indicating a specific claim such as direct race discrimination does not mean that it raises a complaint of indirect race discrimination and victimisation. In considering whether the claim form contains a particular complaint that the claimant is seeking to

raise, the claim form must be considered as a whole. The mere fact that a box is ticked indicating that a certain claim is being made may not be conclusive in determining whether it sets out the basis for such a complaint, Ali v office of National Statistics 2005 IRLR 201, Court of Appeal.

49. Sir John Donnaldson, in Cocking v Sandhurst (Stationers) Ltd and Another, 1974 ICR, in the National Industrial Relations Court, set down, generally, the procedure when considering whether to allow an amendment. His Lordship stated that tribunals must have regard to all the circumstances, in particular, any hardship which would result from either granting or refusing the amendment. This judgment was approved in Selkent.

50. In Selkent, Mr Justice Mummery, President, held that in determining whether to grant the amendment application, the tribunal must always carry out a balancing exercise of all relevant factors, having regard to the interests of justice and to the relative hardship caused to the parties if the application is either granted or refused. The relevant factors are: the nature of the amendment; the applicability of time limits; and the timing and manner of the application.

51. Whether the claim would be in time if the amendment is a new claim, is not determinative of the application to amend.

52. In the case of New Star Asset Management Ltd v Evershed [2010] EWCA Civ 870, the Court of Appeal allowed the claimant to add public interest disclosure to a constructive unfair dismissal claim as the amendment did not raise new factual allegations.

53. In Ahuja v Inghams [2002] ICR 1485, the CA held, Mummery LJ, that Employment Tribunals have the power to allow an amendment even at a late stage based on the evidence given at the hearing. They have a wide jurisdiction to do justice in the case and "…should not be discouraged in appropriate cases from allowing applicants to amend their applications, if the evidence comes out somewhat differently from was originally pleaded. If there is no injustice to the respondent in allowing such an amendment, then it would be appropriate for the Employment Tribunal to allow it rather than allow what might otherwise be a good claim to be defeated.", paragraph 43.

54. It may be appropriate to consider, as another factor, whether the claim, as amended, has any reasonable prospects of success, but the tribunal should proceed with caution as evidence will be required in support of the amendment, Cooper v Chief Constable of West Yorkshire Police and Another UKEAT0035/06; and Woodhouse v Hampshire Hospitals NHS Trust EAT0132/12.

55. In the Presidential Guidance – General Case Management, issued on 22 January 2018, amending a claim or response falls within rule 29 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the power of the tribunal to issue case management orders. "In deciding whether the proposed amendment is within the scope of an existing claim or

whether it constitutes an entirely new claim, the entirety of the claim form must be considered.", paragraph 7.

56. "The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment", sub-paragraph 11.1.

57. The test is the balance of injustice and hardship in allowing or refusing the application and should be approached by considering the practical consequences of allowing an amendment. HHJ Tayler, suggested putting the Selkent factors to one side and to consider what would be the real consequences of allowing or refusing the amendment. If refused, how severe would the consequences be? If it is allowed, what would be the practical problems in responding? It is a balancing exercise both quantitively and qualitatively. "It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice.", Vaughan v Modality Partnership UKEAT/0147/20.

58. The balance of prejudice can include an assessment of the merits of the proposed amended claim, Gillett v Bridge 86 Ltd UKEAT/0051/17.

59. In relation to time issues, where the amendment is granted, time takes effect at that point and not at the date of the original claim form or the date of the application, Galilee v Commissioner of Police of the Metropolis [2018] ICR 667, a judgment of the EAT, paragraphs 67-68, HHJ Hand QC.

60. Under section 123(1) Equality Act 2010, a complaint must be presented within three months,

> "starting with the date of the act to which the complaint relates" (a), "or such other period as the employment tribunal thinks just and equitable," (b) and "conduct extending over a period is to be treated as done at the end of the period," (3)(a).

61. The time limit is extended if there is an ACAS certificate, section 140B Equality Act 2010.

62. Time limits are to be applied strictly. The Court of Appeal held that the exercise of the discretion on just and equitable grounds is the exception rather than the rule, Robertson v Bexley Community Centre [2003] IRLR 434. The factors the tribunal may consider in exercising its discretions are: the reason for and the extent of the delay; whether the Claimant was professionally advised; whether there were any genuine mistakes based on erroneous information; what prejudice, if any, would be caused by allowing or refusing to allow the claim to proceed; and the merits of the claim. There is no general rule, and the matter remains one of fact.

63. In the case of Abertawe Bro Morgannwg University Health Board v Morgan EWCA/Civ/EAT/640, it was held by the Court of Appeal, that the tribunal has a broad discretion to consider factors, such as the length of and reasons for the delay; whether the delay has prejudiced the respondent; and the prejudice to the claimant.

Conclusion

Constructive unfair dismissal

64. I accepted the submissions by Mr Boyd in relation to the constructive unfair dismissal claim as the Trust has accepted that in relation to that claim, it was the claimant's employer. It was reasonably practicable for the claim form to have been presented to the tribunal in time. Mr Tovey was not told by the ACAS conciliator that he should send the form to ACAS. It was his assumption that she should do so. He, as well as the claimant, were aware of the time limits. He made no attempt to enquire as to where the form should be sent by either questioning the Conciliation Officer or by doing the necessary research online, or by contacting Unison's lawyers. I find that, at all material times, he was representing the claimant from the investigation meeting in September 2022, to the presentation of the claim form on 6 November 2023, up to but not including this hearing. He represents a large union with access to its legal advisers. The claimant entrusted her case to him. It was reasonably feasible for the claim form to have been presented in time. The claimant has not discharged the duty placed upon her to prove that it was not reasonably practicable for her to do so. She, therefore, cannot escape the consequences of Mr Tovey's actions or omissions. By 6 November 2023, the claim form was not presented within a reasonable timeframe. Had it been correctly presented on or around 13 July 2023, there may have been a different outcome. Time limits are applied strictly. Accordingly, the constructive unfair dismissal claim is struck out as it was presented out of time. This claim only impacts upon the Trust and not on Sodexo. If the claimant has a legal recourse, it is likely to be against Unison in this claim having to be struck out.

The application to amend by adding direct sex discrimination

65. In relation to the nature of the amendment, having regard to paragraph 29 above, the direct sex discrimination is a new claim. It is not referred to in the claim form either implicitly or inferentially. It is also not in the case management Agenda and in Sodexo's List of Issues.

66. As regards the applicable time limits, the claimant had three months plus the ACAS extension of time, within which to present this claim and did not do so because of the misguided approach and the failure by Mr Tovey to conduct an enquiry into the tribunal's procedure. However, this is only one factor in the balancing exercise and is not determinative of the application.

67. The timing and manner of the application is another factor to be considered. The fact that the application was made on the day of the hearing should not define the outcome as an application to amend can be made at any stage in the proceedings. The claimant said that when she completed the claim form, she was unsure about what to include and did not know the boxes to tick. She only ticked disability discrimination notwithstanding that she was also claiming constructive unfair dismissal. The Overriding Objective do require the cases are conducted expeditiously, but this case has no final hearing date and no further private or public preliminary hearing been listed

to hear and determine any outstanding issues and to make case management orders for a final hearing. The application was made because the claimant genuinely felt that she had been discriminated and forced to leave her employment as the only woman working on the Helpdesk Switchboard at night.

68. In relation to the balance of hardship, Vaughan v Modality Partnership, should the application be refused, the claimant would be deprived of putting forward an important aspect of her case. Should the disability discrimination claim fail, she would be unable to argue that being the only female on the night shift, she had been discriminated because of her sex or of sex. Sodexo, on the other hand, in its response, has denied the direct disability discrimination claim which is based on the alleged same factual assertions as the direct sex discrimination claim. I did not hear any evidence that in allowing the amendment, it would affect the cogency of the evidence, or that memories have faded adversely impacting on the respondent's case. I am satisfied, having regard to the documents in the joint bundle, that memories can be refreshed by reading the relevant documents. Its response to the claim is very detailed and it has prepared a detailed witness statement in connection with the issue of the claimant's correct employer. It is, therefore, not unable to access relevant evidence in support of its case.

69. Consequently, I have come to the conclusion that the prejudice likely to be suffered by Sodexo if the application is allowed, is outweighed by the prejudice likely to be suffered by the claimant if it is refused. The amendment application is, therefore, granted.

Out of time

70. Here the tribunal has a broad discretion, Abertawe Bro Morgannwg University Health Board v Morgan. Relevant factors include the length of and reasons for the delay; whether the delay has prejudiced the respondent; the prejudice to the claimant; and the potential merits of the claim.

71. I have addressed the time point in the application to amend. In relation to the direct disability discrimination claim, the delay in presenting this claim was eight months. The reason being that Mr Tovey mistakenly sent the claim form to ACAS and was, latterly, not aware for some time that he was using the wrong Watford Tribunal email address. This is not a good reason for the delay, but it is one factor to consider.

72. In relation to prejudice, the claimant is likely to suffer the greater prejudice compared with Sodexo, if her claim is truck out. Sodexo has prepared a detailed response to the claims. It has provided a witness statement challenging the claimant's assertion that she was employed by it. I, therefore, do not accept that the cogency of the evidence would be significantly adversely affected if this claim is not struck out.

73. In relation to the merits, I am not in a position to form either a provisional or definitive view as I did not hear evidence relevant to liability. Accordingly, I

extend time on just and equitable grounds and allow the direct sex discrimination claim to proceed to a final hearing.

74. The Trust is not dismissed from these proceedings without a hearing to determine the correct employer.

75. The parties must liaise with each other and with the tribunal to agree whether there should be a further private or public preliminary hearing and, if so, the issues to be determined as well as the listing of the case for a final hearing.

Approved by:

Employment Judge Bedeau

19 January 2025
Date: ……..

Sent to the parties on: 27 January 2025

For the Tribunal Office

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